ALJ/JBW/tcg

6/11/98

Decision 98-06-022 June 4, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation and Order to Show Cause into Whether the Passenger Stage Certificate of Khalil Homeidan, Farahat Abdelmalek, Edward Chernyak and Fira Chernyak, a partnership doing business as AIRTRANS EXPRESS (PSC 6369) should not be revoked.	I.96-10-034 (Filed October 25, 1996)

John E. DeBrauwere, Attorney at Law, for Khalil Homeidan, Farahat Abdelmalek, Edward Chernyak and Fira Chernyak, a partnership dba Airtrans Express, respondents.

Cleveland W. Lee, Attorney at Law, and Moira Simmerson, Rail Safety and Carriers Division.

O P I N I O N

Statement of Facts

By Decision (D.) 90-06-004 issued February 1, 1990 in Application (A.) 90-02-003, the Commission granted a Certificate of Public Convenience and Necessity to operate a passenger stage for the transportation of passengers and baggage between points in Los Angeles and Orange Counties on the one hand, and Los Angeles International Airport (LAX), Long Beach Airport, John Wayne Airport, Ontario Airport, Burbank Airport, and Los Angeles Harbor on the other hand, to Usama Al Bostani, Khalil Homeidan, and Farahat Abdelmalek, a co-partnership doing business as (dba) Airtrans Express (Airtrans).

In January of 1995, after years of partnership disagreements, Bostani and Homeidan each sold ⅓ of each's ⅓ interest in Airtrans to Edward Chernyak.

Shortly thereafter, on March 1, 1995, Bostani sold the remaining ⅔ of his ⅓ interest in Airtrans to Fira Chernyak, the wife of Edward. Bostani's transfer of his interest in Airtrans was authorized, nunc pro tunc as of the respective earlier dates of the sales and transfers, by D.96-05-065 (in A.95-11-036). Bostani's participation in Airtrans affairs ceased as of February 1995.

Meanwhile, however, the Compliance and Enforcement Branch of the Commission's Transportation Division[1] (staff), as part of a special task force auditing on-call transportation companies, had concluded that Airtrans appeared to be in violation of various PU Code requirements and was engaging in unlawful operations. This resulted in the Commission's Order Instituting Investigation (OII) 93-09-003. Respondents Bostani, Homeidan, and Abdelmalek dba Airtrans Express were alleged to have:

1. failed to comply with airport regulations relating to independent drivers;
2. failed to participate in the Department of Motor Vehicle (DMV) "Pull Notice" Program;
3. unlawfully used "independent contractors" who were neither employees nor licensed charter party carriers;
4. filed a false revenue and fee report; and
5. failed to post rates.

[1] In October of 1996, by order of the Executive Director of the Commission, the Transportation Division of the Commission ceased to exist; its duties and responsibilities were transferred to a newly formed entity, the Rail Safety and Carrier Division of the Commission.

Assertedly to avoid the expense, inconvenience, and uncertainty of litigation of these issues, the respondents and staff entered a Stipulation for Settlement which was adopted by the Commission in D.95-01-034 issued January 25, 1995. The Stipulation provided for a 90-day suspension of Airtrans' operating authority; the suspension to be stayed subject to Airtrans' observation of the other terms of the Stipulation Settlement. There was also a two-year probation period with provision for reopening of the Investigation proceeding should Airtrans not comply with Commission regulations during the probation period; any such reopening would determine whether or not the stayed 90-day suspension should be imposed.

Other provisions of the Stipulation Agreement were that Airtrans would:

1. Pay a $7,000 fine in 10 consecutive installments of $700 each; the first to be paid no later than 30 days after January 24, 1995;

2. Not knowingly operate an unsafe vehicle, and that all vehicles would be inspected;

3. Would not allow unlicensed drivers to operate its vehicle and would enroll in the DMV Pull Notice Program;

4. Would cancel all "Prefranchise Agreements;"

5. Would comply with all General Order (GO) 158 requirements, including use of bona fide employees or licensed charter party carriers;

6. Would file reaudited PUCTRA reports for 1992 and 1993; and

7. Would post representative fares in its vehicle.

During 1996, Staff learned that Airtrans apparently had continued to operate using non-employee, so-called "independent" drivers. Investigation disclosed other apparent unlawful operating practices, leading Staff to ask the Commission to issue an Order Instituting Investigation (OII)/Order to Show Cause why Respondents' operating authority should not be revoked.

