

Decision No. R04-0550

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-101CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

NEMARDA CORPORATION, DOING BUSINESS AS AIRPORT BOULEVARD CO.
AND/OR ABC SHUTTLE,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
ASSESSING CIVIL PENALTY**

Mailed Date: May 27, 2004

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Nemarda Corporation, doing business as Airport Boulevard Co. and/or ABC Shuttle (Nemarda).

2. In Civil Penalty Assessment Notice (CPAN) No. 28513 Staff alleges that Nemarda has violated various portions of the October 1, 1998 edition of the Federal Motor Carrier Safety Regulations, 49 *Code of Federal Regulations* (CFR) Chapter III. These regulations have been incorporated into the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties (Safety Rules), 4 *Code of Colorado Regulations* (CCR) 723-15, by 4 CCR 723-15-2.1.

3. In CPAN No. 28513, Staff alleges that between January 1, 2004 and January 25, 2004, Nemarda violated 49 CFR Part 391.21(a) on four occasions (Counts 1 through 3 and 16), 49 CFR Part 391.23(c) and/or Part 391.51(b)(2) on four occasions (Counts 4 through 6 and 17), 49 CFR Part 391.25 once (Count 7), 49 CFR Part 391.27(a) once (Count 8), 49 CFR Part 391.45(b)(1) once (Count 9), Part 396.3(b)(3) on five occasions (Counts 10 through 14), 49 CFR Part 391.51(b)(7) once (Count 18), and 49 CFR Part 396.11(b) on 25 occasions (Counts 15 and 19 through 42). *See*, Exhibit 1. The subject CPAN seeks imposition of a civil penalty in the amount of \$8,400.00.

4. The matter was set for hearing at the Commission's offices in Denver, Colorado, on May 25, 2004, pursuant to an Order Setting Hearing and Notice of Hearing (Hearing Notice) issued by the Commission on April 8, 2004. The Certificate of Service attached to the Hearing Notice establishes that it was served on Nemarda by mail at the address provided by it to the Commission; namely, 10340 E. Jewell Avenue, Unit 76, Denver, Colorado 80231-3542.

5. The undersigned Administrative Law Judge called the matter for hearing at the assigned time and place. Staff appeared through Mr. John P. Opeka, a Commission Compliance Investigator. Nemarda did not appear at the hearing. During the course of the hearing, Exhibits 1 through 7 were identified, offered, and admitted into evidence and testimony was received from Mr. Opeka in support of the allegations contained in CPAN No. 28513.

6. In accordance with § 40-6-109, C.R.S., the undersigned now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

7. Nemarda is a common carrier providing for-hire intrastate passenger carrier services within the State of Colorado pursuant to authority issued to it by the Commission in Certificate of Public Convenience and Necessity PUC No. 25810. It also provides luxury limousine services within Colorado pursuant to Registration No. LL-01116.

8. On February 24, 2004, Mr. Opeka conducted a Safety and Compliance Review of Nemarda at its facility. At that time he reviewed the books and records maintained by the company and determined that it had failed to comply with certain recordkeeping requirements imposed on motor carriers by the Safety Rules.

9. Specifically, he found that while Nemarda drivers DeRiso, Ferris, Cabrera, and James had provided Nemarda with employment applications, they did not contain all the information required by 49 CFR Part 391.21(b); namely, information concerning each driver's driving history over the past three years. As a result, he concluded that Nemarda had violated 49 CFR Part 391.21(a). He also found that the driver qualification files maintained in connection with these drivers failed to include inquiries into their past employment histories as required by 49 CFR Parts 391.23(c) and/or 391.51(b)(2). The file for driver DeRiso failed to evidence an annual review of his driving record as required by 49 CFR Part 391.25 or to indicate that Nemarda had required him to produce a list of driving violations for the past 12 months as mandated by 49 CFR Part 391.27(a). The file for driver Cabrera established that Nemarda allowed him to drive during a time when his medical card had expired in violation of 49 CFR Part 391.45(b)(1). The file pertaining to driver James failed to include a copy of his medical card as required by 49 CFR Part 391.51(b)(7). Although there was evidence that Nemarda was inspecting, repairing, and maintaining its vehicles, Mr. Opeka found that it failed to maintain

sufficient records establishing that it was doing so as required by 49 CFR Part 396.3(b)(3). Finally, Mr. Opeka found that while Nemarda's drivers were regularly preparing vehicle inspection reports, the report forms being used did not contain all the information required by 49 CFR Part 396.11(b).¹

10. A written summary of Mr. Opeka's findings, as well as his recommendations for achieving compliance with the subject regulations, were provided to a Nemarda representative, Ms. Whipple, shortly after the Safety and Compliance Review was completed. *See*, Exhibit 2.

11. Mr. Opeka then reviewed the Commission's records concerning prior Safety and Compliance Reviews that had been conducted in connection with Nemarda's operations. This review revealed that all the recordkeeping violations he discovered on February 24, 2004, had previously been brought to Nemarda's attention in connection with Safety and Compliance Reviews conducted by the Commission's Staff in 2000, 2002, and 2003. *See*, Exhibits 4, 6, and 7.

12. For example, in 2000 and 2002 Nemarda was advised that a portion of its records failed to comply with 49 CFR Part 391.21(a) (failure to have drivers provide complete employment applications). In 2000 and 2003 it was advised that some of its records failed to comply with 49 CFR Part 391.27(a) (failure to require drivers to provide an annual list of traffic violations). In 2000 it was advised that it had violated 49 CFR Part 391.45 by allowing a driver who had not been medically examined and certified within the past 24 months to drive. In 2002 and 2003 Nemarda was advised of violations of 49 CFR Part 391.23(c) (failure to make inquiry,

¹ Mr. Opeka actually documented 78 violations of 49 CFR Part 396.11(b) in connection with the February 24, 2004, Safety and Compliance Review. *See*, Exhibit 2, page 3. However, only 25 such violations were included in CPAN No. 28513 in light of the Staff's policy not to assess a penalty totaling greater than \$5,000 for violating any single recordkeeping regulation.

within 30 days of employment, of driver employment histories). In 2003 it was advised of its failure to annually review the driving records of its drivers as required by 49 CFR Part 391.25. In 2000 it was advised of the failure to maintain medical examiner's certificates as required by 49 CFR Part 391.51(b)(7). In 2000 it was also advised that its vehicle inspection reports failed to contain all the information required by 49 CFR Part 396.11(b). Finally, in 2003 Nemarda was advised that it failed to maintain appropriate records documenting the inspection, maintenance, and repair of its vehicles as required by 49 CFR Part 396.3(b)(3).

13. In 2002 and 2003 Nemarda acknowledged receipt of the Safety and Compliance Reviews conducted by the Staff for the periods in question and certified to the Commission that the violations noted therein had been corrected. *See*, Exhibits 3 and 5. The Commission did not initiate civil penalty assessment proceedings against Nemarda in connection with the violations discovered in the above-described 2000, 2002, and 2003 Safety and Compliance Reviews.

14. Mr. Opeka's comparison of these prior Safety and Compliance Reviews (and the accompanying certifications by Nemarda that corrective action had been taken) with the Safety and Compliance Review he conducted on February 24, 2004, evidenced a continuing pattern of Nemarda's failure to correct the recordkeeping deficiencies noted therein. Therefore, Mr. Opeka determined that it was necessary to initiate the instant civil penalty assessment proceeding in order to enforce the subject regulations.

15. As a result, he prepared CPAN No. 38513 and personally served it on Nemarda's authorized representative on March 8, 2004, receipt of which was acknowledged by that representative. *See*, Exhibit 1, page 5. At hearing, Mr. Opeka testified that the copy of CPAN No. 38513 served on Nemarda contained certain typographical errors. Specifically, Count

Nos. 10 through 14 erroneously referred to 49 CFR Part 393.3(b)(3) instead of 49 CFR Part 396.3(b)(3).

III. DISCUSSION

16. Intrastate motor carriers as defined in § 40-10-101(4)(a), C.R.S., and carriers exempt from regulation as public utilities as defined in § 40-16-101(4)(a), C.R.S., are subject to the Safety Rules. *See*, 4 CCR 723-15-1. The Safety Rules incorporate the 1998 edition of 49 CFR Part 391 and Part 396. *See*, 4 CCR 723-15-2.1. As indicated above, Nemarda is a motor vehicle carrier and a carrier exempt from regulation as a public utility. Therefore, it is subject to the Safety Rules and its intentional violation of the same subjects it to civil penalties of up to \$200.00 per day under 4 CCR 723-15.12.5. *See also*, § 40-7-113(1)(g), C.R.S., § 40-7-115, C.R.S., and § 40-7-112(1), C.R.S. A carrier is deemed to have intentionally violated a provision of the Safety Rules if, after having been issued a written notice of violation, violates the same provision again. *See*, 4 CCR 723-15-12.10.

17. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence. Section 40-7-116, C.R.S., also provides that CPANs issued by the Commission must contain, among other things, the nature of the violation.

18. As indicted above, Staff has alleged in CPAN No. 28513 that Nemarda has violated 49 CFR Part 391.21(a). *See*, Counts 1 through 3 and Count 16. That regulation obligates the **driver** of a commercial motor vehicle to furnish the motor carrier that employs him with an application for employment that meets the requirements of 49 CFR Part 391.21(b). This particular regulation imposes no obligation on the **carrier** to obtain such an application. That

obligation is imposed by 49 CFR Parts 391.51(a) and (b)(1) (carrier shall maintain a driver qualification file for each driver it employs and the qualification file must include the driver's application for employment completed in accordance with 49 CFR Part 391.21). These portions of CPAN No. 28513 do not comply with the technical requirements of § 40-7-116, C.R.S., since they do not properly advise Nemarda of the nature of the subject violation; *i.e.*, that it is charged with violating 49 CFR Parts 391.51(a) and (b)(1), not 49 CFR Part 391.21(a).

19. Similarly, the copy of CPAN No. 28513 served on Nemarda alleged that it had violated 49 CFR Part 393.3(b)(3). *See*, Counts 10 through 14. However, there is no regulation corresponding to that particular number. As indicated above, Mr. Opeka testified that this was an erroneous reference and that these portions of CPAN No. 28513 should have referred to 49 CFR Part 396.3(b)(3). Nonetheless, these portions of CPAN No. 28513 do not comply with the technical requirements of § 40-7-116, C.R.S., since they do not properly advise Nemarda of the nature of the subject violation; *i.e.*, that it is charged with violating 49 CFR Part 396.3(b)(3), not 49 CFR Part 393.3(b)(3).

20. The evidence of record establishes that Nemarda intentionally violated those portions of the Safety Rules referred to in Counts 4 through 9, 15, and 17 through 42 of CPAN No. 28513. Mr. Opeka's testimony concerning his discovery of the subject violations during the course of his February 24, 2004, Safety and Compliance Review is undisputed. These violations must be deemed to be intentional in light of the prior written notifications of the same violations provided to Nemarda in connection with Safety and Compliance Reviews performed by the Staff in 2000, 2002, and 2003.

IV. CONCLUSIONS

21. Staff has failed to prove the allegations contained in Counts 1 through 3, 10 through 14, and 16 of CPAN No. 28513 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

22. Counts 1 through 3, 10 through 14, and 16 of CPAN No. 28513 are not in compliance with the requirements of § 40-7-116, C.R.S.

23. For these reasons, Counts 1 through 3, 10 through 14, and 16 of CPAN No. 28513 must be dismissed, without prejudice.²

24. Staff has sustained its burden of proving the allegations contained in Counts 4 through 9, 15, and 17 through 42 of CPAN No. 28513 by a preponderance of the evidence as required by § 40-7-116, C.R.S. The total civil penalty for such violations is \$6,600.00. *See*, 4 CCR 723-15-12.5.

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

1. Counts 1 through 3, 10 through 14, and 16 of Civil Penalty Assessment Notice No. 28513 are dismissed, without prejudice.

2. Nemarda Corporation, doing business as Airport Boulevard Co. and/or ABC Shuttle, is assessed a civil penalty in the amount of \$200.00 each in connection with Counts 4 through 9, 15, and 17 through 42 of Civil Penalty Assessment Notice No. 28513 and

² Dismissal without prejudice allows the Staff to initiate a new civil penalty assessment proceeding against Nemarda on the basis of the same factual allegations underlying Counts 1 through 3, 10 through 14, and 16 by issuing a new, corrected CPAN.

shall pay the total assessed penalty of \$6,600.00 within ten days of the effective date of this Order.

3. 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.

4. 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.

5. 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