



DEPARTMENT OF TRANSPORTATION

4910-EX-P

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2010-0149]

Notice of Reinstatement of Informal Hearing Procedure

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA announces that it is reinstating the informal hearing procedure authorized under the Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings (Rules of Practice), codified at 49 CFR part 386. On June 7, 2010, the Agency stated that it would not entertain new requests for informal hearings pending a reevaluation of the procedure, based on concerns about the neutrality of Agency Hearing Officers. After conducting numerous informal hearings (involving cases that were pending at the time the 2010 notice was published) with an attorney in the Office of Chief Counsel's Section of Adjudications serving as Hearing Officer, the Agency believes informal hearings should remain an option for administrative adjudication of contested civil penalty claims and will again permit respondents in enforcement cases to request this option. Prior to June 7, 2010, FMCSA had made informal hearings available only to respondents located within its Eastern and Midwestern Service Centers. The Agency removes this geographical limitation and will make informal hearings available to all respondents, regardless of where they are domiciled.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to <http://www.regulations.gov> at any time and insert “FMCSA-2010-0149” in the “Keyword” box, and then click “Search.” The docket is also available by going to the ground floor, room W12-140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sue Lawless, Office of Chief Counsel, Adjudications Counsel (MC-CCA), FMCSA, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366-0834.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 113(f), Congress directed FMCSA to carry out the duties and powers related to motor carriers or motor carrier safety vested in the Secretary of Transportation by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315 and 317 of title 49 of the U.S. Code, except as otherwise delegated by the Secretary. Regulations implementing this statutory authority include the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR parts 380-399), the Federal Motor Carrier Commercial Regulations (FMCCRs) (49 CFR parts 360-379), and the Federal Hazardous Materials Regulations (HMRs) (49 CFR parts 171-180).

FMCSA’s enforcement powers include the general authority to conduct administrative enforcement proceedings for violations of the FMCCRs (49 U.S.C. 14701)

as well as to assess civil penalties for violations related to commercial motor vehicle safety (49 U.S.C. chapter 5) and hazardous materials (49 U.S.C. chapter 51).

In accordance with this authority, the Agency promulgated regulations governing civil penalty and driver disqualification proceedings before the Agency. These regulations are known as the Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings (Rules of Practice) and are codified at 49 CFR part 386.

In May 2005, the Agency amended the Rules of Practice to establish, among other things, an informal hearing process as an option for adjudicating administrative enforcement proceedings (see 70 FR 28467, May 18, 2005). Civil penalty proceedings are initiated by issuance of a Notice of Claim by a representative of the Agency (Claimant) pursuant to 49 CFR 386.11(c). Under 49 CFR 386.14(b)(2), the party against whom a claim is made (Respondent) must reply to the Notice of Claim by electing one of three options: (1) paying the full amount of the claim; (2) contesting the claim by requesting administrative adjudication pursuant to section 386.14(d); or (3) seeking binding arbitration in accordance with the Agency's arbitration program. Under 49 CFR 386.14(d)(1)(iii), a respondent electing administrative adjudication may request that the matter be adjudicated either through: (A) submission of written evidence without hearing; or (B) an informal hearing; or (C) a formal hearing.

The informal hearing process was intended to provide expedited consideration of a civil penalty case by a neutral third party without the formalities attendant to a hearing before an Administrative Law Judge (see 69 FR 61620, Oct. 20, 2004). Section 386.2 defines an informal hearing as "a hearing in which the parties have the opportunity to

present relevant evidence to a neutral Hearing Officer, who will prepare findings of fact and recommendations for the Agency decisionmaker. The informal hearing will not be on the transcribed record, and discovery will not be allowed. Parties will have the opportunity to discuss their case and present testimony and evidence before the Hearing Officer without the formality of a formal hearing.” After receiving the Hearing Officer’s report and recommendations, the Assistant Administrator (AA), who, pursuant to section 386.2, is the Agency’s “decisionmaker,” has the discretion to either adopt the report or issue other orders as he or she deems appropriate. [See sections 386.16(b)(4)(i)(A) and 386.61(b).]

FMCSA implemented informal hearings on a graduated basis in order to evaluate the efficacy of this new process. In the first phase of implementation, FMCSA considered requests for informal hearings only from respondents in the Midwestern Service Center’s geographical area (see 71 FR 13894, Mar. 17, 2006). In the second phase, FMCSA expanded eligibility to respondents in the Eastern Service Center’s geographical area (see 72 FR 6806, Feb. 13, 2007). FMCSA was concerned about the appropriateness of the personnel the Agency assigned to serve as Hearing Officers. Section 386.2 defines “Hearing officer” as “a neutral Agency employee designated by the Assistant Administrator to preside over an informal hearing.” The Agency selected two FMCSA employees—one located in the Southern Service Center and one located in the Western Service Center—to serve as Hearing Officers. However, the Agency did not receive enough informal hearing requests to dedicate these employees as full-time Hearing Officers. As a result, these employees also continued to carry out their existing responsibilities related to the implementation of the enforcement programs in their

respective Service Center areas. FMCSA was concerned that FMCSA personnel involved in the Agency's enforcement program may not be considered neutral.