Thereafter, on October 25, 1996 the Commission issued I.96-10-034, its OII and order to show cause, stating that should Staff's allegations of continued unlawful business practices of Homeidan, Abdelmalek, and Fira and Edward Chernyak, dba Airtrans Express, be substantiated in hearing, there would be ample cause for revocation of the Airtrans operating authority. I.96-10-034 also reopened I.93-09-003 to determine the degree Respondents had complied with the Stipulation Settlement adopted by D.95-10-034.

The specific violations asserted by Staff against Respondents and included in I.96-10-034 for investigation:

1. Failure to ensure that all drivers or subcarriers were enrolled in the DMV Pull Notice Program;

2. Allowing drivers to transport passengers for compensation for more than 10 hours spread over a total of 15 consecutive hours;

3. Unlawful use of "independent" drivers who were neither bona-fide employees nor licensed sub-carriers;

4. Filing false revenue reports and underpayment of fees to the Commission;

5. Failure to obey LAX Airport rules and regulations by use of non-employee drivers at the airport;

6. Failure to post a schedule of rates in its vans; and

7. Operating beyond the scope of its Certificate, and failing to obtain Commission approval prior to a transfer of ownership.

While by I.96-10-034 the Commission had also ordered that a related matter, A.95-11-036, be held in abeyance pending a final outcome in I.96-10-034, the Commission was mistaken in its order because by D.96-05-067 (issued five months before issuance of I.96-10-034) the Commission already had authorized the transfer sought by A.95-11-036.[2] In the absence of any evidence in the prepared Staff exhibits of any Bostani participation in Airtrans after March 1, 1995, or that Bostani had even been noticed of any status in the captioned Investigation, and in view of the earlier D.96-05-067, assigned Administrative Law Judge (ALJ) John B. Weiss did not pursue A.95-11-036.

Following passage of Senate Bill (SB) 960 (Leonard; Stats. 1996, ch. 856), in preparation for implementation of the procedural changes ordered by the SB, the Commission by Resolution ALJ-170 signed January 13, 1997 provided for a sample of proceedings to be handled under the Experimental Rules and Procedures to gain experience, where practicable, with management of Commission proceedings under requirements of SB 960. As to previously filed OIIs, the Resolution provided that the Assigned Commissioner would identify a sample proceeding and propose a categorization. On February 28, 1997,

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[2] In an abundance of caution, having received conflicting information from the Legal Division and Staff regarding transfer of a ⅓ partnership interest in Airtrans from Bostani to the Chernyaks, Bostani's attorney had filed A.95-11-036 for nunc pro tunc approval of the transfer. There having been no sale, lease, assignment, transfer or incumbrance of the operating right, (the Certificate held by the partnership) there was no issue under PU Code §§ 1031 or 1036(b). (Under partnership law, conveyance by a partner of his interest does not dissolve the partnership. Nor in the absence of an agreement to the contrary does the conveyance entitle the assignee to interfere in management or administration. The assignee merely is entitled to receive the profits to which the assigning partner otherwise would have been entitled.)

The Chernyaks, by acquisition of ⅓ interest, did not acquire control of the partnership, so that PU Code § 554(a) was not at issue. Thus, under present Code provisions, prior Commission authorization is not required for conveyance of a minor or non-controlling interest in a partnership. The Commission does expect written notification for its records, however. Such written notification here had been provided.

Assigned Commissioner Henry M. Duque issued his ruling identifying I.96-10-034 as a sample proceeding and categorized I.96-10-034 as adjudicatory. No appeal being filed, that ruling became final. ("Adjudicatory" proceedings include enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission.) ALJ Weiss was designated as the presiding officer.

On September 8, 9, and 17, 1997, ALJ Weiss held a duly noticed evidentiary hearing on the captioned and related proceeding in Los Angeles. Upon submission of concurrent closing briefs the proceeding was submitted for decision October 20, 1997. In the hearing Staff presented its evidence through seven witnesses: James H. Badgett (Special Agent, Consumer Services Division), Mger Garibyan (former Airtrans driver), Rajesh Sarohn (former Airtrans driver), Michael Nakasone (Staff Special Investigator), Toni Crowley (Staff Special Agent), Sharon Hahn (Principal Clerk, Landside operations, City of Los Angeles, and Moira H. Simmerson (Staff Supervisor, Passenger Carrier Investigation, Litigation, and Enforcement). Airtrans presented its evidence through Farahat Abdelmalek and Khalil Homeidan (Respondents).

Discussion

The California Public Utilities Commission (Commission), pursuant to the California Constitution, Article XII, and Public Utilities (PU) Code §§ 1031 et seq.; 5331 et seq.; and GOs 157-C and 158 regulates carriers of passengers on the California public highways. And, pursuant to PU Code § 1033.5, for good cause the Commission, after notice and opportunity to be heard, may revoke, alter, or amend the operating right or certificate, or as an alternative to the suspension, revocation, alteration, or amendment of an operating right or certificate, may impose a fine not to exceed $5,000.

We now turn to the seven specific violations asserted by Staff in the present I.96-10-034 proceeding:

Failure to Enroll All Drivers in the DMV Pull Notice Program[3]

Complying with the Stipulation Settlement adopted by D.95-01-034 in the initial investigation, on May 16, 1995 Respondents provided Staff with verification to show enrollment of all drivers. And thereafter, supplemental lists were also provided. However, as part of its investigation in the March through September 1995 period, Staff ascertained that a total of 34 drivers were on Airtrans' rooster, and of these 8 had not been enrolled. Staff's evidence was that at least 5 of the 8 had actually driven for Airtrans during the review period.

But apart from the list of 34, the evidence was that another driver, Khanzetyan, had been hired in August 1995 at a time when his operator's license had expired and he had a prior record of driving on a suspended license. And on September 30, 1996, while driving for Airtrans, Khanzetyan was stopped at LAX for an administrative violation. A police check revealed that Khanzetyan was driving on a suspended license with two outstanding warrants totaling $5,200. His license had been suspended as of June 18, 1996 to December 17, 1996. As of October 1996 the DMV Pull Notice Unit confirmed to Staff that Khanzetyan had never been enrolled in Airtrans' Pull Notice Program.[4]

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[3] California's Vehicle Code § 1808.1 and Commission General Orders 157-B and 158, Parts 1.06 and 5.02, require that every passenger stage operator enroll in the "Pull Notice Program" of the Department of Motor Vehicles. The purpose is to make every carrier employer aware of the status of the licenses and operating records of each of his drivers. To employ, or continue to employ, a driver against whom a disqualifying action has been taken regarding that driver's operating privilege, when the employer has notice, renders the employer guilty of a public offense which upon conviction shall result in jail, a fine, or both.

[4] Shuttle traffic at LAX is controlled by Shared Ride Management, a non-profit corporation of all the Shuttle operator companies. Each carrier must send its new driver to Shared Ride to get an airport access badge. The new driver presents an application signed by himself and the carrier

Footnote continued on next page

The evidence is that while Airtrans may have as of the January issue date of D.95-01-034 been in compliance with the Program, thereafter Airtrans did not register all of its drivers as required both by Statute and Commission General Orders. Respondents' argument that omission of some drivers was an exception rather than the rule does not serve as an acceptable excuse.

The prior violations addressed by I.93-09-003, and their resumption of practices in violation of the Pull Notice Program indicate the lack of concern for public safety by Respondents, and their continuing disregard for both the applicable statute and Commission order.

Violations of the Limitations on Driver's Driving Hours[3]

Staff interviews with three Airtrans drivers assertedly indicated that these drivers were driving for as long as 16 consecutive hours on a work shift, and seven days a week. But as witnesses two drivers explained how they split up hours or were in holding lot time, not driving on the public highways for such hours which is the act prescribed by the statute, and the evidence cannot support

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to Shared Ride, along with a copy of his DMV record printout which he gets from DMV. Somehow, despite Khazetyan's DMV printout dated 8/30/95 showing his expired license, Shared Ride issued an airport access badge. After Khazetyan's arrest, Staff learned of it and obtained from Shared Ride the 8/30/95 printout Khazetyan's used. Staff directed Respondents to explain and produce its Pull Notice reports. Respondents failed to do so. Staff thereupon obtained certified DMV Pull Notice records that showed that Khazetyan as of 10/23/96 and before had never been enrolled in the Airtrans Pull Notice Program.

[3] The California Vehicle Code by Section 21702(a) provides "[n]o person shall drive upon any highway any vehicle designed or used for transporting persons for compensation for more than 10 consecutive hours nor for more than 10 hours spread over a total of 15 consecutive hours." General Order 158, Part 5. provides: "[e]very driver of a vehicle shall be the certificate holder or under the complete supervision, direction, and control of the operating carrier and shall be an employee of the certificate holder, employee of a subcarrier, or an independent owner-driver with charter party authority and operating as a sub-carrier."

the assertion that Respondents encouraged or accepted such practice, much less that the drivers engaged in it.

Unlawful Use Independent Non-Employee Drivers[6]

By the Stipulation Settlement adopted by D.95-01-034, Respondents agreed to comply thereafter with GO 158 requirements and use only bona-fide employees or licensed charter party carriers in their operations. Such compliance would also serve to bring them into accord with their then applicable LAX License Agreement. Respondents signed the Settlement Agreement October 31, 1994. D.95-01-034 was issued and made effective January 24, 1995.

But, while controverted, the evidence shows that Respondents did not keep their October 31, 1994 Settlement Agreement promises. The evidence discloses a murky facade of compliance, with continued hedging and evasions, compelling the conclusion that Respondents did not comply with either the spirit or letter of their agreement or with the provisions of the General Order.

In an early 1995 Division of Labor Standards Enforcement proceeding brought against Respondents, it was found that while the drivers should legally be "employees," they were not being treated as such under the law. In an audit the hearing officer of the Division found that checks were issued, but no deductions were being made, nor were Form 1099's being issued. And that contrary to Respondents' assertions that the drivers were "limited partners," no

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[6] General Order 158, Part 5.03 provided that every driver must be either the certificate holder, or under the complete supervision, direction, and control of the operating carrier, and shall be:

A. An employee of the certificate holder; or,

B. An employee of a sub-carrier; or

C. An independent owner-driver holding charter-party carrier authority and operating as a sub-carrier.

profit distributions were made. Upheld on appeal, the hearing officer concluded that as Respondents had control (dispatching drivers; paying by Commission, and because under the LAX permit drivers had to be Airtrans employees to serve LAX), the drivers were legally to be classed as "employees." Respondents received a Civil Penalty Citation assessment of $100,750.

The Division after May of 1995 was assured that Respondents were in compliance with Labor Standards; treating drivers as employees without leasing; and paying $875/month salary.

But it is very clear that during this early 1995 period, five months after the October 31, 1994 Settlement, as their testimony before the Labor Standards proceeding displays, Respondents were hedging and avoiding compliance with the Commission D.95-01-034 order to comply with GO 158.[7]

During Staff's mid-1995 investigation, Respondents assured Staff that its drivers were employees being paid by check on a 25% of collected revenue basis, with deductions being made as legally required. And on August 1995 a Staff survey of eleven drivers, with each interview form being signed by the drivers under declaration of truthfulness, appeared on the surface to support Respondent's assurances.

But then, interviews of three additional drivers in October 1995 contradicted Respondents. The three, Garibyan, Morgan, and Sarohn told Staff that they leased the vans from Respondents, paying $90 or $135 per day

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[7] Before the Labor Commission in March of 1995, five months after the PUC Settlement, Respondents had testified that the drivers were not "employees," rather that they were "limited partners" and "independent contractors, leasing their vans from Respondents for $125/day. But the seven drivers interviewed by the Labor Commission all denied that there were leases. They stated they were "limited partners," having paid $100 to $1,000 to become such. They asserted they received 30% of fares collected with no deductions, and were paid by check daily, weekly, or every two weeks.

(respectively applicable to Ontario or LAX). But two weeks later, when asked to sign the formal typed up copy, Garibyan, according to Staff, recanted; then stating he was paid by check and had no leasing agreement. As a witness Garibyan was evasive but essentially stayed pat on his recanted position of not leasing.

Sarohn, however, signed the formal typed copy of his survey, stating he had been an "independent contractor" leasing a van for $135/day. Sarohn also charged that all the Airtrans' Waybills were fake; that all payroll ledger figures were made up; and all drivers worked on a lease basis. Discharged in October 1995 following an altercation with Abdelmalek, Sarohn surreptitiously had taken some dispatch records and reservation forms, delivering these to Staff to substantiate his assertions that the Waybills produced by Respondents were not reliable as a basis for payment assertedly made to drivers. But when called as Staff witness, in part Sarohn hedged and recanted, testifying that as to leases he could only speak of his months of personal experience; that he "thought" some of the Airtrans drivers were on the same arrangement as his, but that he had no proof. He testified that he had been given one or two paychecks "for the record," cashed them at Airtrans' Wells Fargo branch, and then returned the money to Respondents—his deal being that he kept all revenues he collected beyond the $135/day lease.[8]

The Morgan survey form set forth responses purportedly given the Staff. However, Morgan did not sign the form, nor was he a witness. These purported responses reflect that he operated on a $135 or $90 per day lease basis and had

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[8] Abdelmalek, called as a witness, conceded that Sarohn had been put on a lease basis when, after several prior stints as an Airtrans driver, he returned. Assertedly, this was a favor since Sarohn had some personal financial problem.

received one paycheck "for the record" during the 4-5 months association with Airtrans; cashed that check and returned the proceeds to Respondents. As hearsay it is admissible, but entitled to little weight except as to corraborative notation.

