

Decision No. R04-0674

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-149CP

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

SAN MIGUEL MOUNTAIN VENTURES, LLC, D/B/A TELLURIDE EXPRESS,

RESPONDENT.

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

Mailed Date: June 18, 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, San Miguel Mountain Ventures, LLC, doing business as Telluride Express (Telluride Express).

2. In Civil Penalty Assessment Notice (CPAN) No. 28542 Staff alleges that Telluride Express 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. 28542, Staff alleges that between February 1 and 7, 2004, Telluride Express violated 49 CFR Part 391.25(a) on three occasions (Counts 6 through 8), 49 CFR Parts 391.25(b) and (c) on five occasions (Counts 9 through 13), and 49 CFR Part 391.27(a) on five occasions (Counts 14 through 18). *See*, Exhibit 1. The subject CPAN seeks imposition of a civil penalty in the amount of \$2,600.00 for these alleged violations.¹

4. On April 13, 2004, the Commission issued an Order Setting Hearing and Notice of Hearing setting a hearing in this matter for June 10, 2004, in Montrose, Colorado. A request by Telluride Express to continue the hearing was denied. *See*, Decision No. R04-0473-I. On May 17, 2004, Telluride Express filed a pleading that was construed as a motion to set aside that decision and/or as a motion for summary judgment. Those motions were also denied. *See*, Decision No. R04-0543-I.

5. The undersigned Administrative Law Judge (ALJ) called the matter for hearing at the assigned time and place. Staff appeared through Mr. Paul Hoffman, a Commission Compliance Investigator. Telluride Express appeared through its President, Mr. Sid Brotman. During the course of the hearing, Exhibits 1 through 7 were identified, offered, and admitted into evidence. Mr. Hoffman testified in support of the allegations contained in CPAN No. 28542. Mr. Brotman and Mr. Rusty Faurie, Telluride Express' Fleet Manager, testified on behalf of Telluride Express.

¹ On or about April 1, 2004, Telluride Express acknowledged liability for 30 of the violations set forth in CPAN No. 28452 (Counts 1 through 5 and 19 through 43) and paid the applicable fine (\$3,000.00) for such violations. It is contesting only the remaining 13 violations (Counts 6 through 18) described above.

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. Telluride Express 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 Nos. 1648 and 55679 and Contract Carrier Permit Nos. A-9820 and B-9821. It also provides property carrier services within Colorado pursuant to Registration No. PRC-58512.

8. On March 8, 9, and 10, 2004, Mr. Hoffman conducted a Safety and Compliance Review (Audit) of Telluride Express. At that time he reviewed the books and records maintained by the company, including various driver qualifications files, and determined that it had failed to comply with certain recordkeeping requirements imposed on motor carriers by the Safety Rules. Among other potential violations, the Audit included reference to those ultimately contained in CPAN No. 28542.

9. The Audit indicated that the driver qualification files maintained by Telluride Express for drivers Robert Dodge (Dodge), Jason Bean (Bean), and Samuel Auker (Auker), failed to demonstrate that it had complied with 49 CFR Part 391.25(a) (failing to make inquiries into the driving record of these drivers covering at least the preceding 12 months to the appropriate agency of the state in which the drivers held a commercial motor vehicle operator's license or permit during that time period).² The Audit also indicated that the driver qualification

² Counts 6 through 8 of CPAN No. 28542.

files maintained in connection with these drivers, as well as drivers Harold Hansen (Hansen) and Levi Brannam (Brannam), failed to demonstrate that Telluride Express had complied with 49 CFR Part 391.25(b) (failing to review the driving record of these drivers at least once every 12 months to determine whether the drivers met the minimum requirements for safe driving or were disqualified to drive a commercial motor vehicle pursuant to 49 CFR Part 391.15) and that they failed to contain the documentation required by 49 CFR Part 391.25(c) (a copy of the response from each State agency to the inquiry required by subsection (a) of Part 391.25 and a note of the review of the drivers' driving record required by subsection (b) of Part 391.25).³

10. Finally, the Audit indicated that the driver qualification files maintained by Telluride Express in connection with these five drivers failed to demonstrate that it had complied with 49 CFR Part 391.27(a) (failing to require these drivers at least once every 12 months to prepare and furnish it with a list of all violations of motor vehicle traffic laws and ordinances the driver has been convicted of or which he has forfeited bond or collateral during the preceding 12 months) by failing to contain the driver certifications required by subsection (c) of that regulation.⁴

11. Mr. Hoffman recalls discussing the results of the Audit with Mr. Brotman, Mr. Faurie, and/or another Telluride Express representative, Mr. Smith, shortly after it was completed. He also recalls advising Mr. Faurie or Mr. Smith of the missing documentation discussed above and providing them an opportunity to locate and produce it. They were, however, unable to do so. Mr. Hoffman then provided a copy of the Audit to Telluride Express, receipt of which was acknowledged by either Mr. Faurie or Mr. Smith.

³ Counts 9 through 13 of CPAN No. 28542.

⁴ Counts 14 through 18 of CPAN No. 28542.

12. Mr. Hoffman prepared CPAN No. 38542 shortly after completing the Audit. He served it on Telluride Express' authorized representative on March 23, 2004. *See*, Exhibit 1, page 4.

13. Mr. Hoffman testified that the violations contained in Counts 6 through 18 of CPAN No. 38542 had previously been brought to Telluride Express' attention as a result of a prior Audit conducted in June of 2003.

14. Telluride Express does not dispute Staff's contention that the driver qualification files maintained for the five drivers in question failed to contain the certifications required by 49 CFR Part 391.27 as alleged in Counts 14 through 18 of CPAN No. 38542. However, it submits that such certifications are unnecessary since, by performing regular reviews of driving records and by observing its drivers performance on a day-to-day basis, it effectively complies with this regulation. Notwithstanding this belief, Telluride Express indicates that it will henceforth secure the required certification from its drivers.

15. With regard to Counts 6 through 8 of CPAN No. 38542, Telluride Express contends that the documentation required by 49 CFR Part 391.25(c)(1) (*i.e.*, a current copy of the subject drivers' Motor Vehicle Record) was included in the driver qualification files for drivers Dodge, Bean, and Auker at the time the Audit was performed. Similarly, with regard to Counts 9 through 13 of CPAN No. 38542, Telluride Express contends that the documentation required by 49 CFR Part 391.25(c)(2) (*i.e.*, notes indicating that reviews of driving records were properly conducted) was included in the driver qualification files for drivers Dodge, Bean, Auker, Hansen, and Brannam at the time the Audit was performed.

16. At the hearing, Telluride Express produced the current Motor Vehicle Records (MVRs) for these five drivers in support of its position. *See*, Exhibits 2 through 6.⁵ The MVRs contain handwritten notations made by Mr. Faurie or Ms. Colleen Moore, Telluride Express' former Driver Coordinator, documenting the driving record reviews performed in connection with these five drivers. With the exception of the MVR relating to driver Bean (Exhibit 3),⁶ Mr. Hoffman testified that this documentation, had it been included in the subject driver qualifications files at the time he conducted the Audit, would have been sufficient to satisfy the requirements of 49 CFR Part 391.25 and, therefore, would have precluded the necessity of citing Telluride Express for the violations included in Counts 6 through 9 and 11 through 13 of CPAN No. 28542.

17. In mitigation of the charges contained in CPAN No. 28542, Telluride Express points out that it imposes more stringent standards than those imposed by the Safety Rules in connection with the hiring, monitoring, and retention of its drivers. *See*, Exhibit 7. It also notes that its prior safety record is unblemished in that it has not had a passenger-related accident within the past five years.

III. DISCUSSION

18. Intrastate motor common and contract carriers as defined in §§ 40-10-101(4)(a) and 40-11-101(3), 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

⁵ The first page of each of these exhibits is a copy of the current MVR for each of the involved Telluride Express drivers. The remaining pages do not contain information that is directly relevant to the issues involved in this proceeding.

⁶ The notation of the driving record review included on Exhibit 3 does not contain the date the review was conducted as required by 49 CFR Part 391.25(c)(2).

Rules incorporate the 1998 edition of 49 CFR Part 391. *See*, 4 CCR 723-15-2.1. As indicated above, Telluride Express is a motor vehicle common and contract 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.

19. 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.

20. As indicated above, Telluride Express does not dispute that it failed to secure the certifications required by 49 CFR Part 391.27 from drivers Dodge, Bean, Auker, Hansen, and Brannan or to maintain such certifications in their respective driver qualification files. Its argument that securing these certifications is unnecessary in light of other precautions employed to insure that its drivers are fully qualified is unpersuasive.

21. First, the subject regulation specifically requires the carrier to secure such certifications and maintain them in its driver qualification files. The regulation goes so far as to include a form that can be reproduced and used by the carrier in order to comply with the regulation. Second, the importance of securing such a certification is underscored by 49 CFR Part 391.11(b)(6) which has the effect of disqualifying the driver from operating a commercial motor vehicle if he fails to prepare and furnish the carrier with the certification. Finally, the ALJ

agrees with Mr. Hoffman that requiring drivers to complete the required certification enhances the safety of the carrier's operations by imposing an "honesty check" on its drivers. For these reasons, Telluride Express has violated 49 CFR Part 391.27 as alleged in Counts 14 through 18 of CPAN No. 38542.

22. The central issue regarding the allegations contained in Counts 6 through 13 of CPAN No. 38542 is one of credibility; *i.e.*, were the required MVRs and/or notations of driving record reviews for the subject drivers contained in the applicable driver qualification files at the time the Audit was performed? Subsections (c)(1) and (2) of 49 CFR Part 391.25 requires that this documentation be maintained in those files. Telluride Taxi contends that it was so maintained and Mr. Hoffman contends that it was not, at least not on the days he conducted the Audit.

23. In resolving this issue, the ALJ finds Mr. Hoffman's testimony concerning the circumstances under which the Audit was conducted to be persuasive. First, Mr. Hoffman is an experienced member of the Commission's Safety and Enforcement Staff. He has performed hundreds, perhaps even thousands, of audits similar to the one he performed in connection with Telluride Express. While no one is perfect, the ALJ has confidence that Mr. Hoffman knows what he is looking for when reviewing driver qualification files, that his testimony that he was unable to locate a necessary item of documentation is credible, and that, in all likelihood, such documentation was absent from the files under review.

24. In addition, Mr. Hoffman discussed the absence of the subject documentation with one or more representatives of Telluride Express and provided them with an opportunity to locate and produce the same. However, for whatever reason, the subject MVRs were not provided to

Mr. Hoffman during the time he conducted the Audit. While the record is unclear as to which Telluride Taxi representatives were parties to this discussion, the testimony presented at the hearing did not directly dispute the fact that such a discussion occurred.⁷

25. For these reasons, it is concluded that the MVRs and/or notations of driving record reviews for Telluride Express drivers Dodge, Bean, Aucker, Hansen, and Brannam were not contained in their respective driver qualification files at the time the Audit was performed. This constitutes violations of 49 CFR Part 391.25 as alleged in Counts 6 through 13 of CPAN No. 28542.

26. Notwithstanding the above, the ALJ concludes that the MVRs for the involved drivers were in Telluride Express' possession at the time of the Audit. This is supported by the date shown on each MVR as well as the date each MVR was sent to Telluride Express via facsimile transmission. All of the subject MVRs are dated prior to the time the Audit was conducted and all bear facsimile transmission dates prior to that time. *See*, Exhibits 2 through 6.

27. Similarly, the ALJ concludes that Telluride Express actually conducted the driving record reviews for four of the five subject drivers prior to the time of the Audit. The Telluride Express witnesses testified that the handwritten "OK" notation on the lower right-hand corner of each of the subject MVRs indicate that the necessary reviews were conducted on the date shown next to that notation (except for driver Bean; Exhibit 3) by the company representative whose initials appear next to the notation. *See*, Exhibits 2 and 4 through 6. Staff did not dispute this testimony.

⁷ It is possible that Mr. Hoffman discussed this matter with Mr. Smith, a Telluride Express representative who did not testify at the hearing.

28. The ALJ is unable to conclude, however, that Telluride Express actually conducted the necessary driving record review for driver Bean prior to the time of the Audit since the date of the review does not appear on his MVR as required by 49 CFR Part 391.25(c)(2).

29. Mr. Hoffman's undisputed testimony establishes that Telluride Express was provided prior written notification of the same violations as are contained in Counts 6 through 18 of CPAN No. 28542 as a result of the Audit he conducted in June 2003. Therefore, the evidence of record establishes that Telluride Express intentionally violated these Safety Rules within the meaning of 4 CCR 723-15-12.10.

30. Rule 12.5 of the Safety Rules, 4 CCR 723-15-12.5, authorizes the Commission to assess a civil penalty of "up to" \$200.00 for each violation. Therefore, it has the ability to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments. These include, among others, deterring future violations, motivating a carrier to come into compliance with the law, and punishing a carrier for prior, illegal behavior.

31. Based on the findings of fact and discussion above, the ALJ finds that \$1,075.00 is the appropriate total civil penalty amount to be assessed in this case. Regarding Counts 6 through 13, the ALJ is persuaded that the underlying purpose of 49 CFR Part 391.25 (*i.e.*, to ensure that a carrier regularly reviews the driving records of its drivers) is being fulfilled by Telluride Express and that assessment of the maximum penalty amount for these violations is not necessary to deter future violations or to further motivate it to comply with the law. The evidence established that it had, in fact, conducted such reviews and secured the necessary

documentation notwithstanding the fact that it failed to place the same in the applicable driver qualification files, at least at the time Mr. Hoffman performed the Audit. This justifies a reduction in the penalty amount for Counts 6 through 9 and 11 through 13 from the maximum of \$200.00 to \$50.00, and a reduction in the penalty amount for Count 10 from the maximum of \$200.00 to \$100.00.⁸

32. Regarding Counts 14 through 18, the ALJ is convinced that Telluride Express now appreciates the importance of securing the driver certifications required by 49 CFR Part 391.27 and will take the necessary steps to comply with this regulation. An additional mitigating factor is Telluride Express' rigorous driver hiring, monitoring, and retention policy which appears to have assisted the company in maintaining an accident-free record over the past five years notwithstanding its failure to comply with 49 CFR Part 391.27. This justifies a reduction in the penalty amount for Counts 14 through 18 from the maximum of \$200.00 to \$125.00.

IV. CONCLUSIONS

33. Staff has sustained its burden of proving the allegations contained in Counts 6 through 18 of CPAN No. 28542 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

34. The total civil penalty for such violations is \$2,600.00. *See*, 4 CCR 723-15-12.5. However, the total civil penalty will be reduced to \$1,075.00 in light of the mitigating factors discussed above.

⁸ There is insufficient mitigating evidence to reduce the penalty amount for Count 10 to \$50.00 in light of the fact that Exhibit 3 fails to show the date Mr. Bean's driving record was reviewed as required by 49 CFR Part 391.25(c)(2).

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

1. Respondent, San Miguel Mountain Ventures, LLC, doing business as Telluride Express, is assessed a civil penalty in the amount of: (a) \$50.00 each in connection with Counts 6 through 9 and 11 through 13 of Civil Penalty Assessment Notice No. 28542; (b) \$100.00 in connection with Count 10 of Civil Penalty Assessment Notice No. 28542; and (c) \$125.00 each in connection with Counts 14 through 18 of Civil Penalty Assessment Notice No. 28542. It shall pay the total assessed penalty of \$1,075.00 within ten days of the effective date of this Order.

2. 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.

3. 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.

4. 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