

Decision No. R03-0330

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-381BP

IN THE MATTER OF THE APPLICATION OF DARREL SEGERS AND TERRY SEGERS,
DOING BUSINESS AS DESIGNATED DRIVER SERVICES, FOR AUTHORITY TO
OPERATE AS A CONTRACT CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DISMISSING APPLICATION
AND CLOSING DOCKET**

Mailed Date: March 30, 2004

Appearances:

Darrel Segers, *pro se*, for Applicant Darrel Segers, doing business
as Designated Driver Services; and

Charles M. Williams, Esq., Denver, Colorado, for Intervenor
Tazco, Inc., doing business as Sunshine Taxi.

I. STATEMENT

1. On August 22, 2003, Darrel Segers and Terry Segers, doing business as Designated Driver Services (Segers or Applicant), filed an Application to Operate as a Contract Carrier by Motor Vehicle for Hire (Application). The Application commenced this proceeding.

2. On September 8, 2003, the Commission issued public notice of the Application as follows:

For authority to operate as a contract carrier by motor vehicle for hire for
the transportation of

passengers and their baggage

between all points in Mesa County, State of Colorado.

RESTRICTIONS: This application is restricted to providing transportation for:

- (1) Mesa Theater & Club, 538 Main Street, Grand Junction, CO 81501;
- (2) Thunder Mountain Tavern, 2701 U.S. Highway 50, Grand Junction, CO 81503;
- (3) The Blue Moon, 120 North 7th, Grand Junction, CO 81501;
- (4) Boomers, 436 Main Street, Grand Junction, CO 81501;
- (5) Triple Tree Tavern, Clifton, CO 81520;
- (6) V.F.W. Post 1247, 1404 Ute, Grand Junction, CO 81501;
- (7) Cruiser's, 748 North Avenue, Grand Junction, CO 81501;
- (8) Wrigley Field, 1810 North Avenue, Grand Junction, CO 81501;
- (9) Brass Rail, 476 28 Road, Grand Junction, CO 81501;
- (10) Cheers, 210 Colorado Avenue, Grand Junction, CO 81501;
- (11) Eagles Lodge 595, 1674 U.S. Highway 50, Grand Junction, CO 81503; and
- (12) Jimmy's Road House, 3112 Highways 6 and 24, Grand Junction, CO 81501.

3. On October 2, 2003, Tazco, Inc., doing business as Sunshine Taxi (Tazco or Intervenor), filed an intervention by right in this matter. This is the only intervention filed in this proceeding.

4. On October 16, 2003, the Commission issued an Order Setting Hearing and Notice of Hearing. The Order scheduled hearing in this matter for November 6, 2003, in Grand Junction, Colorado. By Decision No. R03-1202-I the undersigned Administrative Law Judge (ALJ) vacated the hearing. By Decision No. R03-1371-I the ALJ scheduled a hearing in this matter for February 10, 2004, in Grand Junction, Colorado.

5. On October 16, 2003, Applicant filed a request to dismiss the intervention of Tazco. Tazco opposed the request.

6. On October 24, 2003, Intervenor filed a motion to dismiss the Application. Applicant opposed the motion.

7. By Decision No. R03-1300-I, the ALJ denied the request to dismiss the intervention and the motion to dismiss the Application. In that Order the ALJ required that specified filings, among them lists of witnesses and copies of exhibits, be made by dates certain. *See id.* at ¶¶ 16, 28-31.

8. On December 1, 2003, Applicant filed an amendment to the Application. As amended, Mr. Darrell Segers, as an individual, is the Applicant and proposes to operate under the trade name Designated Driver Services. By Decision No. R04-0090-I, the ALJ granted the request to amend the Application.

9. On December 24, 2003, Intervenor filed a Second Motion to Dismiss Application. Applicant opposed the second motion. By Decision No. R04-0090-I, the ALJ denied the Second Motion to Dismiss Application and, for the reasons stated in that Order, limited the witnesses and exhibits which Applicant could offer at hearing.

10. The hearing commenced as scheduled on February 10, 2004. Testimony was received from one witness, Mr. Segers. Exhibits No. 1 through 6 were marked for identification and offered into evidence. Exhibits No. 1, 2, 5, and 6 were admitted into evidence. Exhibits No. 3 and 4 for identification were not admitted into evidence.

11. At the conclusion of Applicant's case, Tazco made an oral motion to dismiss the Application on the basis that Applicant had failed to present a *prima facie* case. The motion was argued. The motion was granted orally, and the case was dismissed.

12. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits of the proceeding together with a written recommended decision.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

13. Applicant presented one witness (himself) who testified in support of the Application. Applicant did not present the testimony of a representative of any of the establishments for which he wished to do contract carriage. Applicant presented no exhibits which addressed his proposed operation, financial fitness, or operational fitness. Applicant did not offer as an exhibit the Application or any document appended to the Application.

14. Mr. Segers testified concerning his understanding of the average time (approximately 20 minutes) for Intervenor to respond to a call requesting transportation service. He did not explain the basis for this understanding. Applicant testified that his principal interest in offering his proposed transportation service was "to make a change," to reduce the number of persons who drink and drive. Applicant testified that, in his opinion, the proposed service would accomplish that end by timely responding to calls for transportation service, thus reducing the waiting time for those who wished to have a ride home.

15. Applicant testified in general terms about the proposed operation of Designated Driver Services. He testified about the means he would use to stay in contact with, and to dispatch, vehicles. He testified that the operation would include transportation to and from the 12 identified establishments. He testified that he would use at least four vehicles in the

operation, but he did not provide information about the types or ages of the vehicles. He testified, without providing detail, that he had financing available to obtain additional vehicles.

16. Mr. Segers testified that he would provide transportation service in response to calls from individuals irrespective of whether one of the 12 identified establishments was aware of, made, or authorized the request for transportation. He further testified that, generally, the passenger, and not the establishment, would pay for the transportation service provided.

17. Mr. Segers did not testify, and provided no documentary evidence, concerning the distinct transportation needs of his proposed customers (*i.e.*, the 12 identified establishments).

18. Mr. Segers did not testify, and provided no documentary evidence, concerning the way(s) in which his proposed transportation service would be tailored and specialized to meet any distinct transportation needs which his proposed customers (*i.e.*, the 12 identified establishments) might have.

19. Mr. Segers did not testify, and provided no documentary evidence, concerning either his operational experience or his financial fitness to operate the proposed contract carrier service.

III. DISCUSSION

20. Applicant bears the burden of proof. *See Rule 4 Code of Colorado Regulations (CCR) 723-1-82(a)(1)*. Applicant must establish, by substantial and competent evidence, the legal basis for an award of authority to operate as a contract carrier.

21. To meet his burden of proof in this case, Applicant must establish that the service he intends to offer is contract carriage and that he meets the minimum criteria for issuance of a permit. The minimum criteria are found in Rule 4 CCR 723-23-4.1.

22. The evidence of record establishes that Applicant has failed to establish a *prima facie* case.¹ Therefore, the Tazco motion to dismiss will be granted.

23. In viewing Applicant's evidence in the light most favorable to Applicant for the purposes of deciding the motion to dismiss, the ALJ finds that the record contains no evidence to establish the overall financial fitness of the Applicant. The record contains no financial statement,² no specifics about Applicant's provisions for insurance, and few if any details (other than the means Applicant might use to stay in contact with drivers) concerning the operation of Applicant's proposed service. In addition, the record contains no evidence of Applicant's previous operational experience (if any) in providing transportation service generally or contract carriage service specifically.

24. In addition, Rule 4 CCR 723-23-4.1.1 requires an applicant for a contract carrier permit to establish "that the service it proposes to provide to potential customers is specialized and tailored to the potential customers' distinct needs." The ALJ finds that the record contains no evidence concerning whether any of Applicant's proposed customers now have or in the

¹ In making this determination, the ALJ relies upon *Monday v. Robert J. Anderson, P.C.*, 77 P.3d 855 (Colo. App. 2003). In that case the Court of Appeals determined that *prima facie* evidence is that evidence necessary to require a defendant (here, intervenor) to proceed with its case. The court stated that a plaintiff (here, applicant) "*must* present evidence regarding each essential allegation of the complaint [here, application] to demonstrate that there is *some* factual basis for relief before the defendant [here, intervenor] will be required to present evidence." *Id.* at 857 (emphasis supplied). The court stated that, only after the plaintiff (here, applicant) presents evidence on each essential allegation does the defendant (here, intervenor) have the obligation to respond. *Id.*

² See, e.g., Rule 4 CCR 723-1-50(e)(6) (application for permanent authority to operate as transportation utility must contain a "current financial statement showing applicant's assets, liabilities, and net worth."). The Application, which is not an exhibit in this proceeding, did not contain a current financial statement; and Applicant provided no testimony concerning his current financial condition, his assets, his liabilities, or his net worth.

future will have “distinct needs” and no evidence concerning the “specialized and tailored” way in which Applicant proposes to address any such “distinct needs.”

25. Without evidence of record concerning Applicant’s fitness and evidence of specialized and tailored service, the Commission cannot award a permit for contract carriage. Therefore, the Tazco motion to dismiss for failure of Applicant to establish a *prima facie* case will be granted.

26. Since the motion to dismiss rests on the stated grounds alone, it is unnecessary to address whether Applicant has established that the service he intends to offer is contract carriage. Were resolution of this issue necessary for determination of this case (which it is not), however, the ALJ would find that the proposed service as described by Applicant is not contract carriage. Based on Applicant’s own description of the transportation service to be provided, it appears that Applicant intends to provide transportation to any individual who contacts him and, further, that the individual passenger (and not the contractor-establishments) would pay for the transportation provided. This more closely describes common carriage than contract carriage. *See, e.g., Regular Route Common Carrier Conference v. Public Utilities Commission*, 761 P.2d 737, 740 (Colo. 1988) (“A contract carrier generally furnishes transportation services for pay at the convenience of, and subject to a satisfactory agreement with, its customer[.]” A common carrier is “required by law to provide transportation service to all members of the public upon payment of the approved rate.”).

27. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

IV. ORDER**A. The Commission Orders That:**

1. The motion of Intervenor Tazco, Inc., doing business as Sunshine Taxi, to dismiss the Application to Operate as a Contract Carrier by Motor Vehicle for Hire for the failure of Applicant to establish a *prima facie* case is granted.

2. The Application to Operate as a Contract Carrier by Motor Vehicle for Hire filed by Darrel Segers and Terry Segers, doing business as Designated Driver Services, is denied.

3. Docket No. 03A-381BP is dismissed with prejudice.

4. Docket No. 03A-381BP is closed.

5. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

6. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the

administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge