

Decision No. C04-0884

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.

COMMISSION ORDER STRIKING EXCEPTIONS

Mailed Date: August 2, 2004

Adopted Date: July 20, 2004

I. BY THE COMMISSION

A. Background

1. This matter comes before us for consideration of exceptions filed directly by Commission Transportation Staff (Staff) to Recommended Decision No. R04-0550.

2. In Civil Penalty Assessment Notice (CPAN) No. 28513, Staff alleges that Nemarda Corporation, doing business as Airport Boulevard Co. and/or ABC Shuttle (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, 4 *Code of Colorado Regulations* (CCR) 723-15-2.1.

3. Nemarda is a common carrier providing for-hire passenger carrier services within the State of Colorado pursuant to Certificate of Public Convenience and Necessity PUC No. 25810, and luxury limousine services within Colorado pursuant to Registration No. LL-01116. On February 24, 2004, Staff conducted a safety review of Nemarda at its facility, and found that many recordkeeping requirements were not being met.

4. Staff found that employment applications did not contain all the information required by 49 CFR Part 391.21(b); including information concerning applicants' driving history for the past three years. Staff also found that Nemarda's driver qualification files maintained in connection with these drivers failed to include inquiries into past employment histories as required by 49 CFR Parts 391.23(c) and/or 391.51(b)(2). Also missing was evidence of an annual review of the driving record of one driver as required by 49 CFR Part 391.25, and a request for a list of violations over the last 12 months as required by 49 CFR Part 391.27. The review indicated that Nemarda allowed one driver to drive during a period when his medical card had expired in violation of 49 CFR Part 391.45(b)(1), and that Nemarda's file on one driver did not contain a copy of his medical card as required by 49 CFR Part 391.51(b)(7). Staff also found that Nemarda failed to keep proper vehicle maintenance records as required by 49 CFR Part 396.3(b)(3). Finally, Staff found that driver vehicle inspection report forms did not contain all the information required by 49 CFR Part 396.11(b).

5. Staff then reviewed the Commission's records on prior safety reviews of Nemarda, and found that all the recordkeeping violations discovered on February 24, 2004 had been previously brought to Nemarda's attention in connection with previous safety reviews in 2000, 2002, and 2003. The Commission did not initiate civil penalty assessment proceedings in

connection with the previous violations. Because Staff believed there to be a consistent failure to maintain proper records, Staff initiated this CPAN proceeding.

6. CPAN No. 28513 was issued on March 8, 2004 to Nemarda's representative, and the matter was set for hearing on May 25, 2004 at the Commission's offices. Staff appeared through Mr. Opeka, the investigator who issued the CPAN and Nemarda did not appear. Mr. Opeka offered exhibits into evidence and provided testimony as to Nemarda's violations.

7. On May 27, 2004, the Administrative Law Judge (ALJ) issued Recommended Decision No. R04-0550. This decision dismissed several of the counts in the CPAN because errors in the CPAN meant that Nemarda was not properly apprised of the violations it was charged with. The ALJ also dismissed a portion of the recordkeeping violations because he believed that it was the driver's duty under the Commission's rules to be sure records were properly kept, not Nemarda's as alleged in the CPAN.

8. The ALJ then levied \$6,600 in fines against Nemarda for its violations. Staff filed exceptions claiming that the ALJ erred in dismissing a portion of the violations due to the drafting error in the CPAN and also erred in concluding that the drivers, rather than Nemarda have the responsibility for submitting complete driver applications.

B. Discussion

9. We decline to address the merits of the arguments set forth in the exceptions. Section 40-6-109(7), C.R.S., provides:

The Commission may by general rule or regulation provide for appearances *pro se* by, or for the representation by authorized officers or regular employees of, the commission's staff, corporations, partnerships, limited liability companies, sole proprietorships, and other legal entities in certain non-adjudicatory matters before the commission.

10. Commission Rule 21 (4 CCR 723-1-21) sets forth the requirements for appearances by attorneys, and does not provide for Staff to appear in adjudicatory matters without an attorney:

(a) Representation by Attorney. A party to a proceeding, other than an individual appearing in accordance with subsection (b) of this section, may be represented only by an attorney at law, currently in good standing before the Supreme Court of the State of Colorado...

(b) Participation by Non-Attorneys (1) *Pro se* Representation. An individual who is a party to a Commission proceeding and who wishes to appear *pro se* may represent only his individual interest in the proceeding.

11. In this matter, Commission Staff members who appeared at the hearing and who filed the exceptions were representing the interests of Commission Transportation Staff, not their own personal interests.

12. The reasons behind the requirement that parties, including Staff appear through counsel are several. Trained attorneys are in the best position to protect the rights of the parties, including those of the Commission and the public. Particularly in proceedings that are prosecutorial in nature, lawyers, as officers of the Supreme Court are in the best position to ensure that appropriate procedural and legal safeguards are adhered to.

13. If parties appear *pro se*, when they should appear through an attorney, their pleadings are struck as nullities. See *Bennie v. Triangle Ranch Co.* 216 P. 718 (Colo. 1923); *Woodford Mfg. Co. v. A.O.Q., Inc.*, 772 P.2d 652 (Colo. App. 1988); *Matter of Estate of Nagel*, 950 P.2d 693 (Colo. App. 1997). In this matter, Commission Staff appeared without counsel in the administrative hearing, and filed exceptions without an attorney. Colorado law and Commission rules do not allow for *pro se* appearances by Commission Staff in adjudicatory proceedings. Without addressing the merits of Staff's contentions in the exceptions, we therefore

strike Recommended Decision No. R04-0550, and Staff's exceptions thereto as nullities, and dismiss this matter without prejudice. The civil penalties in that decision are thus vacated. Under Colorado law it is not possible for Commission Staff to appear without counsel.

II. ORDER

A. The Commission Orders That:

1. Recommended Decision No. R04-0550, and Commission Staff's exceptions thereto are struck as nullities consistent with the discussion above.
2. This matter is dismissed without prejudice.
3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.
4. This Order is effective on its Mailed Date.

**B. ADOPTED IN THE COMMISSIONERS' WEEKLY MEETING
July 20, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners