Decision 89 04 078 APR 26 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mailed APR 27 1989

Investigation on the Commission's own motion into the operations, rates, and practices of Sanford A. McColley and Kathy J. McColley doing business as A Touch of Class Limousine Service.	I.88-06-021 (Filed June 17, 1988)

Sanford A. McColley and Kathy J. McColley, for themselves, applicants.
Lawrence O. Garcia, Attorney at Law, and Paul Wuerstle, for the Transportation Division.

OPINION

On June 17, 1988, the Commission instituted this investigation into the operations, rates, charges, and practices of Respondents Sanford A. McColley and Kathy J. McColley (McColleys), doing business as A Touch of Class Limousine Service, for the purpose of determining:

"1. Whether Respondents have violated the terms of Commission order to cease and desist from operating as a charter-party carrier of passengers after the effective date and service of such an order.

"2. Whether Respondents have violated Section 5379 of the Public Utilities (PU) Code by transporting passengers as a charter-party carrier after the revocation of its permit.

"3. Whether Respondents have violated Section 314 of the PU Code by failing to produce records for examination when requested by a representative of the Commission's Transportation Division.

"4. Whether any or all of Respondents' operating authority should be cancelled, revoked or suspended pursuant to Section 1033.5(a) and/or Section 5378(a) of the PU Code or in the alternative, a fine should be imposed upon Respondents pursuant to Section 1033.5(b) and/or Section 5378(b) of the PU Code.

"5. Whether a fine plus an assessment to cover the reasonable expense of investigation should be imposed upon Respondents pursuant to Section 5413.5 of the PU Code.

"6. Whether any other orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

"The scope of the investigation includes, but is not limited to, transportation services performed by Respondents for passenger Greg Thompson on July 17, 1987, and all other transportation services performed by Respondents during the period July 8, 1987 to August 4, 1987."

A duly noticed public hearing was held in San Francisco on September 14, 1988, before Administrative Law Judge Orville I. Wright and the matter was submitted on December 1, 1988 upon the filing of concurrent briefs by the parties.

Failure to Produce Records

Transportation Division's (staff's) brief notes that testimony adduced at the hearing is that respondents sought legal advice when requested to produce records for examination. They were advised to make their records available for inspection but were not required to make copies for staff's benefit.

Staff is satisfied that respondents' refusal to produce their records occurred because respondents misunderstood staff's request to inspect documents to be a request for copies of records. Staff, accordingly, considers the charge of violation of Section 314 of the PU Code to be unproven and suggests that this issue not be further pursued.

We concur in the staff recommendation.

Staff's Evidence

Staff's evidence is predicated upon Commission Decision (D.) 87-07-047, dated July 8, 1987, entitled "Order Reopening Proceeding and Order to Cease and Desist," which contains the following ordering paragraphs:

"1. Sanford A. (Stan) and Kathy J. McColley shall immediately cease and desist operating as a passenger stage corporation or charter-party carrier of passengers until satisfactory proof of adequate insurance is presented to the Executive Director or his delegate or until further order of the Commission.

"2. The charter-party carrier permit, TCP 2335-P, issued to Stan McColley doing business as A Touch of Class Limo is hereby revoked."

Personal service of this order was made on respondent Sanford McColley on July 10, 1987.

Following such service, on July 17, 1987, staff investigators placed a request by telephone to respondents for charter-party transportation for two persons from Campbell, California to the San Francisco International Airport. Respondents provided the ordered service at charter-party rates on July 18, 1987.

Also on July 17, 1987, another staff investigator visited respondents' office, observed charter-party orders for transportation being taken and written up, and confirmed with respondents that transportation business was being conducted as usual.

Respondents, for their part, admit to the incidents of transportation service testified to by staff on July 17 and 18, 1987, after the date of personal service of the Commission's order revoking TCP 2335-P.

McColleys' Showing

McColleys fully participated in the hearing in this matter on their own behalf and without the assistance of legal

counsel. They produced 27 documents which were identified (Exhibits 6 through 33) but, through inadvertence, not offered into evidence. Further, respondents submitted a lengthy brief in the premises.

Staff making no objection to respondents' exhibits, we hereby admit them into evidence.

Exhibits 6 through 33 comprise a chronological reproduction of notices and correspondence between respondents and the Commission between March 16, 1987, when McColleys' charter-party authority was first suspended, until August 4, 1987, when the charter-party was reinstated.

McColleys' purpose is to show that their operating authority was suspended and revoked for the stated reason of lack of evidence of insurance on file with the Commission whereas their vehicles were always adequately insured except that the proper paperwork was not in place with the Commission through no fault of respondents.

The principal insurance issue was whether respondents' insurer should be accepted by the Commission although not acceptable to the California Department of Insurance. Other issues presented by McColleys' chronology have to do with the form and content of filed notices of insurance and the legality of a Commission resolution directing staff to reject insurance notices which were already on file (Resolution PE-2492).

Staff, however, correctly points out that matters of insurance validity and proof of insurance have no bearing on issue as to whether respondents conducted charter-party operations on July 17 and 18, 1987, after personal service of a Commission order revoking their authority.

These insurance issues could and should have been submitted for our review prior to the order of revocation and cease and desist. We note, in this regard, that staff's letter of

charter-party suspension dated March 16, 1987, advises the recipients that an appeal by filing an application is appropriate.

We find that McColleys did conduct charter-party operations on July 17 and 18, 1987, after receiving personal service on July 10, 1987 of a Commission order revoking their charter-party permit.

Penalty

Staff recommends a penalty of $2,000 for the July 17 and 18, 1987 violations of the Commission's July 8, 1987 cease and desist order, offering the rationale that the integrity of a Commission order and process is at issue. Staff's recommendation is based partly on the fact that respondents continued to operate after the March 16, 1987 suspension of their operating authority for failure to maintain evidence of insurance. Staff points out that it foregoes seeking suspension of operating authority or that respondents be held in contempt.

Respondents earnestly contend that no punishment is warranted. They state that they have lost perhaps half of their business already because of a newspaper article covering their suspension which was published July 22, 1987, based upon a Commission press release.

For purposes of mitigation of penalty, respondents claim that at least 14 other charter-party carriers, as well as respondents, were affected by Commission Resolution (PE-2492) dated May 29, 1987, which found respondents' then insurer to be unacceptable. Respondents assert that all charter-party carriers affected by PE-2492, except respondents, were accorded 90 days (until August 28, 1987) to file suitable evidence of insurance on penalty of having their operating authority revoked. Respondents' authority was revoked on July 10, 1987; and, according to their testimony, no other revocations pursuant to PE-2492 occurred.

This allegedly inconsistent treatment of carriers covered by PE-2492 resulted from staff's adherence to 90 days from the

original suspension date of March 16, 1987 for revocation purposes for respondents rather than the 90 days from May 29, 1987, allowed to other such carriers.

Respondents point out that they obtained suitable insurance coverage on July 1, 1987 and submitted notice of coverage on July 14, 1987. This notice, however, was not properly countersigned, and it was not until July 22, 1987 that notice of adequate insurance in proper form was received by the Commission.

Respondents state that staff's acceptance of its new insurance on July 22, 1987 was coincident with staff's acceptance of the same new insurance filed by 13 other charter-party carriers affected by PE-2492, none of whose permits had been revoked. Thus, had McColleys filed an appeal from staff's refusal to accord them the same 90-day extension granted to other carriers to procure acceptable insurance, they may have persuaded us to grant them an extension of time in harmony with that accorded other charter-party carriers.

We are persuaded that the record in this case justifies the imposition of the fine requested by staff. This is the second time the Commission has found that respondents have operated a charter-party service in conscious disregard of a Commission order. Repeat offenders simply cannot expect the same degree of leniency as first timers.

We take respondents' prior conduct into account in determining the magnitude of the penalty appropriate for the violations giving rise to this proceeding. On March 16, 1987, respondents' charter-party carrier permit was suspended for failure to maintain evidence of insurance. Respondents were informed of the suspension of their operating authority and that their authority would be revoked if they did not provide evidence of insurance within ninety days. Nonetheless, respondents continued to operate their charter-party service. On July 8, 1987, the Commission issued D.87-07-047, which found that respondents had

operated as a charter-party carrier during the suspension of their permit, ordered respondents to cease and desist operating until they provided satisfactory evidence of insurance, and revoked their charter-party carrier permit. Despite the July 8, 1987 cease and desist order respondents continued to operate their charter-party service. Specific trangressions on July 17 and 18, 1987 form the basis for the present proceeding. Respondents' prior conduct clearly supports the magnitude of the penalty sought by staff.

We are not persuaded by respondents' plea for mitigation. The only similarity between the situation of respondents and that of other carriers affected by Commission Resolution PE-2492 is that all such carriers were insured by Insurance Corporation of America (ICA) at some point. Identical timing was neither necessary nor appropriate.

First, respondents were placed on notice of the need to provide the Commission with proof of adequate insurance within 90 days on March 16, 1987, when their charter-party authority was suspended for failure to maintain evidence of insurance coverage. This suspension reflected the absence of any current insurance, and was not related to the fact that respondents subsequently obtained insurance from ICA. PU Code §§ 1040, 5391, and 5392 require the Commission to ensure that passenger stage corporations and charter-party carriers maintain adequate insurance coverage and file evidence of that coverage with the Commission. General Orders 101-E and 115-D state that failure to maintain insurance is good cause for suspension or revocation of operating authority. It is standard Commission practice upon learning that a carrier has failed to maintain insurance or has unacceptable insurance to immediately suspend that carrier's operating authority and to notify the carrier that the authority will be revoked unless evidence of adequate insurance is provided within 90 days.

Respondents' failure to maintain any evidence of insurance led to the March 16, 1987 suspension of their charter-party permit. Respondents' failure to provide proof of insurance within 90 days of the suspension led to the revocation of their authority on July 10, 1987. The fact that respondents obtained unacceptable insurance in the meantime has no bearing on the appropriateness of the timing of the revocation.

Second, contrary to respondents' allegations, not all carriers insured by ICA were informed of ICA's unacceptablity at the same time, and not all of them were given 90 days from May 29, 1987 to provide proof of acceptable insurance. Some carriers received notice through Resolution PE-2480, dated April 22, 1987. Others received notice through Resolution PE-2492, dated May 29, 1987. Respondents received notice through letters dated May 7, May 21, and June 1, 1987 that their May 7, 1987 Certificate of Insurance stating that they were insured by ICA could not be accepted for filing because the insurer was not acceptable to the California Department of Insurance. Because not all carriers insured by ICA received notice of the inadequacy of their insurance on a uniform date, there is no reason to conclude that their opportunity to provide evidence of adequate insurance should have expired on a uniform date.

Third, respondents were not unique in having their operating authority suspended. They were unique only in that their authority had been suspended for failure to maintain insurance a month and a half before the Commission began suspending carriers insured by ICA and rejecting certificates of insurance based on ICA coverage. Each carrier insured by ICA had its operating authority suspended and was notified that its operating authority would be revoked if it did not provide adequate proof of insurance within 90 days.

We take official notice of our Resolution PE-2480, issued April 22, 1987, entitled "Resolution Suspending the Charter-Party

Operating Authorities Which Are Based On Certificates of Insurance On File With The Commission Issued by the Insurance Corporation of America of Boca Raton, Florida." This resolution suspended the operating authorities of nine charter-party carriers and noted that the operating authorities would be revoked if suitable evidence of insurance was not filed with the Commission within 90 days. This resolution also noted that the California Department of Insurance has advised the Commission to reject any further Certificates of Insurance identifying ICA as the underwriting carrier.

We also take official notice of our Resolution PE-2492, adopted May 29, 1987, entitled "Resolution Further Directing Staff Not To Accept Certificates Of Insurance Issued By The Insurance Corporation Of America, Boca Raton, Florida." Resolution PE-2492 ordered that:

> The staff shall not accept any certificates of insurance identifying Insurance Corporation of America, Boca Raton, Florida, as the underwriting carrier, regardless of when the policy was issued, if and until the California Department of Insurance approves of the insurer. Furthermore, the staff shall reject any such certificates that may already be on file and send notices of suspension to any charter-party carrier or passenger stage corporation that as a result does not have adequate evidence of insurance on file.

Finally, we note that respondents were found by D.87-07-047 to have violated the suspension of its charter-party permit by operating as a charter-party carrier. Operation as a charter-party carrier in violation of a Commission order suspending the operating permit constitutes grounds for revocation of the operating permit, just as does the failure to maintain evidence of insurance. (PU Code § 5378.) The July 10, 1987 revocation of respondents' operating authority would have been appropriate on that basis alone.

To sum up, it is simply not true that respondents were treated unfairly in comparison to other carrriers insured by ICA.