Staff's questions and unease regarding Airtrans operations were then fueled further by the Sarohn and Morgan statements. After several demands Staff received from Respondents what assertedly were all payroll records for the period of the investigation. As relevant here, these records included 745 waybills and 85 cancelled paychecks.

The cancelled paychecks had been cashed one to four months after issue; those issued in April and May not being cashed until August; and virtually all were cashed at Airtrans' bank a block away. While it is credible that the drivers, without personal banking accounts, would avail themselves of cashing privileges at Airtrans' bank, it is not credible that individuals of drivers' economic status, would consistently hold their paychecks months before cashing them. Drivers have immediate living expenses. Further serving to discredit Respondents' assertion of compliance with GO 158 is the fact that records show that during the Staff review period 34 drivers were associated with Airtrans, but only 23 received paychecks. All 85 checks went to only 23 drivers. No explanation has been forthcoming as to how the others were compensated.

Respondents assert that all waybills covering Airtrans' transportation during the review period were given to Staff, but none of thebackup dispatch and reservation forms were supplied despite requests. Yet we know these existed as Sarohn had delivered some of them to Staff. The payroll records supplied show appropriate deductions, and the paychecks reflect 23% of the asserted gross revenues. These balance neatly. But in instances no waybills had

been delivered to support the figures on the payroll ledger.[9] Yet Respondents stated that the waybills were the source for the payroll ledger. And most damaging is the fact that the passenger activity for LAX (as shown on Exhibit 14), contrasted with the waybills supplied, indicates far more passenger transportation than is accounted for in the 745 waybills supplied by Respondents.[10]

We are left with the conclusion that in addition to the conceded leasing to Sarohn, there was considerable driving performed beyond that accounted for by the waybills provided. The paychecks issued are not credible and appear to be a facade adopted behind which operations not in compliance with GO 158 were conducted. The payroll system set up in April 1995, but only after Labor Standards exposed the prior operations, was almost 5½ months after Respondents agreed to comply. But that payroll system cannot withstand close scrutiny. The use of payroll documentation not supported by waybills or dispatch/reservation records, pro forma paychecks cashed under improbable circumstances, and the degree of variance with external records such as the LAX activity reports all are indicative of devices to evade regulation and Commission orders. To some degree all have been utilized by Respondents to evade full compliance with Part 5.03 of GO 158.

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[9] For example, although W-2 forms purporting to show employee payments were provided to drivers Chima and Garibyan, there were no cancelled checks payable to either in the 85 cancelled checks provided to Staff.

[10] Under the license granted by Landside operations at LAX to Airtrans, the carrier must each month provide LAX with its daily passenger count to and from LAX. A LAX witness provided the month by month report summary for year 1995 (Exh. 14). This shows far more activity than is reflected by the 745 waybills for the months covered.

Filing a False Report Understating Revenues"

In the Stipulated Settlement adopted by D.95-01-034, Respondents promised that in the future they would file accurate and timely revenue reports to the Commission, and would pay the required Public Utilities Commission Transportation Reimbursement Account (PUCTRA) fees which are based upon these reported revenues.

Revenues are derived from the fares collected and the numbers of passengers transported. In the prior I.93-09-003 investigation which resulted in D.95-01-034, it was determined that Respondents had understated revenues in their reports to the Commission, with the result that PUCTRA fees were underpaid. Respondents had determined their revenues, it was asserted, from the daily waybills drivers turn in together with their receipts. Amongst other things, these waybills list the number of passengers transported in a run and the respective fares paid.

During the current I.96-10-034 investigation Staff requested all waybills, dispatch, and reservation forms from Airtrans for the investigation period. Respondents furnished only waybills (and paychecks) but none of the source materials. In examining the waybills Staff had to conclude that it could not verify the revenue reports submitted separately. In lieu of adequate source records such as the dispatch and reservation forms, Staff applies an audit technique developed by the Commission Finance and Accounts Group. Using a sample quarter, 1995's April to June period, Staff tallied the number of passengers and revenues from the period's waybills as supplied from Respondents, obtaining

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[11] PU Code § 1033.5(c)(2) provides that knowing and willful filing of a false report which understates revenues and fees is "good cause" for suspension, and after notice and opportunity to be heard, for revocation, alteration, or amendment of a carrier's operating authority.

2,720 passengers and revenues listed of $46,086; indicating an average fare of $16.94.

Taking the total number in and out of LAX passengers as reported to LAX by Airtrans in its year 1995 reports showed a total of 31.669 passengers[12] Applying the quarterly average $16.94 per fare to this 31.669 annual total number of passengers produces an indicated annual revenue in the area of $536,760, which even allowing for seasonal variances, far exceeds the $221,586 annual revenue for 1995 reported by Respondents. The potential difference times the PUCTRA fee multiple applicable for 1995 ($0.005) produces a possible underpayment of PUCTRA fees in the area of $1,575.

This very substantial difference cannot be explained away by blaming driver failure to record all trips and fares on waybills. Dispatch and reservation forms existed, but were not furnished to Staff. This failure to provide back up records was Respondents' choice. We conclude that Respondents knowingly and willfully filed false revenue reports understating revenues, and thereby underpaid PUCTRA fees, all in violation of PU Code § 1033.5(c)(2).

Failure to Obey Airport Rules and Regulations[13]

Respondents operated on the property of and into LAX pursuant to the certificate from this Commission they held and by license from LAX. While no consistent failure to comply with safety or traffic rules and regulations of the Airport authority has been demonstrated as could invoke suspension or

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[12] Staff's tally of the monthly totals was in error. It totaled 21,757 for the year, which was the figure used in Staff's computations. The ALJ checking this tally found the error. The correct total is 31,669 which we have used herein.

[13] General Order 158, Part 3.01 provides that consistent failure to comply with safety or traffic rules and regulations of an airport authority may result in suspension or revocation of Commission operating authority.

revocation of operating authority, LAX did require that van carrier drivers must be a "bona fide employee" of the carrier whose van they operate. As set forth elsewhere,[11] by permitting a lease independent contractor driver, Sarohn, to operate their various vans at LAX in operations unauthorized by either this Commission or LAX, Respondents violated GO 158, Part 3.01.

Failure to Post Tariff Rates in Vans Serving Ontario Airport[12]

By the Stipulation for Settlement adopted in D.95-01-034, Airtrans agreed to maintain in all vans a rate schedule to be available to customers upon request; to prominently post a notice of its subjection to Commission jurisdiction and that the driver is required to maintain a fare list; to post representative fares in all vans; and to post other fares when directed by staff to do so.

Commission Special Agents later inspected miscellaneous Airtrans vans at both Los Angeles and Ontario airports. The Los Angeles vans had representative fares taped inside the vans. In September 1995, three vans were inspected at Ontario, and again the same three vans were inspected in October 1995. None of the Ontario vans had posted rates although all had binders aboard listing all their tariff rates. One Ontario driver told the Special Agent that the Ontario area was too vast to be able to post rates, and a witness testified of problems trying to tape rate sheets to windows, as they blew off or disappeared during the day or when the car was washed. More recently Airtrans has tried to use printed adhesive backed representative fare sheets.

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[11] See footnote no. 8.

[12] General Order 158, Part 8.04, as relevant here, provides that all carriers serving an airport shall conspicuously display tariff and timetable information in each vehicle used in Airport service.

Clearly some notice is necessary to protect passengers from arbitrary or "what the traffic will bear" charges. But it appears that the posting requirements of GO 158-A's Part 8.04 (and its referenced GO 122 Series) may no longer be appropriate for today's van service needs. Obviously, Part 8.04 with its reference to "all carriers serving an airport shall conspicuously display tariff and timetable information in each vehicle" (emphasis added) was designed in earlier days when airport service was almost exclusively provided by scheduled large bus service from specific city points to an airport. Today, 7-passenger van service largely has taken over this service, being offered upon demand, door to door, with only 1 fixed terminal, the airport. There is no timetable involved.

Today's shuttle vans increasingly have plush fabric interiors rather than the plastic or metal interior formerly in use. The new vans afford very limited space to affix even limited representative fare information, and taping fare data on windows results in the material being blown off or otherwise lost when vans are washed. Even with air conditioning, windows are open much of the time.

