

ALJ/VDR/mrj

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APR 23 1998

Decision 98-04-044 April 23, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation and Order to Show Cause into whether the operating authority of David Martinez Espinoza, an individual, doing business as David Espinoza Trucking, should be revoked.

ORIGINAL

Investigation 96-04-023
(Filed April 10, 1996)

David Espinoza, for himself, respondent.
Carol Dumond, Attorney at Law, and
Harold E. Hurlbet, for Rail Safety and
and Carriers Division.

OPINION

Summary

Respondent David Espinoza, doing business as David Espinoza Trucking (T-174,128), is ordered to pay a fine of \$10,000 in four equal installments over a one-year period for various violations of licensing and insurance requirements which the Commission administered at the time the violations occurred. The proceeding is closed.

Background

The Commission instituted this proceeding on April 10, 1996, to investigate the operations and practices of respondent. The investigation was based upon allegations of the Safety and Enforcement (now Rail Safety and Carriers) Division (collectively referred to as RSC), and directed the respondent to show cause why his operating authority should not be revoked.

Six different grounds are advanced in support of revoking the respondent's operating authority. These grounds are individually set forth in the Order Instituting Investigation (OII) as follows:

Violation of Public Utilities (PU) Code Sections 3552 and 3553 and Vehicle Code (CVC) Section 34501.12 by failing to submit to regularly required California Highway Patrol (CHP) inspections of his terminal, trucking operation and equipment (BIT Program violation);

Violation of PU Code Section 3553 and CVC Section 1808.1 by failing to enroll his company's drivers in the Department of Motor Vehicles (DMV) Pull Notice Program;

Violation of PU Code Section 3553 and CVC Sections 1808.1, 12500, 15240, and 15242 by driving a motor vehicle in for-hire transportation after his driver's license was revoked by the DMV;

Violation of PU Code Section 3775 by operating during a period of Commission-ordered suspension for lack of liability insurance;

Violation of PU Code Sections 3555, 3632 and 3634, and Commission General Order 100-M, by operating without liability insurance coverage; and

Violation of PU Code Section 3554 by failing to comply with the Commission's Workers' Compensation Insurance coverage requirements.

The OII immediately suspended the respondent's agricultural carrier permit (T-174,128) for continuing noncompliance with the Pull Notice Program, CVC driver's licensing requirements, and the BIT program.¹

¹ The order made the suspension subject to reinstatement by the Director of what was then the Safety and Enforcement Division upon a showing that his vehicles and operations were in full compliance with all of the safety provisions of the CVC, Pull Notice program, and BIT program, evidence that workers' compensation and public

Footnote continued on next page

Procedural History

The administrative law judge (ALJ) scheduled a prehearing conference (PHC) at the Commission's San Francisco offices for June 1, 1996, but rescheduled it to be held as a telephonic conference on July 23 at the respondent's request. The respondent failed to appear at the appointed time, and could not be located by the ALJ. The ALJ set an evidentiary hearing (EH) to be held in San Francisco on September 17, 1996, and the respondent was so notified.

On September 11, RSC moved for postponement of the EH until after October 1. The motion was based upon a new legislative development, namely, the passage of Assembly Bill (AB) 1683 on August 22, 1996, which would transfer jurisdiction over the respondent's activities to CHP and DMV if it were signed into law. Because the bill contained an urgency provision, it would have to be signed by October 1 to become effective. RSC's motion stated, "Should the bill take effect, nothing the Commission does in this proceeding will survive the transfer of jurisdiction," and the proceeding could be dismissed. Therefore, granting the continuance would enable the jurisdictional aspects of the proceeding to be clarified. In response the ALJ continued the EH until October 17, 1996.

On October 2, RSC moved to dismiss the proceeding because Governor Wilson had signed AB 1683 into law on September 30. RSC's motion stated that, "The transfer of jurisdiction is complete and does not allow further action even in cases already underway." Accordingly, the ALJ prepared a dismissal order for

liability insurance certification was on file with the Commission, and acknowledgment from his public liability insurance carrier that it had received a copy of this order and the staff's declaration filed in support of the OII. Thus, the respondent was able to resume making a livelihood when he fulfilled these requirements.

consideration by the Commission, and on October 7 issued a ruling continuing the EH indefinitely pending dismissal.

On August 11, 1997, the ALJ held a PHC at which he was formally advised by RSC's counsel of the opinion that the Commission does, in fact, have jurisdiction to impose penalties short of revocation in proceedings which were ongoing at the time AB 1683 was enacted. (Tr 3-4.) This opinion was based upon the circumstance that the provisions in the PU Code which had been repealed by AB 1683 were substantially reenacted elsewhere in California's statutes, changing only the agency responsible for enforcement. Analogizing from established principles of criminal and civil jurisprudence, we presume the Legislature did not intend that the violations alleged in this proceeding should go unpunished simply because of the jurisdictional change effected by this repeal and reenactment. (Sekt v. Justice's Court (1945), 26 Cal. 2d 297.) There was no break in the continuous operation of the licensing and other requirements when the statutory change took place, and no abatement of the legal consequences of violations. Therefore, we determined to proceed with the matter.

Although he had been duly notified, the respondent did not attend the August 11 PHC. The EH was set for October 21 in San Francisco, and in addition to following the usual notice procedure, the ALJ instructed RSC's counsel to contact the respondent and inform him that the hearing had been scheduled, which she did.

The EH convened as scheduled, and Mr. Espinoza was personally present when it began. He appeared without counsel or other representative, and cross-examined RSC's sole witness with considerable leeway as to the manner of doing so. After RSC put on its testimony the ALJ recessed the hearing until early afternoon at Mr. Espinoza's request. However, he did not return when the hearing reconvened, nor at any time thereafter.

In view of this circumstance the ALJ issued a ruling on October 23 to bring the proceeding to a conclusion. The ruling precluded any further hearing without a good cause showing for Mr. Espinoza's behavior, but gave him an opportunity to submit additional evidence subject to possible objection by RSC. Both parties were given an opportunity to submit briefs. The respondent timely offered an additional exhibit, and the proceeding was submitted December 5, 1997. The ALJ's proposed decision was issued March 23, 1998.

Discussion

Viewing the record in the light most favorable to the respondent, there is substantial evidence in support of each of the allegations of the OII. The exhibits received at the hearing, as well as the late-filed exhibit tendered by the respondent, demonstrate that at least for some period the respondent was not in compliance with the cited requirements, and he is therefore subject to discipline under the terms of the applicable statutes.

Specifically, the evidence of record shows that through October 6, 1995, the respondent had not participated in the BIT program; that through October 10, 1995, he had not enrolled his drivers in the DMV Pull Notice Program; that his driver's license was revoked from October 25, 1994, until November 17, 1995, but he nevertheless worked as a subhauler for Frank Cecchini Trucking for at least several weeks during that period; that he operated from May 31 through June 26, 1995, which was during a period of Commission-ordered suspension for lack of liability insurance; that he operated at least between May 31 and June 12, 1995, without legally required public liability and property damage insurance; and that he failed to comply with the Commission's Workers' Compensation Insurance coverage requirements for at least several weeks during the summer of 1995 while employing Patricia Madrid as a driver. These are serious infractions, and we cannot overlook them.

In his defense, or by way of mitigation, the respondent offers evidence that he was in full compliance with all of the cited requirements by June 18, 1996. This evidence, of course, does not negate his previous infractions, and cannot exculpate him. However, RSC concedes that this evidence demonstrates he has "clearly...made an effort to bring himself into compliance with regulations," and "seems serious about bringing his life and his business under control." (Brief, p. 13.) We will therefore consider these facts in mitigation of the offenses which we find he has committed.²

Penalty

Inasmuch as the Commission's licensing jurisdiction passed to other agencies with the enactment of AB 1683, we conclude that it would not be appropriate for us to consider revocation of the respondent's operating authority at this juncture. But even if we retain such authority, revocation is too harsh a penalty to impose on this respondent. Instead we accept RSC's recommendation to impose a fine of sufficient amount to remind the respondent of the significance of his violations, and insure that he does not stray from his course of compliance in the future.

The respondent is a small agricultural goods hauler. From the record it is obvious that his business is neither sophisticated nor particularly prosperous. This does not excuse his noncompliance with our regulations, which implement important public safety policies, but we have no desire to put him out of business altogether in view of his efforts to correct the deficiencies in his operation. We

² Respondent also professed bewilderment and confusion because of the withdrawal of the prospective dismissal, and seemed to believe that this was somehow improper. This is understandable, but it does not excuse his violation of statues and regulations. We will not consider the procedural vagaries of this proceeding as a factor in mitigation of these violations.

believe that he has learned his lesson, and we are willing to give him an opportunity to prove it.

