

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,687

IN THE MATTER OF:

Served January 11, 2011

EXACT ENTERPRISES INC., Suspension)
and Investigation of Revocation of)
Certificate No. 1249)

Case No. MP-2010-049

This matter is before the Commission on respondent's response to Order No. 12,602, served October 26, 2010, directing respondent to show cause why the Commission should not assess a civil forfeiture against respondent and/or suspend or revoke Certificate No. 1249.

I. BACKGROUND

Under the Compact, a WMATC carrier may not engage in transportation subject to the Compact if the carrier's certificate of authority is not "in force."¹ A certificate of authority is not valid unless the holder is in compliance with the Commission's insurance requirements.²

Commission Regulation No. 58 requires respondent to insure the revenue vehicles operated under Certificate No. 1249 for a minimum of \$1.5 million in combined-single-limit liability coverage and maintain on file with the Commission at all times proof of coverage in the form of a WMATC Certificate of Insurance and Policy Endorsement (WMATC Insurance Endorsement) for each policy comprising the minimum.

Certificate No. 1249 was rendered invalid on June 8, 2010, when the \$1.5 million primary WMATC Insurance Endorsement on file for respondent terminated without replacement. Order No. 12,431, served June 8, 2010, noted the automatic suspension of Certificate No. 1249 pursuant to Regulation No. 58-12, directed respondent to cease transporting passengers for hire under Certificate No. 1249, and gave respondent 30 days to replace the terminated endorsement and pay the \$50 late fee due under Regulation No. 67-03(c) or face revocation of Certificate No. 1249.

Respondent paid the late fee on June 24, 2010, and submitted a \$1.5 million primary WMATC Insurance Endorsement on June 25, 2010, and the suspension was lifted on June 25, 2010, in Order No. 12,459, but because the effective date of the new endorsement is June 24, 2010, instead of June 8, 2010, the order gave respondent 30 days in accordance with Regulation No. 58-14 to verify cessation of operations

¹ Compact, tit. II, art. XI, § 6(a).

² Compact, tit. II, art. XI, § 7(g).

as of June 8, 2010, and to corroborate the verification with copies of respondent's pertinent business records and statements from three of respondent's clients, the Montgomery County Department of Transportation, (DOT), Health Services for Children with Special Needs, Inc., (HSCSN), and LogistiCare Solutions, LLC.

II. RESPONSE TO ORDER NO. 12,459

Respondent's president, Therese Toko Sime, filed a statement asserting that respondent "ceased operation from June 8th, 2010, to June 24th, 2010," and respondent produced a number of documents pertaining to that time period, as required by Order No. 12,459, including among others: driver mileage records, insurance billing forms, checking account statements, and fax cover sheets.

In addition, the Commission received a letter from the Montgomery County Department of Transportation stating that respondent "submitted no invoices for reimbursement of non-emergency wheelchair van services for Montgomery County Medicaid transportation patients, for the period, June 9, 2010 through June 25, 2010."

Finally, the Commission received a letter from HSCSN stating that it "suspended and removed all transportation authorizations from [respondent]" effective June 8, 2010, and that HSCSN "began authorizing [respondent] to start transporting our members on June 28, 2010." The Commission received no letter from LogistiCare Solutions, LLC.

Based on this evidence, the Commission made the following findings in Order No. 12,602:

Although respondent claims not to have operated from June 8 to June 24, 2010, driver mileage records, insurance billing forms, and a fax produced by respondent show that respondent continued transporting passengers in the Washington Metropolitan Area on June 8 and 9, 2010, and that respondent prepared and submitted claims for that transportation the following week. HSCSN may have withdrawn its authorization on June 8, but respondent's records clearly show that respondent performed trips already scheduled by HSCSN for June 8 and 9 and that respondent submitted a request for payment to HSCSN for both dates the following week.

Furthermore, although Montgomery County DOT may not have received any invoices from respondent for transportation during the suspension period, this does not rule out the possibility that respondent continued performing transportation services for Montgomery County Medicaid patients while suspended but simply did not bill the county for that service. Such service is unlawful notwithstanding a tacit understanding that respondent

would not bill the county for service rendered while suspended.³

There is substantial other evidence that respondent provided transportation service to HSCSN and Montgomery County DOT clients and/or others throughout the suspension period. Respondent's checking account statements reveal that respondent pays its drivers according to the number of hours they work and that respondent paid for hours worked throughout the time Certificate No. 1249 was suspended. The June 2010 statement also shows numerous bank card purchases from service stations during the suspension period, which is consistent with entries on the driver mileage records showing gas purchases during that time. Respondent's payroll activity and service station purchases throughout the month of June 2010 are inconsistent with respondent's assertion that it did not operate from June 8 to June 24, 2010.

Order No. 12,602 accordingly gave respondent 30 days to show cause why the Commission should not assess a civil forfeiture against respondent, and/or suspend or revoke Certificate No. 1249, for knowingly and willfully transporting passengers for hire between points in the Metropolitan District while suspended and uninsured on June 8 and 9, 2010.

Order No. 12,602 also gave respondent 15 days to request an oral hearing.

III. RESPONSE TO ORDER NO. 12,602

Respondent filed a request for oral hearing on November 12, 2010, together with a request for an extension of time to show cause.

The extension was approved in Order No. 12,621 on November 10, 2010. The deadline was extended to December 23, 2010.

Respondent later filed an acceptable \$1.5 million WMATC Insurance Endorsement for the period beginning June 8, 2010, and ending June 24, 2010, thus closing the gap that triggered Regulation No. 58-14.

Finally, respondent withdrew its request for oral hearing on December 20, 2010, stating that it would not oppose a modest civil forfeiture for operating while suspended.

³ See *In re Madison Limo. Serv., Inc.*, No. AP-91-39, Order No. 3891 (Feb. 24) (holding that continuation of certificated operations at no charge is "transportation for hire") (citing Order No. 3810 at 6; *Unique Freight Lines Co. v. White Tiger Transp. Co.*, 618 F. Supp. 216 (S.D.N.Y. 1985)), *aff'd on reconsideration*, Order No. 3914 (Mar. 25, 1992).

IV. ASSESSMENT OF FORFEITURE AND PROBATION

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.⁴ Each day of the violation constitutes a separate violation.⁵

The Commission may suspend or revoke all or part of any certificate of authority for willful failure to comply with a provision of the Compact, an order, rule, or regulation of the Commission, or a term, condition, or limitation of the certificate.⁶

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.⁷ The terms "willful" and "willfully" do not mean with evil purpose or criminal intent; rather, they describe conduct marked by intentional or careless disregard or plain indifference.⁸ Employee negligence is no defense.⁹ "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.¹⁰

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)." (Emphasis added). This places a duty on each carrier to be aware of when its WMATC Endorsement is due to expire.¹¹

Under Regulation No. 58-12: "Failure to replace a WMATC Insurance Endorsement prior to termination shall result in immediate, automatic suspension of a carrier's WMATC operating authority. The carrier must suspend operations immediately and may not recommence operations unless and until otherwise ordered by the Commission."

⁴ Compact, tit. II, art. XIII, § 6(f)(i).

⁵ Compact, tit. II, art. XIII, § 6(f)(ii).

⁶ Compact, tit. II, art. XI, § 10(c).

⁷ *In re L & J Limo Servs. LLC*, No. MP-10-017, Order No. 12,658 (Dec. 17, 2010); *In re Sams Health Care Servs. Inc.*, No. MP-08-005, Order No. 11,947 (Apr. 23, 2009); *In re Boomerang Tours, Inc.*, No. MP-08-204, Order No. 11,805 (Jan. 21, 2009).

⁸ Order No. 12,658; Order No. 11,947; Order No. 11,805.

⁹ Order No. 12,658; Order No. 11,947.

¹⁰ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

¹¹ Order No. 12,658; *In re Angel Enterprise Inc, t/a The Angels*, No. MP-10-028, Order No. 12,473 (July 8, 2010).

In situations similar to this one - operating while suspended but not while uninsured - the Commission has assessed a civil forfeiture of \$250 for each day of unauthorized operations and placed carriers on probation for one year.¹² We shall follow the same course here and assess a civil forfeiture of \$250 per day, or \$500, for knowingly and willfully operating two days while suspended and place respondent on probation.

THEREFORE, IT IS ORDERED:

1. That the withdrawal of request for oral hearing is granted.
2. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against respondent in the amount of \$500 for knowingly and willfully violating Article XI, Section 6(a), of the Compact, and Regulation No. 58-12.
3. That respondent is hereby directed to pay to the Commission within 30 days, by check or money order, the sum of five hundred dollars (\$500).
4. That Certificate No. 1249 shall be subject to revocation pursuant to Article XI, Section 10(c) of the Compact if respondent fails to timely comply with the requirements of this order.
5. That respondent shall serve a one-year period of probation. A willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, during the period of probation shall constitute grounds for immediate suspension and/or revocation of Certificate No. 1249, regardless of the nature and severity of the violation.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER, HOLCOMB, AND KUBLY:



William S. Morrow, Jr.
Executive Director

¹² Order No. 12,658; Order No. 11,947; Order No. 11,805.