

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,137

IN THE MATTER OF:

Served September 2, 2009

SKYHAWK LOGISTICS, INC., Suspension)
and Investigation of Revocation of)
Certificate No. 406)

Case No. MP-2009-044

This matter is before the Commission on respondent's request for reconsideration of Order No. 12,101, served July 24, 2009, which assessed a \$26,000 civil forfeiture against respondent for knowingly and willfully violating Article XI, Section 6(a), of the Compact, Regulation No. 58, and Order No. 11,895, and revoked Certificate No. 406 for respondent's willful failure to comply with Article XI, Section 6(a), of the Compact, Regulation No. 58, and Order No. 11,895.

Under Title II of the Compact, Article XIII, Section 4, a party to a proceeding affected by a final order or decision of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved, and stating specifically the errors claimed as grounds for the reconsideration.¹ If the application is granted, the Commission shall rescind, modify, or affirm its order or decision with or without a hearing, after giving notice to all parties.² Filing an application for reconsideration may not act as a stay upon the execution of a Commission order or decision, or any part of it unless the Commission orders otherwise.³

Respondent timely applied for reconsideration on August 24, 2009.⁴ Respondent argues that the Commission erred in finding that respondent willfully violated Regulation No. 58. Respondent also argues that \$26,000 is excessive relative to the number of days respondent was uninsured/underinsured. Respondent requests that the Commission vacate the forfeiture and the suspension and/or revocation. Respondent requests in the alternative that the Commission abate or reduce the forfeiture on the ground that respondent profited little or not at all from its unauthorized operations.

¹ Compact, tit. II, art. XIII, § 4(a).

² Compact, tit. II, art. XIII, § 4(d).

³ Compact, tit. II, art. XIII, § 4(e).

⁴ Although technically the deadline was August 23, because August 23 fell on a Sunday, respondent had until August 24 to file its application under Commission Rule No. 7-01.

I. RESPONDENT'S WILLFULNESS

The Commission found in Order No. 12,101 that respondent had knowingly and willfully operated for forty-two days while Certificate No. 406 was suspended, including ten days while respondent was uninsured/underinsured. Respondent argues that Certificate No. 406 should not have been suspended in the first place because respondent did not willfully fail to comply with the Commission's insurance regulation, Regulation No. 58, which was cited as the basis for the suspension in Order No. 11,895, served March 17, 2009. Respondent asserts that the insurance company "unilaterally" terminated coverage and that respondent "did everything it could to obtain replacement coverage but, regretfully, it took several weeks to do so."

Under the Compact, the term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.⁵ The terms "willful" and "willfully" do not mean with evil purpose or criminal intent; rather, they describe conduct marked by careless disregard whether or not one has the right so to act.⁶ Employee negligence is no defense.⁷ "To hold carriers not liable for penalties where the violations . . . are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.⁸

Regulation No. 58-01 states that: "No carrier shall transport passengers for hire between points in the Metropolitan District unless and until the carrier has satisfied the financial responsibility requirements set forth in this regulation." Regulation No. 58-03 states that: "A carrier operating under temporary authority or a certificate of authority issued by the Commission (WMATC carrier) shall maintain on file with the Commission at all times an acceptable, effective "WMATC Certificate of Insurance and Policy Endorsement" (WMATC Insurance Endorsement)."

Respondent would have us construe the regulation to require a carrier's best efforts at compliance instead of compliance itself. The regulation does not support such a construction, and such a construction would not be consistent with the public interest in that carriers would be permitted to operate without any insurance whatsoever provided they "did everything [they] could" to comply with the regulation short of actually complying.

⁵ *In re Westview Med. & Rehab. Servs., P.C. Inc.*, No. MP-07-070, Order No. 10,882 (Nov. 2, 2007); *In re Handi-Pro Transp., Inc.*, No. MP-07-060, Order No. 10,817 (Oct. 10, 2007); *In re Sydney Shuttle, LLC*, No. MP-07-064, Order No. 10,792 (Sept. 28, 2007).

⁶ Order Nos. 10,882; 10,817; 10,792.

⁷ *In re Zee Transp. Serv., Inc.*, No. MP-07-120, Order No. 10,671 (Aug. 8, 2007).

⁸ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

In any event, the Compact states that: "A person may not engage in transportation subject to this Act unless there is in force a 'Certificate of Authority' issued by the Commission authorizing the person to engage in that transportation."⁹ The Compact further states that:" A Certificate of Authority is not valid unless the holder is in compliance with the insurance requirements of the Commission."¹⁰ The record is clear that respondent continued operating despite its knowledge that it was not in compliance with the Commission's insurance requirements. The decision therefore stands on respondent's willfulness.

II. AMOUNT OF FORFEITURE

A person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation.¹¹ Each day of the violation constitutes a separate violation.¹²

Respondent argues that, "The \$26,000 civil forfeiture [assessed in Order No. 12,101] is excessive in light of the fact that there was a mere nine day lapse of insurance coverage"

Order No. 12,101 assessed \$500 per day for 42 days of operations while Certificate No. 406 was suspended, or \$21,000, and \$500 per day for the 10 days respondent operated while uninsured/underinsured, or \$5,000, for a total forfeiture of \$26,000. The amount of forfeiture was doubled from the \$250 per day assessed against respondent in 2008 for the very same violations¹³ because \$250 per day had apparently proved an insufficient deterrent. The decision therefore stands on the amount of forfeiture.

III. UNJUST PROFITS

The Commission noted that in calculating the amount of the forfeiture, the Commission had taken into account that the civil forfeiture provision of the Compact serves at least two functions: deterrence of future violations and disgorgement of unjust profits.¹⁴

⁹ Compact, tit. II, art. XI, § 6(a).

¹⁰ Compact, tit. II, art. XI, § 7(g).

¹¹ Compact, tit. II, art. XIII, § 6(f)(i).

¹² Compact, tit. II, art. XIII, § 6(f)(ii).

¹³ *In re Skyhawk Logistics, Inc.*, No. AP-07-195, Order No. 11,693 at 4 (Nov. 19, 2008).

¹⁴ *In re Chukwunyenye Nnakwu t/a Progressive Med. Care Servs.*, No. MP-08-242, Order No. 12,121 (Aug. 18, 2009); *In re Jimmie Lee Davenport & James L. Hughes*, No. MP-04-164, Order No. 9987 (Oct. 11, 2006); *In re Atlantic Airport Shuttle, Inc.*, No. MP-03-61, Order No. 7513 (Nov. 5, 2003); *In re Zohery Tours Int'l, Inc.*, No. MP-02-46, Order No. 7096 (Mar. 19, 2003); *In re Affordable Airport Charter, Inc.*, No. MP-97-76, Order No. 5350 (June 2, 1998).

Respondent contends that it "has not unjustly profited" from operating while suspended. Respondent requests "additional time to calculate and tabulate all of its direct, fixed and overhead costs attributable to" the transportation it was performing while suspended in order to establish the amount of profit or loss attributable to that activity.

The Commission has partially suspended civil forfeitures in the past where respondents demonstrated they had profited little or not at all from their unauthorized operations.¹⁵ The Commission has reduced forfeitures on reconsideration.¹⁶ The Commission will therefore grant respondent's request for additional time to produce evidence concerning respondent's "very small or possibly [nonexistent] profit" from unauthorized operations. Respondent is reminded that it bears the burden of proof on this issue and is cautioned to comply with Rule No. 4 and produce full supporting documentation and/or independent verification of its computations.

In the meantime, under Article XIII, Section 4(e), of the Compact, payment of the \$26,000 forfeiture is not stayed. In the event respondent timely demonstrates a basis for partially suspending the forfeiture due to little or no profit, the Commission will refund the suspended portion at that time.

IV. CONCLUSION

The Commission finds respondent's allegations of error are without merit. We shall affirm Order No. 12,101 with the proviso that respondent shall have thirty days to demonstrate a basis for partially suspending the \$26,000 forfeiture.

THEREFORE, IT IS ORDERED:

1. That the application for reconsideration of Order No. 12,101 is granted.

2. That the revocation of Certificate No. 406 is affirmed.

3. That the \$26,000 civil forfeiture assessed in Order No. 12,101 is affirmed; provided, that respondent shall have thirty days to adduce evidence of its profit or loss from unauthorized operations as a basis for partially suspending said forfeiture.

4. That respondent shall immediately pay \$26,000 to the Commission, by money order, certified check, or cashier's check.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS CHRISTIE AND BRENNER:

¹⁵ See e.g., Order No. 12,121; Order No. 5350.

¹⁶ See e.g., Order No. 9987; Order No. 7096.

A handwritten signature in black ink, appearing to read 'W.S. Morrow, Jr.', written in a cursive style.

William S. Morrow, Jr.
Executive Director