Given the cumulative nature of the penalties available for continuing violations, RSC contends that we could impose a total penalty of as much as \$124,500 in this proceeding. In view of the size of the respondent's business and the scale of its operations, imposing such a penalty would be a hollow exercise of our power and amount to de facto revocation of his authority. RSC recommends instead that we impose a fine of \$10,000, payable in installments over a period of several months. We will accept this recommendation.

Comments

No comments were received in response to the ALJ's proposed decision.

Conclusion

In light of the record we will impose a total penalty of \$10,000 on the respondent, payable in four equal installments of \$2,500 over a 12-month period commencing on the 90th day after the effective date of our order. The first three installments will be payable as of the 90th, 180th, and 270th days after the date this order becomes final, and the final installment as of the anniversary of that date. If the respondent fails to comply with this order, or with any other rule, regulation, or statute which governs his operation as an agricultural carrier, the Commission staff is directed to take appropriate action to revoke his operating authority.

An application for rehearing of the decision that follows may be made pursuant to Division 1, Part 1, Chapter 9, Article 2 of the PU Code. Judicial review of Commission decisions is governed by Division 1, Part 1, Chapter 9, Article 3 of the PU Code. The appropriate court for judicial review is dependent on the nature of the proceeding. This is an enforcement proceeding brought by the Commission against respondent David Espinoza, and so this decision is

issued as an "adjudicatory proceeding" as defined in Section 1757.1. Therefore, the proper court for filing any petition for writ of review is the Court of Appeal. (See PU Code Section 1756(b).)

Findings of Fact

1. All of the following findings are based upon events which occurred before September 30, 1996, the date on which AB 1683 was signed into law.
2. At all times pertinent to this order the respondent was engaged in the business of an agricultural goods carrier (T-174,128).
3. The respondent did not participate in the BIT program at any time encompassed by this investigation, up to and including October 6, 1995.
4. The respondent had not enrolled his drivers in the DMV Pull Notice Program at any time encompassed by this investigation, up to and including October 10, 1995.
5. The respondent's driver's license was revoked from October 24, 1994, until November 17, 1995. For at least several weeks between those dates he worked as a subhauler for Frank Cecchini Trucking.
6. Respondent operated his trucking business between May 31 and June 26, 1995, during a period of Commission-ordered suspension for lack of liability insurance.
7. Respondent operated his trucking business between May 31 and June 12, 1995, without public liability and property damage insurance required by law.
8. For at least several weeks during the summer of 1995 respondent failed to comply with the Commission's worker's compensation insurance requirements while employing a driver.
9. The respondent corrected the violations of California statutes, and the rules and regulations of this Commission, set forth in the OII.

Conclusions of Law

10. RSC has met its burden of proving the allegations set forth in the OII to the extent set forth in the findings herein.

11. The respondent should be fined for violating the statutes, rules, and regulations demonstrated by the findings.

12. A fine in the amount of \$10,000 is appropriate in light of the respondent's conduct and circumstances.

13. This is an enforcement proceeding, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code Section 1757.1. Therefore, the proper court for filing any petition for writ of review will be the court of appeal.

14. This investigation should be closed.

O R D E R

IT IS ORDERED that:

1. Respondent David Espinoza, doing business as David Espinoza Trucking (T-174,128), shall remit to the Fiscal Office of the Commission in San Francisco a fine in the total amount of \$10,000 in four equal installments of \$2,500 apiece. The first installment shall be due by not later than the 90th day after the effective date of this order; the second installment by not later than the 180th day; the third installment by not later than the 270th day; and the final installment by not later than the anniversary date.

2. The Fiscal Office shall deposit the monies received as the fine pursuant to this order with the State Treasury to the credit of the General Fund.

3. If the respondent fails to comply with this order, or with any other rule, regulation, or statute which governs his operation as an agricultural carrier, the Executive Director shall cause the Commission staff to take appropriate action

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with the responsible agency to seek revocation of the respondent's operating authority.

4. Investigation 96-04-023 is closed.

This order is effective today.

Dated April 23, 1998, at Sacramento, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners