

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 14,114

IN THE MATTER OF:

Served July 31, 2013

WASHINGTON SHUTTLE, INC., Trading) Case No. MP-2011-099
as SUPERSHUTTLE, WMATC No. 369)
Investigation of Violation of)
Commission Regulation No. 64)

This matter is before the Commission on the response of Washington Shuttle, Inc., t/a Super Shuttle, to WMATC Order No. 13,726, served February 5, 2013, directing Washington Shuttle to show cause why the Commission should not assess a civil forfeiture for respondent's knowing and willful violation of certain Commission safety requirements in Commission Regulation No. 58.

I. BACKGROUND

The Washington Metropolitan Area Transit Regulation Compact,¹ (Compact), applies to: "the transportation for hire by any carrier of persons between any points in the Metropolitan District."² A person may not engage in transportation subject to the Compact unless there is in force a Certificate of Authority issued by the Washington Metropolitan Area Transit Commission (WMATC) authorizing the person to engage in that transportation.³ "A person other than the person to whom an operating authority is issued by the Commission may not lease, rent, or otherwise use that operating authority."⁴ "Each authorized carrier shall: (a) provide safe and adequate transportation service, equipment, and facilities; and (b) observe and enforce Commission regulations established under [the Compact]."⁵

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 Compact, tit. II, art. XI, § 1. 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. II.

³ Compact, tit. II, art. XI, § 6(a).

⁴ Compact, tit. II, art. XI, § 11(b).

⁵ Compact, tit. II, art. XI, § 5.

The Commission may investigate on its own motion a fact, condition, practice, or matter to determine whether a person has violated or will violate a provision of the Compact or a rule, regulation, or order.⁶ If the Commission finds that a respondent has violated a provision of the Compact or any requirement established under it, the Commission shall issue an order compelling compliance and effecting other just and reasonable relief.⁷

This investigation was initiated on November 28, 2011, in Order No. 13,063 to review respondent's compliance with the Commission's safety regulation, Regulation No. 64. Then, as now, Regulation No. 64 adopted and incorporated by reference the Federal Motor Carrier Safety Regulations (FMCSRs) as set out in Title 49 of the Code of Federal Regulations and as they apply to: (1) passenger vehicles seating 9 persons or more, including the driver; and (2) the drivers and carriers operating such vehicles.⁸

At the time this investigation was initiated, respondent operated over 140 vans with a seating capacity of 9-10 persons each. Vans seating 9-15 persons have been identified by federal authorities as posing unique safety concerns. In a letter dated December 10, 2010, the National Highway Traffic Safety Administration and the Federal Motor Carrier Safety Administration (FMCSA) advised state DMV commissioners that federal "safety data indicate that 9, 12, and 15-passenger vans are often inadequately maintained, and the tires are especially vulnerable to deterioration as they age." And "[b]ecause these vehicles have unique handling characteristics, they display particular sensitivity to rollovers, particularly when they are fully loaded."

One of respondent's 10-passenger vans was involved in a fatal crash on the Dulles Access Road on August 15, 2011. Accordingly, the Commission concluded that the public interest warranted a comprehensive review of respondent's compliance with the FMCSRs as adopted by Commission Regulation No. 64. Order No. 13,063 directed the Commission's Executive Director to take the necessary steps to conduct the review, including but not limited to hiring a firm qualified to perform safety compliance reviews of motor passenger carriers using the criteria the FMCSA uses under Part 385, Appendix B, of the FMCSRs.

⁶ Compact, tit. II, art. XIII, § 1(c).

⁷ Compact, tit. II, art. XIII, § 1(d).

⁸ Regulation No. 64-01. At all times relevant to this investigation, Regulation No. 64 provided as follows: "The Commission adopts and incorporates herein by reference the Federal Motor Carrier Safety Regulations as amended from time to time, to the extent that the said regulations apply to the operations of passenger carriers. These regulations are set out in Title 49 of the Code of Federal Regulations."

II. VIOLATIONS DISCOVERED DURING SAFETY REVIEW

The Executive Director hired Consolidated Safety Services (CSS) to conduct the review. CSS has more than 20 years of experience providing commercial motor vehicle safety support services to various clients nationwide and has conducted New Entrant Safety Audits of motor passenger carriers on behalf of the FMCSA and comparable reviews of motor passenger carriers for the Department of Defense.

CSS conducted a comprehensive onsite safety compliance review and evaluation of respondent's records and vehicles during the week of February 6, 2012. CSS delivered its report to WMATC on February 14, 2012. Based on the findings, conclusions, and recommendations in the report, respondent was assigned a proposed safety rating of "Unsatisfactory" on March 1, 2012.⁹

According to 49 C.F.R. § 385, Appendix B, a safety rating is determined by the number of violations of "acute" and "critical" regulations: "Acute regulations are those identified as such where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier." "Critical regulations are those identified as such where noncompliance relates to management and/or operational controls." CSS found no violations of acute regulations, but CSS's review did reveal five violations of critical regulations. The five violations involve failure to comply with 49 C.F.R. §§:

- 391.51(b)(2) -Inquiries into drivers' motor vehicle records
- 391.51(b)(7) - Medical Examiners' Certificates
- 395.8(a) - Records of Duty Status
- 396.3(b) - Minimum Records of Maintenance and Inspection
- 396.11(a) - Driver's Vehicle Inspection Report

It should be noted that Washington Shuttle promptly corrected these violations and had its safety rating upgraded by letter to "Conditional" on April 17, 2012, and by order to "Satisfactory" on February 5, 2013.¹⁰

III. VIOLATION REVEALED IN ACCIDENT REPORT

The fatal crash that prompted this investigation was investigated by the Metropolitan Washington Airports Authority Police Department, the law enforcement agency with jurisdiction over the Dulles Access Road. According to the report of the investigator, neither speed, nor drugs, nor alcohol, nor the driver's psychological state were causal or contributing factors. The investigation revealed no evidence of vehicle mechanical deficiencies. The report concludes that the direct cause of the crash was human error, i.e., loss of

⁹ An Unsatisfactory rating indicates that a carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard in 49 C.F.R. 385.5(a) and that a carrier is operating at an unacceptable level of compliance.

¹⁰ WMATC Order No. 13,726 at 3-4.

control of vehicle due to driver failure to maintain full attention on the road. In addition, the report finds that the driver was not using the available "lap and shoulder belt restraint system" when the crash occurred, which is a violation of 49 C.F.R. § 392.16.

IV. FINDINGS

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

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.¹² The term "willfully" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard whether or not one has the right so to act.¹³

Washington Shuttle does not dispute the violations found in Order No. 13,726, which it characterizes as "technical non-compliance" but which were serious enough to warrant suspension of Washington Shuttle's operating authority had it not promptly corrected them. In any event, Washington Shuttle contends that although violations were found, those violations were not committed knowingly and willfully. According to Washington Shuttle:

At the time Respondent obtained its authority from this Commission in 2001, its vehicles were not subject to the FMCSRs, Certainly no regulatory entity including the WMATC, ever suggested otherwise, notwithstanding the existence of Regulation No. 64. More importantly, until November of 2011, Respondent had never been informed by the Commission, or any other regulatory body, that their business must comply with the FMCSRs.

Response of Washington Shuttle at 1 (Feb. 21, 2013).

The record is to the contrary. In August 2004, the Commission rejected a \$4 million excess WMATC Insurance Endorsement filed by Washington Shuttle because, among other things, it appeared to amend "a policy issued by an insurance company not licensed in one of the fifty states."¹⁴ As authority for the proposition that such a policy did not meet Commission standards, the rejection order cited 49 C.F.R. § 387.35 and noted that said section had been "adopted by Commission

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

¹² *In re Veolia Transp. On Demand, Inc., & Washington Shuttle, Inc., t/a SuperShuttle*, No. AP-07-006, Order No. 11,580 at 6 (Sept. 18, 2008).

¹³ *Id.* at 6.

¹⁴ *In re Washington Shuttle, Inc., t/a SuperShuttle*, No. MP-04-151, Order No. 8235 (Aug. 24, 2004).

Regulation No. 64."¹⁵ And when Washington Shuttle requested an extension of time to respond to the rejection order, the Commission granted the request because "the resolution of this proceeding involves the interpretation and application of a Federal Motor Carrier Safety Administration insurance regulation adopted by Regulation No. 64."¹⁶ The extension order further cited Commission precedent from 2001 "interpreting Commission Regulation No. 64 as adopting [the] insurance regulation at 49 C.F.R. § 387.25."¹⁷ We therefore find that the application of this provision of the FMCSRs to Washington Shuttle placed Washington Shuttle on notice as of August 2004 that the FMCSRs adopted by Regulation No. 64 apply to operations under WMATC Certificate No. 369.

At the very latest, respondent was on notice of the full reach of Regulation No. 64 and the consequent applicability to respondent of the FMCSR provisions at issue on or about November 28, 2011. This is so because that is the date the Commission initiated this investigation. Respondent appears to concede this point.¹⁸ The records violations discovered over two months after this investigation began were for the most part current, ongoing violations. Ignorance of the law is no excuse, in any event.

Washington Shuttle further contends with respect to the driver's failure to comply with the "lap and shoulder belt restraint system" requirement in 49 C.F.R. § 392.16 that "there is no factual basis in the record to support the conclusion that Washington Shuttle, Inc. 'knowingly and willfully' allowed (or directed) the driver to operate his vehicle without his safety belt on." Employee negligence, however, is no defense.¹⁹ "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.²⁰

In the very case cited by Washington Shuttle, *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 58 S. Ct. 533 (1938), the U. S. Supreme Court upheld a finding of knowing and willful violation of a federal livestock transportation statute based on the failure of railroad employees to timely offload cattle from a rail car. There was no contention that railroad executives possessed any contemporaneous knowledge of the employees' failure to comply with the statute or that railroad executives "allowed" the violation to occur.

¹⁵ *Id.* at 1 n.3.

¹⁶ *In re Washington Shuttle, Inc., t/a SuperShuttle*, No. MP-04-151, Order No. 8291 (Sept. 23, 2004).

¹⁷ *Id.*

¹⁸ See Oral Hearing discussion below.

¹⁹ *In re Exec. Tech. Solutions, LLC*, No. MP-10-090, Order No. 13,044 at 4 (Nov. 8, 2011).

²⁰ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 244, 58 S. Ct. 533, 535 (1938).

"As respondent could act only through employees, it [was] responsible for their failure."²¹

We therefore conclude that the record supports assessment of a forfeiture of \$1,000 for each of the six different knowing and willful FMCSR violations, or \$6,000. In calculating the amount of the forfeiture, we have 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.²² In addition, although we have assessed \$500 per safety violation in the past,²³ we are doubling that amount here because this is not the first time the Commission has assessed a forfeiture against a member of respondent's corporate family.²⁴ The Commission has doubled forfeiture assessments in the past under similar circumstances.²⁵

V. HEARING REQUEST

Order No. 13,726, served February 5, 2013, granted Washington Shuttle 15 days to submit "a written request for oral hearing, specifying the grounds for the request, describing the evidence to be adduced, and explaining why such evidence cannot be adduced without an oral hearing." Washington Shuttle timely filed an oral hearing request on February 21, 2013. The request states that Washington Shuttle would use the hearing to adduce "live testimony under oath" "to establish that it had no knowledge of the application of the FMCSRs to its SuperShuttle fleet until after it received the Commission's Order #13,063 [served November 28, 2011]."

The request shall be denied. First, the request fails to explain why such testimony cannot be adduced in an affidavit. Second, the "knowledge" requirement in WMATC forfeiture precedent applies to underlying facts, not to knowledge of applicable law.²⁶

THEREFORE, IT IS ORDERED:

1. That the request for oral hearing is denied.

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 \$6,000 for knowingly and willfully violating 49 C.F.R. §§ 391.51(b)(2); 391.51(b)(7); 392.16; 395.8(a); 396.3(b); and 396.11(a), as adopted by WMATC Regulation No. 64.

²¹ 303 U.S. at 244, 58 S. Ct. at 535.

²² *In re Skyhawk Logistics, Inc.*, No. AP-09-044, Order No. 12,101 (July 24, 2009).

²³ See Order No. 13,044 at 5 (assessing \$500 for failure to produce current safety inspection certificates).

²⁴ See Order No. 11,580 (assessing forfeiture against respondent's affiliate and against respondent's ultimate parent).

²⁵ See Order No. 12,101 (doubling forfeiture assessed against recidivist).

²⁶ Order No. 11,580 at 6.

3. That respondent is hereby directed to pay to the Commission within 30 days of the date of this order, by check or money order, the sum of six thousand dollars (\$6,000).

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

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

William S. Morrow, Jr.
Executive Director