

Decision No. R14-0956

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0197EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

BROTHERS AIRPORT EXPRESS LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
ASSESSING CIVIL PENALTY AND
CLOSING PROCEEDING**

Mailed Date: August 7, 2014

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I. STATEMENT

1. On March 3, 2014, Trial Staff (Complainant or Staff) of the Commission served Respondent Brothers Airport Express (Respondent or Brothers), with Civil Penalty Assessment Notice (CPAN) No. 108565 arising out of one alleged violation of *Rule 6102(a)(I) of the Rules Regulating Transportation by Motor Vehicle*, 4 *Code of Colorado Regulations* (CCR) 723-6 and 49 *Code of Federal Regulations* (CFR) § 391.21(a); one alleged violation of *Rule 6105(c) 4 CCR 723-6*; one alleged violation of *Rule 6102(a)(I) 4 CCR 723-6 and 49 CFR § 396.3(b)*; and two violations of *Rule 6103(d)(II)(c) 4 CCR 723-6*.

2. On March 12, 2014, Respondent requested a hearing concerning the CPAN.

3. On March 12, 2014, the Public Utilities Commission (Commission or PUC) set the proceeding for an evidentiary hearing to commence on April 29, 2014.

4. On March 26, 2014, the Commission referred this matter to an Administrative Law Judge (ALJ).

5. On March 27, 2014, by Interim Decision No. R14-0338-I, the evidentiary hearing in this proceeding was rescheduled *sua sponte* by the ALJ to May 13, 2014.

6. On May 13, 2014, the above captioned proceeding was called. Counsel for Staff entered his appearance. The Respondent failed to appear. A recess was taken to allow additional time for the Respondent to appear. After a 15-minute recess, the proceeding was called again and the Respondent again failed to appear.

7. As a prehearing matter, Counsel for Staff requested a continuance due to illness. The continuance was granted since it would not prejudice the Respondent.

8. Pursuant to Decision No. R14-0531-I, issued on May 19, 2014, an evidentiary hearing was convened in the Commission offices on July 18, 2014. Staff appeared through its

counsel, Assistant Attorney General Michael Axelrad. Respondent failed to appear. A recess was taken to allow additional time for the Respondent to appear. After a 15-minute recess the proceeding was called again and the Respondent again failed to appear. The proceeding was then commenced without the presence of the Respondent,

9. Staff offered the testimony of Criminal Investigator Nancy Brandt. Hearing Exhibits 1 through 18 were offered and admitted. At the conclusion of the evidence, Staff presented an oral closing statement. At that point, the ALJ closed the record and took the matter under advisement.

10. In reaching this Recommended Decision the ALJ has considered all arguments presented, including those arguments not specifically addressed in this Decision. Likewise, the ALJ has considered all evidence presented at the hearing, even if the evidence is not specifically addressed in this Decision.

11. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

12. Nancy Brandt is a criminal investigator (CI) employed by the Commission's Transportation Investigation and Enforcement Section. Her duties include performing safety and compliance reviews (SCR) on carriers that are regulated by the Commission.

13. Respondent is a Luxury Limousine carrier currently operating with Commission Permit No. LL-01953 and also a Contract Carrier operating with Commission Permit No. B-10010.

14. Respondent employs two drivers in its operations, Mr. Alemseged Yemaneh and Ms. Sitina Edries.

15. On April 29, 2011, Commission Permit No. LL-01953 was issued to Cheap Limo at Denver (Cheap Limo). *Hearing Exhibit 5*

16. In June of 2012, Cheap Limo filed an application with the Commission to change the name of Cheap Limo to Brothers Airport Express LLC. *Hearing Exhibit 6*.

17. Brothers was granted authority to operate as a luxury limousine carrier on June 11, 2012. *Hearing Exhibit 2*.

18. Brothers was granted authority to operate as a contract carrier on October 24, 2014. *Hearing Transcript p. 56, l. 14-25*.

19. An SCR entails reviewing any applicable PUC files on the carrier, driver qualifications files, vehicle maintenance files, and inspecting the vehicles.

20. On July 19, 2011, an SCR was conducted at Cheap Limo¹ by CI Monita Pacheco. *Hearing Exhibit 3*.

21. In the report completed by CI Pacheco, after the SCR was completed, there were warnings for failure of Cheap Limo to require drivers to furnish an employment application, allowing drivers to drive without submitting fingerprints for a background check, failure to require drivers to prepare a record of duty service, and for failure to keep minimum inspection and maintenance records of vehicles. *Id.*

22. On September 25, 2013, a consumer complaint was filed with the Commission against Brothers. This complaint was assigned to CI Brandt. *Hearing Exhibit 1*

¹ The SCR was performed prior to Cheap Limo filing for a name change with the Commission.

23. CI Brandt investigated the Commission records concerning Brothers and uncovered the SCR from 2011. Based upon her investigation she determined that it would be appropriate to conduct a new SCR at Brothers.

24. On November 22, 2013, CI Brandt contacted Mr. Alemseged Yemaneh,² the owner of Brothers, via telephone to set up an SCR for December 31, 2013.

25. After the phone conversation CI Brandt sent an e-mail to Mr. Yemaneh confirming the appointment. *Hearing Exhibit 10*

26. On December 31, 2013, CI Brandt and CI Brian Chesher traveled to the Respondent's address for the SCR and the Respondent was not present. CI Chesher contacted Mr. Yemaneh by telephone and was informed that Mr. Yemaneh was in Aspen and would be unable to return for the SCR. The SCR was then rescheduled for January 2, 2014.

27. After the phone conversation CI Brandt sent an e-mail to Mr. Yemaneh confirming the rescheduled appointment for January 2, 2014. *Hearing Exhibit 11.*

28. On January 2, 2014, CI Brandt and CI Chesher conducted an SCR at Brothers. As a result of the SCR, CI Brandt found a total of 15 violations. The violations included failure of the Respondent to require drivers to furnish an employment application, allowing drivers to drive without submitting fingerprints for a background check, failure to require drivers to prepare a record of duty service, and for failure to keep minimum inspection and maintenance records of vehicles. *See Hearing Exhibit 12.*

29. After taking into account the severity of the violations, risk to public safety and also the size of the Respondent, CI Brandt determined which violations to cite Brothers.

² Mr. Yemaneh was also the owner when Brothers went by the name of Cheap Limo.

30. CI Brandt issued a CPAN on February 13, 2014 for a total of five violations found during the SCR conducted on January 2, 2014. CI Brandt cited the Respondent for one violation for failure of the Respondent to require drivers to furnish an employment application,³ one violation for allowing drivers to drive without submitting fingerprints for a background check,⁴ two violations of failure to require drivers to prepare a record of duty service,⁵ and for failure to keep minimum inspection and maintenance records of vehicles⁶. *Hearing Exhibit 17*.

31. The designated agent for Brothers is Mr. Alemseged Yemaneh. *Hearing Exhibit 4, p. 3*.

32. CI Brandt personally served the CPAN on Mr. Alemseged Yemaneh on March 3, 2014. *Hearing Exhibit 18*.

III. APPLICABLE LAW

33. As the proponent of a Commission order, Complainant has the burden of persuasion in this proceeding pursuant to 4 CCR 723-1-1500 of the Rules of Practice and Procedure.

34. Section 40-7-116, C.R.S., mandates a number of procedures for the imposition of civil penalties by the Commission: After specifying that the listed officials are the ones authorized to issue civil penalty assessments for violations of law, § 116(1)(a) states that, “When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice.” Section 116(1)(b) further directs that the civil penalty assessment notice “shall be tendered by the

³ Rule 6102(a)(I) 4 CCR 723-1 and 49 CFR § 391.21(a)

⁴ Rule 6105(c), 4 CCR 723-1

⁵ Rule 6103(d)(II)(c), 4 CCR 723-1

⁶ Rule 6102(a)(I), 4 CCR 723-1 and 49 CFR § 396.3(b).

enforcement official, either in person or by certified mail, or by personal service by a person authorized to serve process under rule 4(d) of the Colorado rules of civil procedure.” § 40-7-116, C.R.S.

35. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order." § 24-4-105(7), C.R.S. As provided in Commission Rule 4 CCR 723-1-1500, "[t]he proponent of the order is that party commencing a proceeding." Here, Staff is the proponent since it commenced the proceeding through issuance of the CPAN. Complainant bears the burden of proof by a preponderance of the evidence. *See*, § 13-25-127(1), C.R.S.; 4 CCR 723-1-1500. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985). While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

36. Proper service of the CPAN is vital. "The mandatory requirements for valid service of process are fundamental because of the due process requirements of notice. *Bush v. Winker*, 892 P.2d 328, 332 (Colo. App. 1994).

IV. DISCUSSION AND CONCLUSION

37. In the instant case CI Brandt personally served the CPAN on Brothers' designated agent with the Commission.

38. Service was made in accordance with § 40-7-116, C.R.S.

39. The Respondent did not appear for the hearing and therefore no defense was presented to the alleged violations contained in the CPAN.

40. The testimony of CI Brandt was credible that at the time of the SCR, the Respondent did not provide documentation of an employment application for driver Alemseged Yemaneh.

41. The testimony of CI Brandt was credible that at the time of the SCR, the Respondent did not provide documentation of a record of duty status for drivers Alemseged Yemaneh or Sitina Edries.

42. The testimony of CI Brandt was credible that at the time of the SCR, the Respondent had not submitted the fingerprints of driver Alemseged Yemaneh, to the Commission for a criminal background check, but had permitted Mr. Yemaneh to drive for the Respondent.

43. The Respondent was advised and made aware of each of the violations cited in the CPAN issued on February 13, 2014, during the 2011 SCR. In the final report of the 2011 SCR, Mr. Yemaneh initialed each page and signed that the violations had been explained to him.⁷

44. The Commission has determined that a violation is intentional within the meaning of § 40-7-113(1)(g), C.R.S., when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction. *Commission Decision No. C00-1075*.⁸

⁷ It is also noted that the Respondent owns two vehicles, one vehicle for the luxury limousine service and one vehicle for the contract carrier service. The maintenance records were provided to CI Brandt for the vehicle used in the luxury limousine service but not for the vehicle used in the contract carrier service. *Hearing Transcript p.54, l.20-25*. The vehicle used for the contract carrier service is the vehicle cited in the CPAN. While it is commendable that the Respondent retained maintenance records for the vehicle used for the luxury limousine service, it does indicate knowledge that it is necessary to retain these records. In addition, Respondent was not cited or warned that an employment application was not provided or fingerprints had not been submitted for driver Edries. Although evidence was not presented that Respondent complied with these regulations for driver Edries, an inference can be made that the Respondent, due to a lack of citation or warning, knew of the regulations, and did comply in regards to driver Edries. *See Hearing Exhibit 15*.

⁸ *Proceeding No. 99K-590CP, Public Utilities Commission of the State of Colorado v. Valera Lea Holtorf doing business as Dashabout Shuttle Company and/or Roadrunner Express* issued September 29, 2000.

45. Since the Respondent was aware of these requirements the violations were intentional.

46. Staff has met its burden of proof by a preponderance of the evidence to show that Brothers, committed one violation of failure of the Respondent to require driver Alemseged Yemaneh to furnish an employment application,⁹ one violation for allowing driver Alemseged Yemaneh to drive without submitting fingerprints for a background check,¹⁰ two violations of failure to require drivers Alemseged Yemaneh and Sitina Edries to prepare a record of duty service,¹¹ and one violation for failure to keep minimum inspection and maintenance records of vehicles.

47. Having found violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. The Commission is authorized to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessment. § 40-7-113, C.R.S.

48. Pursuant to Commission Rule 4 CCR 723-1-1302(b):

The Commission may impose a civil penalty...will consider any evidence concerning some or all of the following factors:

- (I) the nature, circumstances, and gravity of the violation;
- (II) the degree of the respondent's culpability;
- (III) the respondent's history of prior offenses;
- (IV) the respondent's ability to pay;
- (V) any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;

⁹ Rule 6102(a)(I) 4 CCR 723-1 and 49 CFR § 391.21(a)

¹⁰ Rule 6105(c), 4 CCR 723-1

¹¹ Rule 6103(d)(II)(c), 4 CCR 723-1

- (VI) the effect on the respondent's ability to continue in business;
- (VII) the size of the respondent's business; and
- (VIII) such other factors as equity and fairness may require.

49. A warning was issued to Brothers in 2011 for the same violations contained in the CPAN issued in this proceeding.

50. The welfare of the public is at stake with the safety and compliance review. It is through these reviews that the Commission can ensure the proper level of safety for all those on the roads of Colorado. These are important regulations and cannot be ignored or deemed unimportant.

51. The Respondent was brought to the attention of the Commission's Transportation Investigation and Enforcement Section due to a customer complaint.

52. The Respondent failed to appear for the hearing.

53. Mr. Yemaneh submitted his fingerprints to the Commission on January 10, 2014.

54. The aggravation far outweighs the limited mitigation.

55. For the foregoing reasons, the ALJ concludes that Respondent committed the violations as listed on CPAN No. 108565 between September 25, 2013 and January 2, 2014 and that the assessment of the \$2,025.00 civil penalty, plus \$202.50 surcharge is warranted.

56. The ALJ finds that a civil penalty of \$2,227.50 achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers or by Respondent; (b) motivating Respondent to come into compliance; and (c) punishing Respondent for his past behavior.

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

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

1. As alleged in Civil Penalty Assessment Notice No. 108565, Respondent, Brothers Airport Express LLC (Respondent), violated *Rule 6102(a)(I) of the Rules Regulating Transportation by Motor Vehicle*, 4 *Code of Colorado Regulations* (CCR) 723-6 and 49 *Code of Federal Regulations* (CFR) § 391.21(a), *Rule 6105(c)* 4 CCR 723-6, *Rule 6102(a)(I)* 4 CCR 723-6 and 49 CFR § 396.3(b), and two violations of *Rule 6103(d)(II)(c)* 4 CCR 723-6.

2. Respondent is ordered to pay to the Commission within 30 days of the date that this Recommended Decision becomes the decision of the Commission, the sum of \$2,227.50. This amount represents the total of the civil penalty assessed for the violations found in Ordering Paragraph No. 1 plus the mandatory 10 percent surcharge imposed by § 24-34-108, C.R.S.

3. Proceeding No. 14G-0197EC is now closed.

4. 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.

5. 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 nōtranscript 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.

6. 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.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge