

Decision No. R04-0566

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-067EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

LARRY HOLLE, DOING BUSINESS AS BUS EXPRESS,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ASSESSING CIVIL PENALTY**

Mailed Date: May 27, 2004

Appearances:

David Nocera, Esq., Assistant Attorney General, for Staff of the
Commission; and

Larry Holle, *pro se*, on behalf of Respondent Larry Holle, doing
business as Bus Express.

I. STATEMENT

1. The issuance of Civil Penalty Assessment Notice No. 28461 (the CPAN) commenced this proceeding. The CPAN alleges that, on January 24, 2004, Larry Holle, doing business as Bus Express (Respondent or Holle), violated § 40-16-103, C.R.S., and violated § 40-16-104, C.R.S. See Hearing Exhibit No. 3. Commission Staff (Staff) seeks a civil penalty in the amount of \$24,200, which is the maximum enhanced civil penalty for these alleged violations.

2. On March 24, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing establishing a hearing date of April 29, 2004, at 9:00 a.m., in this docket. The Commission served a copy of this Order on Respondent.

3. At the assigned place and time the undersigned Administrative Law Judge (ALJ) called the matter for hearing. Respondent orally moved for a continuance of the hearing. After hearing argument, the ALJ denied that motion. The matter then proceeded to hearing. Ms. Sarah Gunsten, an employee of Regis University, and Mr. John Opeka, a Commission Investigator, testified on behalf of Staff. Respondent, appearing *pro se*, testified on his own behalf and presented no other witnesses. During the course of the hearing, Hearing Exhibits No. 1 through No. 3 were identified and admitted into evidence; and Hearing Exhibit No. 4 was admitted by administrative notice.

4. At the conclusion of the hearing, the evidentiary record was closed. The ALJ heard an oral closing statement from Staff¹ and took the matter under advisement.

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

II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

6. The CPAN in this proceeding alleges one violation of § 40-14-103, C.R.S. (specifically, operating a charter or scenic bus without being registered with the Commission), and one violation of § 40-16-104, C.R.S. (operating without required insurance).

¹ Although provided the opportunity to do so, Mr. Holle elected not to make a closing statement.

7. Section 40-16-103, C.R.S., provides, in relevant part, that “[n]o person may offer services pursuant to [Article 16 of title 40, C.R.S.,] unless he is registered with the public utilities commission of this state.” Among the types of transportation services regulated pursuant to Article 16 of title 40, C.R.S., is “charter or scenic bus.” Section 40-16-101(1.3), C.R.S., defines a “charter or scenic bus” as “a motor vehicle for the transport of people, on a charter basis, with a minimum capacity of thirty-two passengers, that is hired to provide services for a person or group of persons traveling from one location to another for a common purpose.” Also included within Article 16 of title 40, C.R.S., is “children’s activity bus,” which § 40-16-101(1.5), C.R.S., defines as “a motor vehicle hired to transport groups of eight or more children, eighteen years of age or younger and any adults over eighteen years of age accompanying or participating with said group, to or from activities which are sponsored by nonprofit organizations entitled to a tax exemption under the federal ‘Internal Revenue Code of 1986,’ as amended.”

8. Section 40-16-104, C.R.S., requires, in pertinent part, that “[e]ach motor vehicle carrier exempt from regulation as a public utility shall maintain a general liability insurance policy[.]” For a charter or scenic bus, the required minimum insurance amount is \$5,000,000 combined single limit liability. *See* § 40-16-104(1)(a), C.R.S.; *see also* Rule 4 *Code of Colorado Regulations* (CCR) 723-33-3.1.1 (same).

9. Based on the evidence adduced at hearing, the ALJ finds the following facts, which are undisputed except as noted:

a. On January 24, 2004, Mr. Holle was (and remains) the owner of Bus Express. Mr. Holle is the Respondent in this case and is at present the owner of Bus Express.

b. Respondent holds authority from the Commission to operate as a children's activity bus, as defined in § 40-16-101(1.5), C.R.S. On January 24, 2004, Respondent was aware that there are restrictions attendant to the operation of a children's activity bus, and he knew what those restrictions are.

c. Regis University's Office of Student Activities planned and advertised on campus a one-day (*i.e.*, January 24, 2004) ski trip to and from the Keystone ski area located in Colorado, with a dinner stop in Idaho Springs, Colorado. The Office of Student Activities made arrangements with a company to provide the transportation. The day before the scheduled trip, however, that company cancelled, leaving the Office of Student Activities to make new transportation arrangements on short notice.

d. Now needing to obtain transportation for the scheduled ski trip, one of the co-directors of the "Best of Colorado" program² in the Office of Student Activities looked in the telephone yellow pages under "Charters" and began contacting advertised charter services in an attempt to arrange transportation. Respondent was one of those advertising in the yellow pages under the "Charters" category.

e. Ms. Sarah Gunsten is an employee of Regis University in the Office of Student Activities and is a co-director of the "Best of Colorado" program.³ She was so employed at all times relevant to this proceeding. Using the yellow pages information provided by her co-director, Ms. Gunsten contacted Respondent. During the afternoon of January 23, 2004, Ms. Gunsten spoke with Mr. Holle on the telephone. She explained that transportation was

² This is the program within the Student Activities Office which was sponsoring the ski trip.

³ Ms. Gunsten testified, and was subject to cross-examination, at the hearing.

needed for a ski trip, that approximately 35 to 40 Regis University students and their ski equipment would be going, and that the trip was scheduled for the next day (*i.e.*, January 24, 2004). Ms. Gunsten told Respondent that the trip would originate and terminate at Regis University in Denver, Colorado, and would include a dinner stop in Idaho Springs, Colorado. Respondent stated that he could provide the transportation and sent Ms. Gunsten a Trip Order containing the particulars (*e.g.*, number of passengers, price, destination, dinner stop). The Trip Order shows Regis University as the organization seeking the transportation and “Sarah” as the contact person. *See* Hearing Exhibit No. 1. Based on the Trip Order, especially the price quoted, Ms. Gunsten agreed to use Respondent for the transportation.⁴

f. On January 24, 2004, to fulfill the transportation contract, Respondent sent to Regis University a school bus of sufficient size to transport 35 to 40 people and their ski equipment. This was the bus used to provide the ski trip transportation.

g. Mr. Holle was not present at Regis University on January 24, 2004, but he sent an experienced driver, one Respondent had used previously. Prior to the January 24, 2004 transportation, due to hurried arrangements necessitated by the late notice, Mr. Holle did not inform or remind the driver of the age-related and other restrictions attendant to operation as a children’s activity bus.

h. From the record one cannot determine whether Respondent had used the driver to transport persons under his children’s activity bus authority or had used the

⁴ *See* note 10, *infra*.

driver in other transportation activities.⁵ In addition, one cannot determine whether the driver was aware of the age-related and other restrictions attendant to operation as a children's activity bus.

i. In all, 14 students and 3 Regis University staff persons, including Ms. Gunsten, went on the ski trip. While the age of each student passenger is unknown, some students were 19 years of age or older; and all the Regis University staff persons were 19 years of age or older. As the passengers boarded the bus at the beginning of the trip, the driver did not ask their ages.

j. The bus left Regis University in Denver and traveled directly to the Keystone ski area. On the return trip, as arranged, the bus made a dinner stop in Idaho Springs and then returned to Regis University in Denver. The bus traveled on Interstate 70 and surface streets when transporting the passengers to and from Keystone, Colorado.

k. After the trip, Mr. Holle sent an invoice to Regis University for the January 24, 2004, transportation. On February 20, 2004, Mr. Holle received a check in the amount of \$725 from Regis University for that transportation. He cashed the check. *See* Hearing Exhibit No. 2.

l. Prior to the transportation, Respondent did not attempt to ascertain the ages of the persons to be transported. At the time of the transportation on January 24, 2004, Respondent made no effort to ascertain the ages of the persons to be transported. At some time

⁵ In the past Mr. Holle has operated a scenic or charter bus without first being registered with the Commission. *See* Decision No. R03-1456 (Hearing Exhibit No. 4). As a result, in the absence of evidence one cannot simply and reasonably presume that Mr. Holle had used the driver to operate a children's activity bus.

after January 24, 2004, an employee of Respondent asked Ms. Gunsten, for the first time, the ages of the passengers on the ski trip to Keystone.⁶

m. There is no evidence in the record on the issue of whether Regis University, under whose apparent sponsorship the transportation occurred, is a “nonprofit organization entitled to a tax exemption under the federal ‘Internal Revenue Code of 1986,’ as amended.” Section 40-16-101(1.5), C.R.S.

n. On January 24, 2004, Respondent was not registered with the Commission as a “charter or scenic bus,” as that term is defined in § 40-16-101(1.3), C.R.S.

o. On January 24, 2004, Respondent was aware that he was not registered with the Commission as a “charter or scenic bus,” as that term is defined in § 40-16-101(1.3), C.R.S.

