

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,950

IN THE MATTER OF:

Served August 16, 2011

Formal Complaint of SERVICE)
EMPLOYEES INTERNATIONAL UNION LOCAL)
500 Against METRO HOMES, INC., and)
METRO DAY TREATMENT CENTER, INC.)

Case No. FC-2011-01

This matter is before the Commission on the motion of respondents, Metro Homes, Inc., WMATC No. 634, and Metro Day Treatment Center, Inc., WMATC No. 635, to dismiss the complaint filed against them by the Service Employees International Union, Local 500 (SEIU Local 500).

I. STATUTORY FRAMEWORK

The Washington Metropolitan Area Transit Commission (Commission or WMATC) licenses and regulates private-sector, for-hire motor carriers transporting passengers between points in the Washington Metropolitan Area pursuant to the Washington Metropolitan Area Transit Regulation Compact (Compact).¹

Title II of the Compact, Article XI, Section 1, provides that: "This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District."² Article XI, Section 6(a), provides 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."

Article XIII, Section 1(a), stipulates that: "A person may file a written complaint with the Commission regarding anything done or omitted by a person in violation of a provision of this Act, or in violation of a requirement established under it." "If the respondent does not satisfy the complaint and the facts suggest that there are reasonable grounds for an investigation, the Commission shall

¹ Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending tit. I, art. III).

² The Metropolitan District includes: the District of Columbia; the cities of Alexandria and Falls Church of the Commonwealth of Virginia; Arlington County and Fairfax County of the Commonwealth of Virginia, the political subdivisions located within those counties, and that portion of Loudoun County, Virginia, occupied by the Washington Dulles International Airport; Montgomery County and Prince George's County of the State of Maryland, and the political subdivisions located within those counties; and all other cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of those counties, cities, and airports. Compact, tit. I, art. I.

investigate the matter."³ "If the Commission determines that a complaint does not state facts which warrant action, the Commission may dismiss the complaint without hearing."⁴

II. RULES OF PROCEDURE

Commission Rule No. 4-06 stipulates that:

All pleadings, documents or other papers filed by a party in interest or by a person in a representative capacity on behalf of a party in interest, other than by an attorney, shall be subscribed to and verified under oath. Any facts alleged in any filing shall be verified under oath by a person having knowledge of the matters set forth.

Commission Rule No. 10 governs the filing of complaints. Under Rule No. 10-02:

Every complaint and petition, unless otherwise specified, shall contain the following:

- (a) The name, address, and telephone number of the person by or on whose behalf the filing is made.
- (b) The name, address, and telephone number of such person's attorney or attorneys, if such person is represented by counsel.
- (c) A statement setting forth the nature of the interest of the complainant or petitioner in the subject matter of the filing and the position of such person with respect thereto.
- (d) A clear and concise statement of the facts upon which the filing is based.
- (e) A statement of the particular action requested or relief sought.
- (f) A reference to the specific section or sections of the Act, rules, regulations, or orders of the Commission on which the filing is based and which authorizes the Commission to take the requested action or grant the requested relief.
- (g) All other information as required by the Commission's rules and regulations under which the specific complaint or petition is filed, and as may be required by the Commission in a particular case or proceeding.

Under Rule No. 12-01: "An answer shall be filed to any formal complaint or petition filed by any person other than the Commission by each respondent against whom any relief is requested. Joint answers may be filed when common issues of fact or law are involved." Under Rule No. 12-02:

An answer must admit or deny each material allegation of the pleading to which it responds and shall be so drawn as to fully disclose the particular grounds upon

³ Compact, tit. II, art. XIII, § 1(b)(i).

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

which it is based. Answers may contain matters of affirmative defense as well as denials of material allegations. All matters not specifically denied or to which no affirmative defense is pleaded are deemed admitted.

Rule No. 15 governs motions for which no other pleading is available under the Commission's rules of procedure. Rule No. 15-01 provides that:

A timely motion may be filed for any relief or action of the Commission for which no other pleading is available under these rules. All motions shall be submitted in writing, except motions made on the record during a hearing. At the direction of the presiding officer, such oral motions shall be reduced to writing and filed within the time specified by the presiding officer. Motions shall set forth the ruling or relief sought and state the grounds therefor and the statutory or other authority relied upon. Except for good cause shown, any motion, filed prior to hearing, which seeks dismissal of a pleading or the postponement of a hearing must be filed at least ten (10) days before the date set for the hearing.

III. COMPLAINT

The complaint⁵ recounts certain Commission findings in Order No. 12,729, served February 15, 2011, which conditionally approved respondents' applications for reissuance of WMATC operating authority issued to them in 2001/2002 and revoked in 2003.⁶ Of importance here, Order No. 12,729, recapped earlier findings in Order No. 12,663, served December 17, 2010, regarding violations of Article XI, Section 6(a), of the Compact (operating without authority) that Metro Homes apparently committed prior to December 2009 and that Metro Homes did commit from December 2009 through March 2010.⁷ There was no finding of wrongdoing by Metro Day.⁸

With regard to the pre-December 2009 violations, the Commission found "no evidence that Metro Homes received notice from the Commission that [Metro Homes's] authority had been revoked" in 2003 and that "this might constitute grounds for finding the unlawful transportation of Metro Homes's clients was not knowing and willful prior to December 2009,"⁹ when Metro Homes concedes it became aware that Certificate No. 634 had been revoked. Conversely, the Commission found sufficient evidence to indicate that the violations from December 2009 through March 2010 were indeed knowing and willful.¹⁰

⁵ Complaint at 2-5.

⁶ *In re Metro Day Treatment Center, Inc.*, No. AP-10-032, Order No. 12,729 (Feb. 15, 2011).

⁷ *Id.* at 3.

⁸ *See id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 4-5.

The Commission accordingly assessed a civil forfeiture against Metro Homes with regard to the December 2009-March 2010 violations but not the pre-December 2009 violations.¹¹

After applying the requisite criteria for assessing the likelihood of an applicant's future compliance with the Compact, the Commission found respondents fit for operating authority, notwithstanding the violations but subject to a one-year period of probation.¹² Certificate No. 634 was subsequently issued to Metro Homes on March 17, 2011, after Metro Homes had submitted proof of \$1.5 million commercial motor vehicle liability insurance, furnished proof that its vehicles had passed a safety inspection within the prior 12 months, and filed the necessary vehicle leases, and after the markings on its vehicles had passed inspection by Commission staff. Certificate No. 635 was subsequently issued to Metro Day on March 21, 2011, after Metro Day made a similar showing.

The complaint asserts two claims. The first is that respondents knowingly and willfully violated Article XI, Section 6(a), of the Compact after April 1, 2010.¹³ The second is that the violations of Article XI, Section 6(a), of the Compact prior to December 2009 were knowing and willful within the meaning of the Compact.¹⁴

The complaint describes complainant's interest in filing the complaint as follows:

SEIU Local 500 is the largest union in the Washington, DC metropolitan region representing direct support workers in the developmental disability field. SEIU Local 500's members support people with disabilities throughout their daily lives in residential facilities and day programs. Their work also includes providing transportation services to clients using vehicles which are, or should be, certified by WMATC.

Workers at Metro are in the process of forming their union with SEIU Local 500, and have raised concerns about their employer's handling of transportation services, leading SEIU Local 500 to file this complaint with WMATC.¹⁵

IV. MOTION TO DISMISS

Respondents have moved to dismiss the complaint on the grounds that the Complaint does not conform to Rule No. 10 and that complainant lacks standing to bring this complaint.¹⁶

¹¹ *Id.* at 4-5, 7-8.

¹² *Id.* at 6-7.

¹³ Complaint at 5-7, 9-10.