The Commission gave respondents 90 days from the date of notice of the need for insurance, just as it gave other carriers 90 days from the date they were notified their insurance carrier was unacceptable. Since respondents were notified of the need to provide evidence of acceptable insurance earlier than other carriers, their 90-day period to find acceptable insurance before having their authority revoked lapsed earlier. Respondents' charter-party permit was not actually revoked until July 10, 1987, 116 days after their permit was suspended for failure to maintain evidence of insurance, and 64 days after they were notified that ICA was an unacceptable insurer. Revocation of respondents' permit was justified both by their failure to provide evidence of insurance within 90 days of being notified of the need to do so, and by their operation as a charter-party carrier while their charter-party permit was suspended.

It is true, although doubtful, that respondents might have been successful in appealing the issue of whether they should have been given 90 days after May 29, 1987 to provide evidence of acceptable insurance.

The point, however, is not what might have happened if respondents had appealed, but rather what should happen because they failed to appeal but chose instead to knowingly violate a direct Commission order.

Plainly, McColleys have operated a charter-party service after their permit was revoked. This operation occured in conscious disregard of a Commission cease and desist order. McColleys previously operated a charter-party service in conscious disregard of a Commission order suspending their authority. This disregard for the Commission's orders deserves a strong response. If we were to send signals that there are no consequences for disobeying our orders, we would seriously undermine the effectiveness of our enforcement programs.

Our review of all of the surrounding circumstances gathered and presented on the record before us convinces us that a cease and desist order without pecuniary penalty is insufficient in this case. We believe the $2,000 penalty sought by staff for the July 17 and 18, 1987 violations of the Commission's July 8, 1987 cease and desist order (D.87-07-047) is perfectly appropriate.

Comments

Pursuant to the Commission's Rules of Practice and Procedure, the proposed decision of the assigned administrative law judge for this proceeding was filed with the Commission and distributed to the parties on March 1, 1989.

Comments were filed by staff on March 17, 1989. Our review of these comments persuades us that the proposed decision should be changed to impose a $2,000 fine on respondents for operating as a charter-party carrier on July 17 and 18, 1987, in direct violation of our July 8, 1987 decision (D.87-07-047) revoking their charter-party permit and ordering them to cease and desist charter-party operations.

Findings of Fact

1. Sanford A. McColley and Kathy J. McColley, doing business as A Touch of Class Limousine Service, hold charter-party carrier permit TCP 2335-P.

2. TCP 2335-P was revoked by Commission order effective July 10, 1987, and McColleys were ordered to cease and desist charter-party carriage of passengers as of that date (D.87-07-047).

3. TCP 2335-P was reinstated by the Commission effective August 4, 1987.

4. On July 17 and 18, 1987, McColleys provided charter-party passenger transportation services.

5. PU Code §§ 1033.5(b) and 5378(b) provide for fines for violation of PU Code § 5379.

Conclusions of Law

1. Respondents have violated the terms of a Commission order to cease and desist from operating as a charter-party carrier of passengers after the effective date and service of such an order.

2. Respondents have violated PU Code § 5379 by transporting passengers as a charter-party carrier after the revocation of their permit.

3. Respondents should be fined $2,000 for their July 17, and 18, 1987 violations of PU Code § 5379, pursuant to PU Code §§ 1033.5(b) and 5378(b).

ORDER

IT IS ORDERED that:

1. Sanford A. McColley and Kathy J. McColley shall pay to the Commission a fine of $2,000 within 10 days of the effective date of this order.

2. Sanford A. McColley and Kathy J. McColley shall cease and desist from any other or further violations of the PU Code.

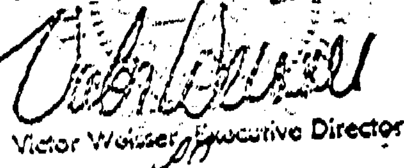
3. The Executive Director of the Commission shall cause personal service of this order to be made upon respondents.

This order becomes effective 30 days from today.

Dated April 26, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY



Victor Weisser, Executive Director

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To sum up, it is simply not true that respondents were treated unfairly in comparison to other carriers insured by ICA.

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ORDER

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3. The Executive Director of the Commission shall cause personal service of this order to be made upon respondents.

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Dated APR 26 1989, at San Francisco, California.

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