

Decision No. R04-0965

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-192CP

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

RONALD SCOTT DILLER,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
DISMISSING PROCEEDING**

Mailed Date: August 13, 2004

Appearances:

John J. Roberts, Esq., Assistant Attorney General, for Complainant,
the Public Utilities Commission of the State of Colorado; and

Janet D. Zimmerman, Esq., for Respondent, Ronald Scott Diller.

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Ronald Scott Diller (Diller).

2. In Civil Penalty Assessment Notice (CPAN) No. 28499, Staff alleges that on March 28, 2004, Diller violated § 40-10-104(1), C.R.S. (operating as a motor vehicle carrier in intrastate commerce without first obtaining a certificate of public convenience and necessity

from the Commission) (Count 1) and § 40-10-110, C.R.S. (operating as a motor vehicle carrier without the proper insurance) (Count 2). CPAN No. 28499 seeks imposition of a civil penalty in the total amount of \$800.00 for these alleged violations. *See*, Exhibit 2.

3. On May 11, 2004, the Commission issued an Order Setting Hearing and Notice of Hearing scheduling a hearing on June 14, 2004, in Denver, Colorado. However, the hearing was continued twice, once to July 15, 2004, and again to August 10, 2004. *See*, Decision Nos. R04-0603-I and R04-0772-I.

4. The undersigned Administrative Law Judge (ALJ) called the matter for hearing at the assigned time and place. Both parties appeared through their respective legal counsel.

5. During the course of the hearing testimony was received in support of Staff's case from Mr. Tony Munoz and Mr. Robert Laws, Commission Compliance Investigators, and Mr. Max Sarr, the Operations Manager for Freedom Cabs, Inc. (Freedom).¹ Staff also solicited testimony from Diller as an adverse witness. Exhibits 2 through 5 and 8 through 10 were identified, offered, and admitted into evidence.² Administrative notice was taken of Exhibits 6 and 7. Exhibit 1 was rejected.

6. At the conclusion of Staff's case-in-chief Diller moved to dismiss this proceeding. The ALJ granted that motion on the grounds more fully set forth below.

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

¹ Mr. Sarr appeared pursuant to a Subpoena to Testify.

² Exhibits 3, 4, and 5 were admitted for the limited purpose of showing the content of the file maintained by the Staff in connection with its investigation of Diller.

II. FINDINGS OF FACT

8. Freedom is a common carrier by motor vehicle authorized to provide taxi services pursuant to PUC Certificate No. 53638. *See*, Exhibit 6. At all times pertinent to this proceeding, Certificate No. 53683 authorized Freedom to provide such services between all points in Boulder County, Colorado. At all times pertinent to this proceeding, Freedom had in effect and on file with the Commission evidence of liability insurance covering its operations under PUC Certificate No. 53638 as required by § 40-10-110, C.R.S. *See*, Exhibit 7.

9. On September 19, 2002, Diller entered into a Lease of Motor Vehicle (Lease) with Freedom wherein, as lessor, he leased his 1995 Ford van (Diller Vehicle) to Freedom, the lessee. The Lease provided that the Diller Vehicle was to be used for the transportation of passengers under Freedom's PUC Certificate No. 53638. *See*, Exhibit 8.³ The Lease commenced on September 18, 2003, and was to be valid "until cancelled." It contained a provision allowing for termination by either party "...by written notice of cancellation served to the other party." The Lease provided that "[D]uring the existence of this lease the vehicle shall be under the complete control of lessee."

10. On October 6, 2003, Freedom verbally advised Diller that his relationship with it was terminated, that he was no longer a Freedom driver, and that the insurance it had obtained to cover the Diller Vehicle was being cancelled. *See*, Exhibit 10. Written notice of this termination was provided to the Commission and to the Department of Excise & License. *See*, Exhibit 9. However, Freedom never provided written notice of its cancellation of the Lease to Diller.

³ The Lease is a form Lease of Motor Vehicle supplied by the Commission. *See*, 4 *Code of Colorado Regulations* 723-31-10.2.

11. In February of this year Staff received a number of informal complaints from taxi drivers and/or taxi companies operating in the Boulder, Colorado area that Diller was providing for-hire taxi services there without having obtained a certificate of public convenience and necessity (CPCN) from the Commission. These complaints were assigned to Mr. Munoz for investigation.

12. Mr. Munoz reviewed the Commission's records and determined that Diller had not been issued a CPCN by the Commission authorizing him to provide taxi services. His review also established that Diller had not filed evidence of having secured the liability insurance coverage required of such carriers by § 40-10-110, C.R.S.

13. On March 28, 2004, Mr. Munoz went to the Pearl Street Mall in Boulder. At approximately 1:30 a.m. he observed Diller transport two passengers from the corner of 13th Street and Walnut Street to 2130 Grove Street in Boulder in the Diller Vehicle. He approached the passengers after the transportation was completed and was advised by them that they had paid Diller for this service. Mr. Munoz then secured a witness statement confirming these facts from one of the passengers.⁴

14. Mr. Munoz prepared CPAN No. 28499 on the basis of the above-described incident and Diller was served with a copy of the same by the Boulder County Sheriff's Office on April 9, 2004. *See*, Exhibit 2.

⁴ The witness statement was offered into evidence at the hearing as Exhibit 1 but was rejected.

III. DISCUSSION

15. Section 40-10-104(1), C.R.S., provides that no motor vehicle carrier shall operate any motor vehicle for the transportation of persons upon the public highways of this state in intrastate commerce without first having obtained a CPCN from the Commission.

16. Section 40-10-110, C.R.S., requires every motor vehicle carrier to file with the Commission a liability insurance policy in such sum and in such form as the Commission deems necessary to adequately safeguard the public interest. *See also*, 4 *Code of Colorado Regulations* (CCR) 723-31-12 and, specifically, 4 CCR 723-31-12.4 which establishes the required minimum insurance coverage limits.

17. It is a common and established practice in the transportation industry for a certificated motor vehicle carrier to lease motor vehicle equipment from independent contractor drivers in furtherance of providing intrastate for-hire transportation services under the CPCNs issued to them by the Commission. This practice is sanctioned by statute and by pertinent Commission rules. *See*, §§ 40-11.5-101 and 102, C.R.S. and 4 CCR 723-31-10. During the existence of any such lease agreement, the authorized carrier (lessee) has complete control of the vehicle leased and is fully responsible for its operations as if it were the owner of such vehicle. This includes, among other things, compliance with all required liability insurance requirements. *See*, 4 CCR 723-31-10.5.

18. The issue to be resolved here is whether the Lease was in existence on March 28, 2004, the date Diller is alleged to have violated §§ 40-10-104(1) and 40-10-110, C.R.S. If not, Diller would be liable for the charges set forth in CPAN No. 28499 since he did not have a CPCN or the required liability insurance on file with the Commission on that date, and the incident giving rise to such charges constituted the intrastate for-hire transportation of

passengers. However, if the Lease was in existence on March 28, 2004, Diller could not be held liable for violating these statutes since, under 4 CCR 723-31-10.5, the Diller Vehicle would have been operating under Freedom's control. In that case, the transportation service performed by Diller would have been authorized and provided under Freedom Certificate No. 53638, and the Diller Vehicle would have been covered by Freedom's liability insurance.

19. The evidence of record establishes that the Lease was in existence on March 28, 2004. Section 40-11.5-102(2), C.R.S., provides that an equipment lease between a motor vehicle carrier and an independent contractor may be terminated by any party.⁵ However, it does not specify the method by which termination may be accomplished. Here, the Lease specifically provides that it will be valid until cancelled and that cancellation may only be accomplished by written notice served to the other party. It is undisputed that Freedom failed to provide such written notice to Diller.

20. For these reasons, it must be concluded that the transportation service performed by Diller on March 28, 2004 was lawfully provided under Freedom Certificate No. 53638 and pursuant to the liability insurance coverage held by that carrier. Therefore, CPAN No. 28499 must be dismissed.

⁵ For this reason, Staff contends that the written termination notice provision contained in the Lease is inconsistent with § 40-11.5-102(2), C.R.S., and is, therefore, invalid; *i.e.*, that Freedom's verbal termination of the Lease on October 6, 2003 was effective. However, the ALJ finds no inconsistency between this portion of the statute and the Lease. The statute merely requires that either party to an equipment lease be allowed to terminate it. There is nothing in the statute or applicable Commission rules prohibiting the parties from specifying in the lease agreement the manner in which termination is to be accomplished. Indeed, it is doubtful that the Commission's Transportation Staff would have included a written termination notice provision in its form Lease of Motor Vehicle had it believed that such a provision was inconsistent with § 40-11.5-102(2), C.R.S.

IV. CONCLUSIONS

21. Staff has failed to sustain its burden of proving the allegations contained in CPAN No. 28499 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

22. The motion to dismiss CPAN No. 28499 submitted by Diller must be granted.

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

1. The motion of Ronald Scott Diller to dismiss Civil Penalty Assessment Notice No. 28499 is granted.

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