¹⁴ *Id.* at 7-9, 11-12.

¹⁵ *Id.* at 2.

¹⁶ Motion to Dismiss at 4-9.

V. STANDING PRECEDENT

Commission Rule No. 10-02(c) provides that a complaint shall contain "[a] statement setting forth the nature of the interest of the complainant . . . in the subject matter of the filing and the position of such person with respect thereto." In other words, a complainant must affirmatively state its grounds for standing.¹⁷

"[T]he concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding."¹⁸ Precisely what constitutes a genuine and legitimate interest at the agency level depends upon a reading of the agency's statute.¹⁹ In this case, the relevant statute is the Compact.

As noted above, the Compact contemplates that upon the bringing of a complaint, if the respondent does not satisfy the complaint and the facts suggest that there are reasonable grounds for an investigation, the Commission shall investigate the matter. If the Commission determines that a complaint does not state facts which warrant action, the Commission may dismiss the complaint without hearing. So, essentially, the question of standing in this context is a matter of whether in the event the Commission determines an investigation is warranted, the complainant's interest is of such a nature that the complainant's participation in the investigation would be consistent with the public interest.

Allowing an injured complainant to participate in an investigation is consistent with the public interest because it helps ensure that the relief afforded is complete in the event a finding is made that the injury occurred by reason of the violation alleged. The Commission, for example, may order a refund of an overcharge and assess a civil forfeiture against a carrier in the same proceeding for the same violation.²⁰ The public has an interest in seeing that the wrongfully injured are adequately compensated and that violators suffer the full consequences of their wrongful conduct.

Conversely, allowing persons with a disingenuous or illegitimate interest access to Commission process is not consistent with the public interest. Thus, the Commission has held that a person "may not assert the interest of another as grounds for standing"²¹ and

¹⁷ *Madison Limo. Serv., Inc., v. Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express*, No. FC-92-01, Order No. 3903 (Mar. 17, 1992).

¹⁸ *United Church of Christ v. FCC*, 359 F.2d 994, (D.C. Cir. 1966).

¹⁹ *Envirocare of Utah, Inc., v. NRC*, 194 F3d 72 (D.C. Cir. 1999).

²⁰ See *American DC Limo. and Bus Serv. Inc., t/a American DC Limo.*, No. AP-10-152, Order No. 12,749 (Mar. 3, 2011) (directing applicant to show cause why Commission should not assess forfeiture and order refund); *In re Shirley L. Nelson, t/a L&N Transp.*, No. MP-96-16, Order No. 4834 (May 9, 1996) (assessing forfeiture for tariff violation and acquiescing in refund self-enforced by customer).

²¹ *In re Safe Ride Servs., Inc.*, No. AP-97-03, Order No. 5059 at 2-4 & n.13 (Apr. 21, 1997); *In re D.C. Ducks, Inc.*, No. AP-94-21, Order No. 4361 (Aug. 9,

that vindication of the private interest asserted must serve a public purpose.²² For example, if an existing carrier protests an application for operating authority, "the burden is on protestant to show that competition from the applicant would adversely affect protestant to such a degree or in such a manner as to be contrary to the public interest."²³ Absent such an interest, a complainant's participation in a Commission proceeding is disfavored.²⁴ This is what the Commission concluded in *Madison Limo. Serv., Inc., v. Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express*, No. FC-92-01, Order No. 3903 (Mar. 17, 1992).

The complaint alleges that "[b]y flagrantly violating the terms of their Certificates of Authority and failing to maintain adequate insurance coverage, Respondents have seized an illegal competitive advantage at Complainant's expense." Commission records show that at all times pertinent to the complaint, complainant did not have authority to operate within the Commission's jurisdiction. Thus, respondents' alleged violations could not have disadvantaged [complainant]. Since no other grounds for standing are alleged, the complaint must be dismissed.

The Commission, however, noted reasonable grounds existed for an investigation, opened a new proceeding, and pursued the allegations without complainant's participation.²⁵

The Commission's standing policy is consistent with the 1990 amendments to the Compact's provisions regarding third-party intervention in Commission investigations. Originally, the Compact afforded to "interested persons reasonable opportunity for hearing . . . in any investigation instituted upon complaint or upon [the Commission's] own initiative."²⁶ That language was eliminated from the Compact in 1990, effective 1991.²⁷ The Commission concluded in 1999 that the deletion of this language signaled the signatories' intent to

1994); *In re Malek Investment, Inc., t/a Montgomery Airport Shuttle*, No. AP-91-44, Order No. 3884 (Feb. 11, 1992), *aff'd in connected case*, No. AP-91-45, Order No. 3915 (Mar. 25, 1992).

²² See *In re CSL LLC*, No. AP-10-056, Order No. 12,545 (Sept. 14, 2010) (WMATC jurisdiction limited to protecting public interest).

²³ *In re Thomas B. Howell, t/a Presidential Ducks*, No. AP-00-07, Order No. 5955 at 2 (Aug. 10, 2000).

²⁴ See Order No. 5059 at 2-4 & n.13 (holding that ambulance operator without WMATC authority lacked standing to protest application for WMATC certificate); *In re Washington Tours, Inc.*, No. AP-83-07, Order No. 2438 (July 8, 1983) (holding that carrier without WMATC authority lacked standing to protest application for WMATC certificate).

²⁵ Order No. 3903 at 2 (citing *In re Air Couriers Int'l Ground Transp. Servs. & United Mgmt. Corp.*, No. MP-92-05, Order No. 3904 (Mar. 17, 1992)).

²⁶ Pub. L. No. 86-794, § 1, 74 Stat. 1031, tit. II, art. XII, § 13(c) (1960).

²⁷ Compare *id.* with Pub. L. No. 101-505, § 1, 104 Stat. 1300, tit. II, art. XIII, § 1(d) (1990).

eliminate third-party intervention in Commission investigations.²⁸ Today, only an interest sufficient to sustain a complaint may serve as a basis for seeking participation in a Commission investigation.²⁹

VI. DISCUSSION

A. Complaint Sufficiency

Respondents argue that the complaint does not identify the person on whose behalf the complaint is filed, but the complaint clearly identifies SEIU Local 500 as the complainant, and Commission Rule No. 2-03 clearly defines the term "person" to include an unincorporated association. We also find that the complaint clearly asserts two claims, even if the supporting documents that respondents attack as unclear are not as lucid. "A complaint is sufficient if it fairly makes out a claim that respondent has violated the Compact."³⁰

B. Standing

As noted above, complainant's stated interest in filing the complaint is that it is an employee union "representing direct support workers in the developmental disability field" and that at the time of the complaint, respondents' employees were "in the process of forming their union with SEIU Local 500, and have raised concerns about their employer's handling of transportation services, leading SEIU Local 500 to file this complaint with WMATC." Complainant elaborated on this interest in its Objection to Motion to Dismiss.

SEIU Local 500 was involved in an organizing effort to assist [respondents'] employees in forming a union. It was in the course of this effort that organizers were alerted to employee concerns about [respondents'] violations of the Compact. As a result, SEIU Local 500 filed the Complaint with WMATC.

The union filed a representation petition with the National Labor Relations Board supported by authorization cards signed by more than 30% of [respondents'] employees reflecting their interest in forming a union with SEIU Local 500. An election was scheduled.