⁶ This point was contested at the hearing. Mr. Holle testified that, on January 23, 2004, before the trip, he asked about the ages of the persons to be transported and that he was told that the students would be 18 years of age or younger. The ALJ finds this testimony unpersuasive. First, Mr. Holle was well aware of the children’s activity bus age-related restriction. Had someone at the Student Activities Office made such a representation, one can reasonably presume that Mr. Holle would have noted it on the Trip Order, which contained all other particulars of the transportation. There is no such representation on the Trip Order. *See* Hearing Exhibit No. 1. In addition, although Mr. Holle testified that he obtained this information from someone other than Ms. Gunsten, nothing other than his testimony supports this claim. The evidence shows that the person to whom anyone connected with Respondent would have spoken was Ms. Gunsten because “Sarah” (*i.e.*, Ms. Gunsten) was the only contact person. *See id.* Second, Mr. Holle testified that he knew Regis University has graduate programs and many (if not most) students attending Regis University are older than 18 years of age. Third, Mr. Holle testified that the invoice he sent to Regis University contained the notation “orientation.” The invoice was not offered into evidence so there is no independent evidence that such a notation was made. Mr. Holle did not explain why this notation meant that those traveling on the ski trip would be 18 years of age or younger, and the notation has no such intrinsic meaning. The ski trip occurred in January, well into the academic school year; and Mr. Holle did not explain how, from whom, or when he obtained the information that the ski trip was an “orientation” event. Ms. Gunsten’s testimony contained no reference to the ski trip as an “orientation” event or to Mr. Holle’s being informed that the trip was such an event. As noted above, Mr. Holle cross-examined Ms. Gunsten; he could have, but did not, elicit information on this point from her during that cross-examination. Fourth, the driver of the bus did not attempt to ascertain the ages of the persons traveling on the ski trip. Thus, irrespective of any oral representations (assuming there were such representations, which the ALJ finds there were not), at the time of the trip Respondent made no effort to assure that eight or more of the persons in the group were in fact 18 years of age or younger. Fifth and finally, the testimony of Ms. Gunsten, who is a disinterested witness with no known bias, contradicts the testimony of Mr. Holle, who is an interested party in this proceeding and, as such, has an identifiable bias. For the foregoing reasons, the ALJ finds the testimony of Mr. Holle on this issue not to be credible.

p. On January 24, 2004, Respondent did not hold a Certificate of Public Convenience and Necessity (CPCN) from the Commission to provide transportation of passengers and their baggage.

q. On January 24, 2004, Respondent was aware that he did not hold a CPCN from the Commission to provide transportation of passengers and their baggage.

r. On January 24, 2004, Respondent did not have in effect a general liability insurance policy in the minimum insurance amount of \$5,000,000 combined single limit liability.

s. On January 24, 2004, Respondent was aware that he did not have in effect a general liability insurance policy in the minimum insurance amount of \$5,000,000 combined single limit liability.

t. On January 24, 2004, Respondent was aware that he could not operate a charter or scenic bus without a general liability insurance policy in the minimum insurance amount of \$5,000,000 combined single limit liability. *See, e.g.*, Decision No. R03-1456 (Hearing Exhibit No. 4) at ¶ 10, d.

u. In Decision No. R03-1456, which became a final Commission decision on January 18, 2004, the ALJ found that, on August 1 and 25, 2003, Respondent operated a charter or scenic bus without authority from the Commission in violation of § 40-16-103, C.R.S. *See id.*, Hearing Exhibit No. 4, at ¶¶ 10, f and h, 11, 13. The ALJ also found that, on those dates, Respondent knowingly operated without the required insurance in violation of Rule 4 CCR 723-33-3.1. *See id.* at ¶¶ 10, f and h, 12, 14. Respondent had admitted those violations. *See id.* at ¶ 10, n.

10. Respondent does not dispute, and the facts establish, the Commission's jurisdiction in this proceeding. The Commission has subject matter jurisdiction over this case. In addition, the Commission has personal jurisdiction over the Respondent, who acknowledged receipt of the CPAN which was served by personal service (*see* Hearing Exhibit No. 3) and who made a general appearance at the hearing in this matter.

11. In this case Staff bears the burden of proof by a preponderance of the evidence. *See* Rule 4 CCR 723-1-82(a). Staff has met this burden of proof with respect to the two violations alleged in the CPAN and with respect to enhanced civil penalties for these violations.

12. Based on the evidence presented and the findings of fact set out above, the ALJ finds and concludes that, on January 24, 2004, Respondent violated § 40-16-103, C.R.S., by operating a charter or scenic bus without being registered with the Commission. In reaching this conclusion the ALJ is not persuaded by Respondent's argument that he provided the transportation pursuant to his children's activity bus authority.

13. As the proponent of the proposition, Respondent must provide sufficient evidence to support his claim of operating under his children's activity bus registration. An essential element in the definition of children's activity bus is: the group must have "eight or more children, eighteen years of age or younger[.]" Section 40-16-101(1.5), C.R.S. There is no evidence in the record that eight or more of the passengers were 18 years of age or younger, although the evidence does establish that some of the passengers were 19 years of age or older. Another essential element is the nonprofit status of the organization sponsoring the activity. *See id.* There is no evidence on this point in the record, and it is not a matter as to which the ALJ

may take administrative notice. *See* Rule 4 CCR 723-1-84(b). The ALJ finds that Respondent did not establish his children's activity bus claim.⁷

14. For the first violation of § 40-16-103, C.R.S., the maximum civil penalty is \$1,100. *See* § 40-7-113(1)(f), C.R.S.; Rule 4 CCR 723-33-11.1. In this case, however, the maximum civil penalty for this violation is \$2,200 because Respondent received a CPAN for violation of § 40-16-103, C.R.S., within the past year. *See* Decision No. R03-1456 (Hearing Exhibit No. 4); § 40-7-113(3), C.R.S.; Rule 4 CCR 723-11-11.10.

15. Based on the evidence presented, the ALJ finds and concludes that, on January 24, 2004, Respondent violated § 40-16-104, C.R.S., by operating a charter or scenic bus without having in effect the required general liability insurance policy in the statutorily-mandated amount of \$5,000,000. For the first violation of this provision, the maximum civil penalty is \$11,000. *See* § 40-7-113(1)(a), C.R.S.; Rule 4 CCR 723-33-11.3. In this case, however, the maximum civil penalty for this violation is \$22,000 because Respondent received a CPAN for failure to have the correct type and amount of insurance within the past year. *See* Decision No. R03-1456 (Hearing Exhibit No. 4); § 40-7-113(3), C.R.S.; Rule 4 CCR 723-11-11.10.

16. Decision No. R03-1456 found that Respondent knowingly violated Rule 4 CCR 723-33-3.1. In this proceeding, the CPAN alleges a violation of § 40-16-104, C.R.S. This raises the question of whether the requirements for civil penalty enhancement have been met. The ALJ

⁷ Staff appeared to argue in this proceeding that the presence of persons over 18 years of age who were not supervising the younger people on the ski trip resulted in an operation that was not under the children's activity bus registration. Because Respondent did not establish the elements of a children's activity bus operation, the ALJ does not reach the question of whether the presence of persons who are over the age of 18 and who are not supervising the children acts to defeat a claim of operating a children's activity bus, assuming all other statutory requirements are met. Section 40-16-101(1.5), C.R.S., refers to "adults over eighteen years of age accompanying or participating with" the group of children. The Rules, Regulations, and Civil Penalties Governing Motor Vehicle Carriers Exempt from Regulation as Public Utilities, 4 CCR 723-33, do not elucidate the statutory language.

finds and concludes that they have. First, the violation is the same under both the statute and the rule, and the conduct underlying the violation is the same: Respondent operated a charter or scenic bus without the required insurance. Second, there is no prejudice or unfair surprise to Respondent. Mr. Holle was on notice, and in fact admitted that he knew, that operating a charter or scenic bus without the required insurance violated the law. It does not matter whether that violation arose under statute or under rule; Respondent was aware of the conduct which would be considered violative and, thus, knew to avoid that conduct or risk the consequences. Third, the Commission has determined that a respondent cannot be assessed in one proceeding two civil penalties for violating two separate rules when the underlying conduct is the same. The Commission has determined that assessing two civil penalties in that circumstance is redundant. *See* Decision No. C96-0076. The Commission has also found that assessing two civil penalties in that circumstance amounts to multiple punishment for the same offense. *See* Decision No. R02-0337. The ALJ here applies that “same conduct” principle (albeit in a different context) by looking to the conduct underlying each CPAN, and not to the legal citation, to determine whether the statutory requirements for enhancing a civil penalty have been met.