Suspension of Informal Hearing Procedure

On June 7, 2010, FMCSA published a Federal Register notice stating that it was suspending the use of informal hearings for enforcement actions initiated after publication of the notice pending reevaluation of the informal hearing procedure (see 75 FR 32242). At that time, there were 20 pending cases awaiting informal hearings and an additional 13 cases in which respondents had requested informal hearings subject to objections by the Eastern and Midwestern Service Centers. In order to avoid further delaying the resolution of these cases, the Agency assigned them to a Hearing Officer located within the Office of Chief Counsel's Section of Adjudications. This section is not connected with the Agency's enforcement program and the attorneys assigned to this section currently draft decisions and orders in civil penalty cases, safety rating appeals, and Hazardous Materials Permit appeals for the review and signature of FMCSA's Assistant Administrator. See 49 CFR 386.3. In its June 7, 2010 notice, FMCSA sought public comment on options for implementing an effective informal hearing process.

Comments on the Notice

Only the American Trucking Associations (ATA) submitted a comment in response to the Notice. The ATA made three suggestions that it believed would either enhance the neutrality of the process or speed its resolution: (1) allow service of claims and responses to claims via electronic means; (2) utilize hearing officers who are not employed by FMCSA to conduct informal hearings; and (3) permit carriers who opt for an informal hearing to preserve their right to a formal hearing.

Response to Comments

The ATA's first suggestion could potentially speed the adjudicatory process, not only for informal hearings, but for other matters coming before the Assistant Administrator under 49 CFR part 386. Implementation of this proposal, however, would require the Agency to revise its rules regarding service of documents to permit electronic service, and the Agency will consider doing so at the appropriate time.

ATA's second suggestion is based on the misconception that any FMCSA employee, regardless of his or her position in the agency, is necessarily biased and cannot act as a neutral arbiter. Under the Agency's Rules of Practice, the Chief Counsel, the Special Assistant to the Chief Counsel, and attorneys in the Chief Counsel's Section of Adjudications are separated from enforcement functions and enforcement counsel, and advise the Assistant Administrator in contested cases. (See 49 CFR 386.3.) These attorneys have advised the Assistant Administrator, and prepared numerous orders and decisions in matters coming before the Assistant Administrator during the past several years, many of which have been favorable to respondents in contested enforcement cases.

After suspending the informal hearing process for enforcement actions initiated on or after June 7, 2010, the Agency held informal hearings in more than 30 cases pending before that date, with an Adjudications attorney serving as Hearing Officer. The informal hearings, which were held via teleconference, proved to be an efficient, less expensive means of adjudication than a formal hearing before an administrative law judge. They were less resource intensive for both parties, provided a timely means of resolution, and were an effective means to resolve enforcement cases. The Agency

intends to continue to use personnel identified in section 386.3, including Adjudications counsel, as hearing officers, but reserves the right to use other neutral arbiters.

The ATA's third suggestion is essentially a request to amend 49 CFR 386.16(b)(4)(A) by eliminating the final sentence of that paragraph, which states: "By participating in an informal hearing, respondent waives its right to a formal hearing." Implementation of this recommendation would require notice and comment rulemaking and, as such, is beyond the scope of this notice. Moreover, it appears to be based on the erroneous assumption that a respondent waives its right to appeal the decision of the Hearing Officer by requesting an informal hearing. This is not the case.

The Hearing Officer issues a report to the Assistant Administrator that includes findings of fact and a recommended disposition of the case. The Assistant Administrator then issues either a Final Order adopting the report or other orders he or she may deem appropriate. If a respondent disagrees with the Final Order, it may submit a petition for reconsideration under 49 CFR 386.64. Final Orders in informal hearing cases are also subject to the appeal provisions of section 386.67. There is a right, therefore, to appeal the Hearing Officer's recommendation.

Furthermore, if a respondent is concerned about the fairness of the informal hearing process, it has the option of requesting a formal hearing in its reply to the Notice of Claim. A respondent requesting a formal hearing simply because it is dissatisfied with the results of the informal hearing process would essentially be engaging in forum shopping. Permitting such a practice would be an inefficient use of Agency resources and delay resolution of the matter.

Reinstatement of Informal Hearings

Accordingly, FMCSA rescinds its June 7, 2010, notice suspending the availability of informal hearings for enforcement actions initiated on or after the date of that Notice. In addition, the Agency removes the geographical limitations on eligibility for informal hearings imposed on March 17, 2006 and February 13, 2007. The informal hearing option will be available to all respondents subject to civil penalty enforcement actions initiated by Notices of Claim issued on or after the date of this notice.

Issued on: March 14, 2014

Anne S. Ferro
Administrator

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