

MONUMENT LIMOUSINE SERVICE, L.L.C.

3430 Fillmore Ridge Heights, Colorado Springs, Colorado 80907 (719) 477-1500 Fax (719) 577-7400

30 November 2004

Hon. Mana L. Jennings-Fader
Public Utilities Commission
State of Colorado
1580 Logan Street, OL-2
Denver, Colorado 80203

Re: Public Utilities Commission v. Monument Limousine Service
Docket No. 04G-458EC

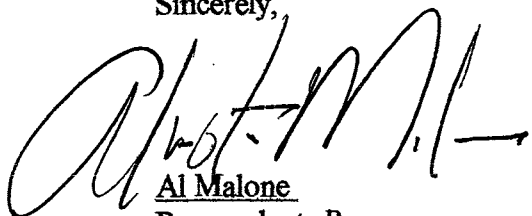
Dear Judge Jennings-Fader:

Enclosed, please find copies of our Motion to Dismiss by Directed Verdict. We apologize for the timing of this Motion; however, we did not come into possession of the information which caused us to generate this filing until Thanksgiving weekend.

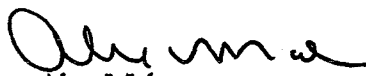
We further understand that the Claimant, the Commission, has a period of twenty (20) days to respond to our motion upon their receipt and we would then have ten (10) days to formulate any response, if necessary.

In light of these circumstances, we request that the Court vacate our 14 December 2004 scheduled Hearing date and reschedule, if needed, after the first of the year.

Sincerely,



Al Malone
Respondent, *Pro se*



Alex Malone
Respondent, *Pro se*

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RECEIVED
STATE OF COLORADO
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2004 DEC -1 PM 1:12

PUBLIC UTILITIES COMMISSION
STATE OF COLORADO,

Claimant,

v.

AL MALONE & ALEX MALONE, d.b.a.
MONUMENT LIMOUSINE SERVICE, L.L.C.

Respondent.

Before the Honorable
Mana L. Jennings-Fader
Administrative Law Judge
Docket No. 04G-458EC

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RESPONDENT'S MOTION FOR DISMISSAL BY DIRECTED VERDICT

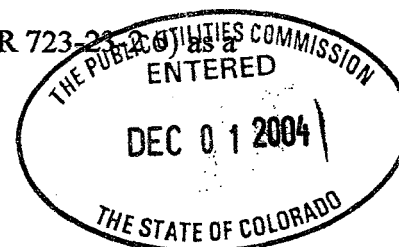
COMES NOW the Respondents in this instant standing before this honorable Court seeking an Order to vacate and set aside the findings of violation by the Claimant and the monetary fines attached to them. If the Court should find and rule for the Respondents, they then petition the Court to vacate and set aside any acknowledgement or admission of liability for alleged violations and return to the Claimants any and all monies forwarded to the State of Colorado in settlement of fines and penalties.

I.

INTRODUCTION

1. The Claimant, the Public Utilities Commission of the State of Colorado, hereafter, the 'PUC or Commission', was created by the Legislature of the State of Colorado (Colorado Revised Statute, CRS 40-2-101) to regulate motor carriers and other public utilities for the welfare and safety of the population at large and empowered to create rules for the enforcement of Title 40 (CRS 40-2-108).

2. The Respondent, Monument Limousine, LLC, hereafter, 'the Company', is operated under PUC Authority No. 582 (Letter of Authority, 4 CCR 723-23.2).



Contract Limousine Service.

3. The Respondent, Al Malone, hereafter, 'Respondent (2)', is part owner of the Company and executes the duties of a Board member, Vice President, COO and the execution of contracted Call/Runs.

4. The Respondent, Alex Malone, hereafter, 'Respondent (3)', is also part owner of the Company and executes the duties of a Board member, President, CEO and the execution of contracted Calls/Runs.

II.

BACKGROUND

1. On or about 2 September 2004, the Company was subject to a Safety and Compliance Review conducted by investigative personnel of the Commission, specifically, Mr. Paul Hoffman, hereafter, the 'Review(ing) Officer'. The Review was conducted under the guidelines set forth in Commission Rules, 4 CCR 723-15.

2. At the completion of the Review, the Reviewing Officer determined that the Respondents were in violation of Title 49, C.F.R. 395.8(a), 396.3(b)(2) of the Federal Motor Carrier Safety Regulations, (FMCSR) in that they failed to 'complete and record an accurate Record of Duty Status', i.e., a log grid or Log Book, and failed to 'maintain an adequate plan of service for vehicles'.

3. The Respondents objected to the findings noting that the Company operates under the guidelines of Part 395.1(e), FMCSR, the '100 air-mile radius Rule' and therefore, exempt from the provisions of 395.8(a) and the guidelines set forth under 396.3(b)(2) are vague and broad allowing the Respondent a wide latitude in developing a system that is best suited for the conditions under which the Fleet vehicles are operated.

4. On or about 19 September 2004, the Respondents received a **Civil Penalty Assessment Notice** outlining the nature of the violation, the legal authority to impose a determination of such a violation, and the fine assessment for the violation, to wit:

- a. Respondent, Monument Limousine Service- was found to be in violation of Title 49, C.F.R., 396.3(b)(2), FMCSR, failing to complete and maintain an adequate plan of service of fleet vehicles for a period of four (4) days during the month of July 2004. The fine assessment of \$200.00 per day or a total of \$800.00 was levied.
- b. Respondent 2, Al Malone- was found to be in violation of Title 49, C.F.R. 395.8(a), FMCSR, failing to complete an accurate 'Record of Duty Status' for a period of seven (7) days during the month of August 2004. A Fine Assessment of \$200.00 per day or a total of \$1400.00 was levied.
- c. Respondent 3, Alex Malone- was found to be in violation of Title 49, C.F.R. 395.8(a), FMCSR, failing to complete an accurate 'Record of Duty Status' for a period of eighteen (18) days during the months of July and August 2004, beginning on the 17th through the 31st (July) and beginning again on the 8th of August through the 10th of August. A Fine Assessment of \$200.00 per day or a total of \$3600.00 was levied.

5. On or about 27 September 2004, and pursuant to the guidelines outlined in the Notice, the Respondents appealed the findings of the Commission and a tentative Hearing date of 14 December 2004 was set.

III.

ARGUMENT

1. **Motion For Directed Verdict to Dismiss is Appropriate.**

A 'Motion to Dismiss by Directed Verdict', pursuant to C.R.C.P Rule 41(b) and Rule 50, is appropriate when the court is the 'trier of fact'. Frontier Exploration v. American National, 849 P.2d 887 (Colo App. 1992) and the evidence presented by the Claimant cannot sustain a *Prima Fascia* case against the Respondents. In determining the quest for granting Respondent's motion, the Court must view the evidence in the light most favorable to the party against whom the motion is directed. Martin Marietta Corp., v. Lorenz, 823 P.2d 100 (Colo 1992).

2. The Commission Lacks Legal Authority.

a. As noted by the Commission's 'Compliance Review Final Report', it relies upon and has adopted, with various modification, the Federal Motor Carrier Safety Regulations (FMCSR) codified in Chapter Three of Title 49, U.S.C. and C.F.R. , specifically Parts 395 and 396, October 1998 edition, as its legal authority in determining that the Respondents were in violation.

b. On the date of the Compliance Review, 2 September 2004 and the dates to which the Commission charges the Respondent to be in violation, 17 July through 10 August 2004, Title 49 U.S.C.A.31136(a)(2,3,4) (C.F.R.) 395.1-395.15 was non-existent having been vacated in its entirety on 16 July 2004 by the United States Court of Appeals, District of Columbia Circuit, Docket No. 03-1165

c. In Public Citizen, et al. v. Federal Motor Carrier Safety Administration, 374 F.3d 1209, (D.C. Cir 2004), the three judge Panel held that, " 49 C.F.R 395.1-395.15 was arbitrary and capricious in that the FMCSA neglected to consider statutorily mandated factor of the Rule's impact on driver health." –Circuit Judge Sentelle. In doing so, the Court vacated the Rule in its entirety and remanded it back to FMCSA for revision and submission to Congress. The new Rule was signed into law in early October 2004.

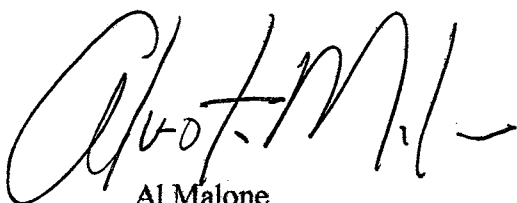
d. No temporary or emergency Rule was passed or submitted by the Commission withstanding of C.R.S 24-4-103(6), lacking legal authority, to enforce State Statutes or existing Commission Rules pertaining to 49 F.C.R. 395.1-395.15.

IV.

CONCLUSION

For the reasons cited above, the Respondents pray to the Court for a favorable ruling on their Motion to Dismiss by Directed Verdict.

Respectfully submitted this 30th day of November 2004.



Al Malone
Monument Limousine
Service, L.L.C.
Respondent, *Pro se*



Alex Malone
Monument Limousine
Service, L.L.C.
Respondent, *Pro se*

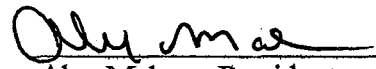
3430 Fillmore Ridge Heights
Colorado Springs, CO 80907

719-477-1500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Motion To Dismiss was placed with the United States Postal Service, Certified Mail No. 7003-1010-0000 7451-5929 this 30th day of November 2004 to the addressee listed below:

**Bruce N. Smith, Director
Public Utilities Commission
State of Colorado
1580 Logan Street, OL-2
Denver, Colorado 80203**


Alex Malone, President
Monument Limousine
Service, L.L.C.