17. Having found that Respondent violated the statutory provisions and having determined that enhanced civil penalties apply, it is necessary to determine the amount of the civil penalty to be assessed for these violations. In the CPAN, Staff seeks a civil penalty of \$24,200.

18. Based on the findings of fact and discussion above, the ALJ finds and concludes that \$24,200 is the appropriate civil penalty amount to be assessed in this case. In making this determination, the ALJ began with the maximum civil penalty for these violations (*i.e.*, \$24,200); considered Commission guidance provided in previous civil penalty cases; considered the

purposes of civil penalties; considered the factors in aggravation; considered the factors in mitigation; and considered the range of civil penalty assessments found to be reasonable in other cases.

19. As factors in aggravation the ALJ considered that Respondent's violations were knowing; that, on December 29, 2003, Respondent was assessed a civil penalty for the same type of conduct; and that the Commission and Staff have attempted in vain to bring Respondent into compliance.⁸ The ALJ took into account the seriousness of the violations alleged, particularly the fact that Respondent operated without insurance, thus stripping the public of the protection which the General Assembly intended insurance to afford. The ALJ also considered the seriousness of Respondent's operating a charter or scenic bus without being registered with the Commission. In the absence of registration the Commission is hampered in performing its statutory duties of assuring Respondent's compliance with statutory and rule requirements governing, *e.g.*, safety,⁹ payment of annual fees, and insurance. The ALJ considered the fact that, despite being on notice that the persons would be college students and, thus, were likely to be older than 18 years of age, Respondent failed to check, and failed to instruct his driver to check, the ages of the persons to be transported on the ski trip before providing the transportation. Finally, the ALJ considered Respondent's past assurance that he would come into compliance (*see* Decision No. R03-1456, Hearing Exhibit No. 4, at ¶ 10, j) and the fact that, as evidenced by the CPAN issued in this proceeding, he did not keep that promise.

⁸ *See* Decision No. R03-1456 (Hearing Exhibit No. 4).

⁹ *See* Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties, 4 CCR 723-15, which rules apply to, *inter alia*, charter or scenic buses. *See* Rule 4 CCR 723-15-1.

20. In mitigation the ALJ considered, but found unpersuasive for the reasons discussed above, Respondent's testimony that he took steps to act within the scope of the children's activity bus registration and, thus, to avoid violating the law. Respondent also offered in mitigation the compressed time frame within which these events occurred and his desire to assist the Student Activities Office to obtain transportation so the students could go on the scheduled ski trip.¹⁰ The ALJ finds that these are not appropriate factors to consider in mitigation. First, Respondent could have, and clearly should have, refused to provide the transportation. Having contracted to provide the transportation, Respondent should have taken, but did not take, steps to assure that he was operating within the scope of the children's activity bus authority. Second, violations of the law should not be excused, or the consequences mitigated, because the violations occurred in a short period of time, occurred in "rushed" circumstances, or occurred due to a desire to help someone. As these were the only points advanced by Respondent and as she could discern no others, the ALJ considered no factors in mitigation.

21. The ALJ finds that the assessed civil penalty achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers and by the Respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for his past illegal behavior. Assessing a civil penalty of a significant amount underscores the seriousness of the violations which occurred and

¹⁰ Ms. Gunsten testified that Respondent underbid another carrier for the ski trip transportation and that he knew about the other carrier's willingness to provide the transportation. Thus, even if one considered in mitigation Respondent's concern that the ski trip might have to be cancelled (which one should not), the record does not support his claimed concern. Based on Ms. Gunsten's unrebutted and unrefuted testimony, the ALJ finds that Mr. Holle knew that another carrier was ready, willing, and able to provide the necessary transportation and that Mr. Holle underbid that other carrier in order to obtain the transportation contract.

should act as a deterrent. The civil penalty and CPAN also trigger increased civil penalties in the event Respondent violates these provisions in the future. *See* §§ 40-7-113(3) and 113(4), C.R.S.

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

III. ORDER

A. The Commission Orders That:

1. Larry Holle, doing business as Bus Express, on January 24, 2004, violated § 40-16-103, C.R.S.

2. Larry Holle, doing business as Bus Express, on January 24, 2004, violated § 40-16-104, C.R.S.

3. A civil penalty is assessed against Larry Holle, doing business as Bus Express, in the amount of \$24,200.

4. Within ten days of the date on which this Recommended Decision becomes the Decision of the Commission, Larry Holle, doing business as Bus Express, shall pay a civil penalty in the amount of \$24,200 to the Commission.

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 Recommended 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