Unfortunately, respondents chose to exert considerable pressure on [their] employees to vote "no" in the union election, and the majority of those voting

²⁸ *In re Malek Investment, Inc., t/a Montgomery Airport Shuttle, & Malek Investment of Va., Inc., & Assadollah Malekzadeh*, No. MP-98-53, Order No. 5707 at 2-3 (Sept. 22, 1999). The Commission found that the elimination of third-party intervention was "consistent with the signatories' overall reduction of procedural burdens as part of the redesign of the Compact in 1990 and with the goal of preventing competitors from shifting the battleground for market share to the offices of the Commission." *Id.* at 3. The Commission's standing policy similarly guards against unnecessary burdens and the misuse of Commission process by a carrier's rivals. The parties in this proceeding are rivals with respect to respondents' employees.

²⁹ See Order No. 5707 at 4 (third parties may still file complaint).

³⁰ *Easy Travel, Inc., v. Jet Tours USA, Inc., & City Tours USA, Inc.*, No. FC-94-01, Order No. 4469 (Jan. 5, 1995).

in the election voted against representation. Even so, 27 [of respondents'] workers voted in favor of forming a union with SEIU Local 500.

SEIU Local 500 is pursuing this Complaint because the concerns raised by [respondents'] employees about [respondents'] noncompliance with the Compact remain valid. [Respondents'] violations of the Compact have the potential not only to negatively affect [respondents'] own employees, but also to set a harmful precedent for other employers in the D.C. area whose members are represented by SEIU Local 500 or might seek union representation in the future.

Although associations may be permitted to assert the interests of their members to establish standing,³¹ the record is clear that none of respondents' employees was a member of SEIU Local 500 when the complaint was filed, and none is a member at this time.

Complainant attempts to cure this obvious defect by asserting the interests of unnamed members whose unnamed employers allegedly might be negatively affected by respondents' violations of the Compact. Such an interest might be more convincing if it had been alleged in the complaint before complainant lost the campaign to unionize respondents' workplaces and not interjected afterward in defense to a charge of misuse of process by respondents. As it is, there is no allegation in the complaint that any of complainant's members are currently employed by an existing WMATC carrier. The closest the complaint comes to such an allegation is the statement that some of the work performed by complainant's members "includes providing transportation services to clients using vehicles which are, or should be, certified by WMATC." (Emphasis added). In the absence of a clear statement tying one or more of complainant's members to a named WMATC carrier, it does not appear that complainant's participation in any investigation would be necessary to ensure complete relief for violations of the Compact allegedly committed by respondents.

C. Basis for Investigation

1. Post-March 2010 Allegations

The Complaint alleges that respondents violated the Compact after April 1, 2010, by using their "own and other vehicles without valid WMATC authority." The Complaint cites the affidavits of five SEIU Local 500 staff members concerning their observations of various vehicles operating in the Washington Metropolitan Area and the affidavit of a sixth SEIU Local 500 staff member concerning the activities of respondents' employees.

a. Mikolay & Vaughn affidavits

The affidavit of Amanda Mikolay states that affiant observed a "dark red van" marked "Metro Day Treatment Center, Inc" transporting "clients of Multi-Therapeutic Services, Inc." at "5701 13th St NW" on

³¹ *In re Washington Shuttle, Inc., t/a Supershuttle*, No. AP-96-13, Order No. 4966 at 11 (Nov. 8, 1996).

January 31, 2011, that the District of Columbia license plate number was 075 51P, and that WMATC# 635 was displayed on the exterior.³² Commission records indicate that the Metro Day vehicle with license plate number 07551P is blue, not red, and that plate number 07551P was issued by the State of Maryland, not the District of Columbia.

The affidavit of Lindsey Vaughn states that affiant observed a vehicle with license plate number 77K647 and no visible markings transporting "clients of Multi-Therapeutic Services, Inc." on "20th St." on February 1, 2011.³³ Neither respondent is mentioned in the Vaughn affidavit.

The Mikolay and Vaughn affidavits are entitled to no weight - the Mikolay affidavit because of material errors and the Vaughn affidavit for failure to allege any link with respondents.

b. Dancy, Payne & Sanchez affidavits

The affidavit of Otis Dancy states that affiant observed a vehicle marked "WMATC# 771" "On the Go Inc.", with Maryland license plate number 49564B, transporting "clients of Metro Homes and/or Metro Day" at "800 Kenilworth" on February 1, 2011.³⁴ WMATC Certificate No. 771 is held by On The Go Transportation, Inc.

The affidavit of Marlin Payne states that affiant observed a vehicle marked "WMATC# 668" transporting "clients of Metro Homes and/or Metro Day" on "Sudbury Road" on February 1, 2011.³⁵ WMATC Certificate No. 668 is held by Mobility Express Inc.

The affidavit of Edward Sanchez similarly states that affiant observed a vehicle marked "WMATC# 668" transporting "clients of Metro Homes and/or Metro Day" on "Eastern Avenue Northwest" on January 31, 2011.³⁶

The Dancy, Payne, and Sanchez affidavits are entitled to little weight. They each claim to be based on "personal knowledge", but none of these three affidavits explains how the affiant "knew" that the passengers on board these vehicles were clients of Metro Homes and/or Metro Day. Inasmuch as none of these affiants is employed by respondents, it would seem that complainant would have the Commission assume that these affiants were personally acquainted with the passengers. We are not prepared to assume that.

On their face, these three affidavits and the Vaughn affidavit implicate other carriers in possible violations - Multi-Therapeutic Services, Inc. (unauthorized operations); On The Go Transportation, Inc. (failure to report vehicles); Mobility Express Inc. (noncompliance with Regulation No. 61) - not necessarily respondents. Indeed, the Commission recently initiated an investigation of Mobility

³² Complaint, Attachment A.

³³ Complaint, Attachment B.

³⁴ Complaint, Attachment C.

³⁵ Complaint, Attachment G.

³⁶ Complaint, Attachment I.

Express Inc. based in part on the allegations in the Payne and Sanchez affidavits concerning vans not registered to Mobility Express but displaying Mobility Express's WMATC No. 668.³⁷ Once that investigation has run its course, we will be in a better position to determine whether an investigation of respondents is warranted with respect to the Payne and Sanchez allegations.

Finally, the complaint deems it significant that the "On the Go" vehicle did not appear on the 2011 annual report of Carrier No. 771.³⁸ That annual report has since been amended to include the vehicle in question. In addition, the two vans allegedly marked "WMATC# 668" are currently leased to Metro Homes and passed a vehicle inspection by Commission staff on March 16, 2011, in connection with the reissuance of Metro Homes's WMATC operating authority. No such markings were observed by staff at that time. Under the circumstances, dismissal of the charges in these three affidavits is appropriate.³⁹

c. Ogbuehi affidavit

The affidavit of Sonny Ogbuehi alleges that certain unnamed employees of Metro Homes informed the affiant that they "work as 'drivers'" and "transport clients in vans bearing WMATC No. 668, the number assigned to Mobility Express, as well as in other vans bearing a variety of other markings or no markings."⁴⁰ The affidavit also states that these employees "do not receive compensation or direction from Mobility Express or any other WMATC carrier."⁴¹

Affiant explains that he came by this information in his or her capacity as complainant's "Organizing Coordinator" during the course of "an ongoing . . . organizing campaign".⁴² Affiant further explains that he/she "cannot reveal the names of the employees from whom I learned this information because doing so would reveal the identities of union supporters among [respondents'] employees, and might subject those employees to retaliation by . . . management."⁴³

The allegations in the foregoing affidavit rest entirely on hearsay. National Labor Relations Board election procedures may permit a complainant to keep the names of union supporters confidential, but WMATC rules of procedure do not permit affiants to rely on the allegations of others as proof of the truth of the matter asserted. Under Commission Rule No. 4-06, "facts alleged in any filing shall be verified under oath by a person having knowledge of the matters set forth." (Emphasis added). Accordingly, we find that

³⁷ *In re Mobility Express Inc.*, No. MP-11-062, Order No. 12,906 (July 7, 2011).

³⁸ Complaint at 6.

³⁹ See Order No. 4469 at 3 (complaint may be dismissed where violations have been voluntarily ceased).

⁴⁰ Complaint, Attachment F.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

this affidavit offers insufficient grounds for commencing an investigation into respondents' post-March 2010 operations.⁴⁴

2. Pre-December 2009 Allegations

Complainant would have the Commission revisit its finding in Order No. 12,729 regarding an absence of evidence to indicate that the violations committed by Metro Homes prior to December 2009 were knowing and willful within the meaning of the Compact.

Under Commission Rule No. 26-04, "If, after the hearing in a proceeding, the Commission shall have reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of such proceeding, the Commission will issue an order reopening." This rule applies to closed proceedings.⁴⁵

The complaint relies on the post-March 2010 allegations as evidence of the willfulness of Metro Homes's pre-December 2009 allegations. Inasmuch as we have found the post-March 2010 allegations an insufficient basis for commencing a new investigation of respondents operations, we likewise find them insufficient for reopening an old one.

The complaint also relies on an allegation that respondents' CEO, Maxwell Asenso, "has continued to engage in business dealings with [respondents' ex-COO,] Herman Bromfield even after [respondents] allegedly fired him for cause]. This is significant, according to the complaint, because respondents claimed in the proceeding finding pre-December 2009 violations by Metro Homes that respondents "claimed that these violations were not knowing and willful in that they were allegedly the fault of former COO Herman Bromfield." This is irrelevant. The Commission refrained from finding the violations were willful not because respondents blamed Mr. Bromfield for the violations and terminated his employment but because there was "no evidence that Metro Homes received notice from the Commission that [Metro Homes's] authority had been revoked."

3. Alleged Admissions

Respondents have not filed an answer to the complaint as directed by Rule No. 12-01. Respondents' have only filed a motion to dismiss under Rule No. 15-01. Complainant argues that as a result, respondents should be deemed to have admitted the allegations in the complaint as provided in Rule No. 12-02, and the Commission should grant the relief requested in the complaint.⁴⁶ We disagree.

⁴⁴ See *In re South East Area Transit, Inc., t/a SEAT*, No. AP-92-29, Order No. 4033 at 2-3 (Jan. 7, 1993) (dismissing protest based on hearsay); *In re Mobile Care, Ltd.*, No. AP-79-10, Order No. 2016 (Aug. 7, 1979) (denying application for operating authority founded on hearsay allegations against existing carriers).

⁴⁵ See *In re Double Decker Bus Tours, W.D.C., Inc.*, No. AP-95-21, Order No. 5963 (Aug. 15, 2000) (reopening application proceeding terminated five years earlier).

⁴⁶ Objection to Motion to Dismiss at 2-3.

Article XIII, Section 11(b)(ii), stipulates that: "If the Commission determines that a complaint does not state facts which warrant action, the Commission may dismiss the complaint without hearing." The meaning of the term "hearing" includes a hearing on the pleadings.⁴⁷ Thus, the Commission is not bound to consider other pleadings when determining whether a complaint states facts which warrant action. This is precisely what occurred in *Executive Technology Solutions, LLC, v. Management Support Technology, Inc.*, No. FC-07-002, Order No. 11,113 (Jan. 29, 2008). Although the respondent filed an answer in that proceeding, the Commission granted the companion motion to dismiss without mentioning the answer other than to note that one had been filed. There was no consideration of whether all matters had been specifically denied and/or defended - and consequently no consideration of whether any of the allegations in the complaint had been deemed admitted.

Considering what respondents may be deemed to have admitted does not yield a different result, in any event. The motion to dismiss specifically refutes the Mikolay, Vaughn, and Dancy affidavits.⁴⁸ The allegations in those affidavits may not be deemed admitted. As for the Payne, Sanchez, and Ogbuehi affidavits, those affiants stop short of expressly alleging that one or both respondents controlled the operation of the vehicles mentioned in the affidavits - a necessary element to any claim that respondents operated unlawfully after April 1, 2010. The Ogbuehi affidavit alleges that respondents' employees drove vehicles to transport clients, but putting respondents' employees behind the wheel, without more, is not enough to make respondents carriers. "Commission precedent holds that a carrier is a person who assumes the risk and responsibility of conducting passenger transportation operations." *In re Chika Transport Serv., Inc.*, No. MP-02-124, Order No. 7173 at 2 (May 7, 2003). In *Chika*, a risk and responsibility analysis established the vehicle owner as the carrier, not the owner's customer who furnished the drivers. *Id.* at 2-3. Neither Payne, nor Sanchez, nor Ogbuehi allege that respondents furnished or otherwise controlled the vehicles mentioned in their affidavits. In fact, Commission records show that the vehicles allegedly observed by Payne and Sanchez are owned by third parties, not respondents. Thus, it is not clear that respondents may be deemed to have admitted violating the Compact.

The one deemed-admission case cited by complainant, *In re Action Taxi, Inc. v. Malek Investment, Inc., t/a Montgomery Airport Shuttle*, No. FC-91-01, Order No. 3857 (Dec. 3, 1991), does not advance complainant's deemed-admission argument.⁴⁹ Attached to the Action Taxi

⁴⁷ See *In re Sydney Shuttle, LLC*, No. MP-07-064, Order No. 10,792 (Sept. 28, 2007) (holding that a "paper hearing" is normally all the Compact requires); *In re Elijah Jehovah Inc.*, No. MP-03-178, Order No. 7899 (Mar. 25, 2004) (same); *In re Babikir Ibrahim Elhag, t/a "BTS" Babcare Transp. Servs.*, No. MP-04-01, Order No. 7891 (Mar. 23, 2004) (same); *In re Tarig A. Omer, t/a Skycare Trans*, No. MP-03-172, Order No. 7889 (Mar. 23, 2004) (same); *In re Affordable Airport Charter, Inc., & Bach Vu, t/a Affordable Airport Charter*, No. MP-97-76, Order No. 5400 (Aug. 31, 1998) (same).

⁴⁸ Motion to Dismiss at 8.

⁴⁹ See Objection to Motion to Dismiss at 2-3.

complaint were Montgomery Airport Shuttle's (MAS's) advertising fliers offering service between specified hotels in Montgomery County Maryland, on the one hand, and Reagan National Airport and Dulles International Airport, on the other, at \$17 and \$19 per trip, respectively. Thus, when MAS's answer failed to deny that the fliers were MAS's, it was clear that the conduct deemed admitted violated the Compact. Furthermore, it should be noted that the Commission did not assess a civil forfeiture against MAS but simply ordered MAS to cease and desist. As noted above, the evidence is that respondents in this proceeding are in compliance with the Compact and Commission requirements at this time. Issuing a cease and desist order in this proceeding would be pointless.

VII. CONCLUSION

The Commission's responsibility under the Compact is to "protect the public, not referee private labor disputes."⁵⁰ The complaint establishes neither a basis for complainant's standing nor sufficient grounds for an investigation. None of respondents' clients, employees, and competitors has lodged a complaint about respondents' operations. Respondents' are by all evidence currently in compliance with Commission requirements. Diverting Commission resources to initiate an investigation of respondents' operations is not warranted on this record at this time. We shall reassess the evidence, however, once the Mobility Express investigation has run its course. The motion to dismiss therefore shall be granted.

THEREFORE, IT IS ORDERED:

1. That the Motion to Dismiss the Formal Complaint of Service Employees International Union is hereby granted.

2. That the Formal Complaint of Service Employees International Union Local 500 is hereby dismissed and this proceeding terminated.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:



William S. Morrow, Jr.
Executive Director

⁵⁰ Order No. 5955 at 6.