Passengers must have access to fare information. The GO 158 Part 8.04 requires representative fares, baggage and waiting charges, and complaint procedure information including the Commission's regulatory role and telephone complaint line number. A binder with all fares available upon request is not enough. A permanently affixed notice meeting Part 8.04 requirements must also be in each van for compliance.

While Respondents are attuned to the need for improved posting methods and have taken steps to meet the requirements, sufficient time lapsed for them to have complied with the General Order requirements. At least in Ontario this was not accomplished, and their non-compliance violated the General Order.

Operations Beyond the Scope of Authorized Service Territory[11]

The certificate of public convenience and necessity granted to Airtrans does not provide for passenger stage operations into San Bernardino, Riverside, and San Diego Counties from the Ontario Airport.

Staff's investigator learned from Airtrans drivers of "tremendous activity" out of Ontario Airport to areas beyond Airtran's authorized territory. Drivers, in signed interviews with a Staff investigator set forth that they provided transportation to Los Angeles, San Bernardino, and Riverside Counties locations; all unauthorized areas from Ontario. Several driver witnesses readily admitted they often took passengers to these areas, even though they were aware that they were not supposed to do so and had been told not to by Respondents. But they also stated that Respondents took no disciplinary action when these transgressions took place. Airtrans even posted representative fares to one such unauthorized area.

It was Respondents' obligation to have taken effective steps to have stopped these actions, or to have applied to the Commission for expanded authority if they wanted to serve the additional areas. Having done neither, they violated both the terms of their October 1994 Settlement and §§ 1031 and 702 of the PU Code.

Failure to Pay the Total Fine Imposed by D.95-01-034

Ordering Paragraph 5 of D.95-01-034, Respondents' prior enforcement proceeding, provided that Respondents:

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[11] PU Code § 1031 provides that no passenger stage corporation shall operate over any public highway in this state without a certificate from the Commission declaring that public convenience and necessity requires the operation, PU Code § 702 provides that every public utility shall do everything necessary and proper to secure compliance by all its employees.

> "...shall pay to the Commission a fine of $7,000 which shall be payable in 10 monthly installments of $700.00, the first installment to be paid no later than 30 days after the effective date of this order."

The effective date of D.95-01-034 was January 24, 1995. The 10 monthly installments were to commence February 24, 1995. By the time of the September 1997 hearing of the present proceeding, Respondents had made only 8 of the 10 payments; $5,600 of the $7,000, with $1,400 being unpaid, even though 20 months had lapsed.[17]

At the September 1997 hearing Respondents' attorney stated that he hoped to submit a late-filed exhibit showing that all 10 payments had been made. ALJ Weiss offered the opportunity, stating:

> "I've directed Mr. De Braurwere that if he can show cancelled checks—provide cancelled checks, both sides, which show additional payments that have been made on this fine after the 10-13-95, they are to be directed to me." (T. 417.)

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[17] The Commission Fiscal office records reveal the following log in and processing dates for Airtran's fine payments pursuant to D.95-01-034:

	3/6/95	$700	
	4/13/95	700	
	5/10/95	700	
	6/19/95	700	
	7/24/95	700	
	8/15/95	700	
	9/7/95	700	
	10/13/95	700	Total $5,600
and, as of	10/22/97	700	Total $6,300

Exhibit 24 from the Enforcement Staff included a double entry on 4/13/95 which was corrected on the exhibit's face. Receipt No. 97095041 was listed on each entry, indicating that there had been only one payment made 4/13/95. We do not agree that this obvious clerical error, corrected on the face, serves to invalidate the payment record stated in Exhibit 24.

No such late-filed exhibit was forthcoming. Instead, on October 22, 1997, approximately a month after submission subject to briefing, Fiscal office logged in an additional payment of $700--two years late, but still leaving an unpaid balance of $700 on Respondents' January 24, 1995 fine set forth in D.95-01-034

Respondents in their closing brief attempt to set up the proposition that their initial $700 check, assertedly sent February 23, 1975, was not credited to their account since the first credit on the staff exhibit was dated March 6, 1975. The Fiscal office logs such receipts as soon as Commission internal mail and staff time permit. Here approximately five work days lapsed before Respondents' check No. 1038 was processed. As Respondents' second payment was not due until March 23, 1995, it is not credible that the March 6, 1995 credit applied to their second payment. Nor did Respondents offer any cancelled checks to put flesh on their inference.

The only reasonable conclusion is that Respondents failed to comply with their obligation to meet the fine payments imposed by D.95-01-034 for their earlier transgressions.

Conclusions

As to the seven specific areas of violations discussed in the foregoing, the record persuades the Commission to conclude:

1) Respondents did not register all their drivers in the DMV Pull Notice Program as required by Cal. Veh. Code § 18081 and GO 157B and 158;

2) The evidence does not support a finding of violations of Cal. Veh. Code § 21702(a) limitations on driver driving time;

3) Respondents knowingly and willfully failed to comply with both their Settlement Agreement and D.95-01-034 requirements that pursuant to GO 158 requirements they employ only bona-fide employee drivers or licensed

Charter Party carriers in their operations, but rather both leased vans and indulged in deceptive pro-forma practices designed to evade the regulations and deceive Commission staff;

4) Respondents knowingly and willfully filed false revenue reports understating revenues, thereby underpaying PUCTRA fees in violation of PU Code § 1033.5(c)(2);

5) Respondents knowingly and willfully violated GO 158, Part 3.01 by allowing non-bona fide employees to operate vans in their service at LAX;

6) Although trying to essentially comply with the Tariff Rate display requirements of GO 158, Part 8.04, Respondents have been in technical violation of the GO; and

7) Respondents, while rendering lip service to limitations on operations beyond the scope of their authorized service territory, have violated the terms of their 1994 Settlement Agreement and PU Code §§ 1031 and 702 by taking no disciplinary actions when such driver transgressions took place.

In addition, Respondents failed to pay all of the punitive fine imposed for earlier violations by D.95-01-034.

Viewed overall, Respondents, as demonstrated by their actions and practices since D.95-01-034, have shown convincingly that they are neither willing nor capable of operating a passenger stage operation in compliance with the provisions and requirements of the PU Code, the Cal. Veh. Code, Commission decisions, or Commission General Orders. Nor have they honored their prior promises of the D.95-01-034 Settlement Agreement. They have further indulged in deceptive schemes and practices to evade discovery of their actions and to escape Staff investigation. All this demonstrates that Respondents are both unwilling and incapable of operating lawfully.

As noted earlier in this discussion, PU Code § 1033.5 provides that the Commission may for "good cause" suspend or revoke the certificate of a carrier, or in the alternative fine up to $5,000. In view of the violations of prior D.95-01-034 and Respondents' subsequently demonstrated unwillingness and incapacity of operating lawfully, a suspension and fine would be ineffective." Accordingly, in the order that follows we will revoke the Certificate of Public Convenience and Necessity held by Respondents effective immediately.

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 a Commission decision on rehearing is governed by Division 1, Part 1, Chapter 9, Article 3 of PU Code. The appropriate court of judicial review is dependent on the nature of the proceeding. This is an enforcement proceeding brought against Khalil Homeidan, Farahat Abdelmalek, Edward Chernyak and Fira Chernyak, a partnership doing business as Airtrans Express, and so the decision that follows is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, the proper court for filing any petition for writ of review is the Court of Appeal (See PU Code § 1756(b).).

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[11] In Application of Walter Hoffman (1976) 80 CPUC 117, the Commission stated:

> "...'reasonableness fitness' connotes more than mere adequacy or sufficiency in training, competency, or adaptability to the appropriate technical and vocational aspects of the service to be rendered. It also includes an element of moral trustworthiness, reliance, and dependability."

Comment on the Proposed Decision of Administrative Law Judge

As provided by PU Code § 311(d), the Proposed Decision of ALJ Weiss was served on the parties to this proceeding on May 4, 1998. No comment was received.

Findings of Fact

1. Respondent partners, dba Airtrans, conduct passenger stage airport shuttle operations in the greater Los Angeles area pursuant to a Certificate of Public Convenience and Necessity issued in 1990 by the Commission.

2. An industry-wide 1993 audit of area shuttle operations disclosed the probability of numerous violations of PU Code Sections, Commission General Orders, and other unlawful operations, by Respondents and resulted in I.93-09-003.

3. To avoid litigation of the charges in I.93-09-003, Respondents and Staff offered a Stipulation for Settlement which was accepted by the Commission and resulted in D.95-01-034.

4. D.95-01-034 provided for a 90-day suspension of operating rights (stayed subject to observance of the terms of the Stipulation Settlement by Respondents); a two-year probation period; and a $7,000 fine to be paid in ten consecutive installments. In addition, as relevant herein, Respondents further agreed (1) not to allow unlicensed operators to drive their vehicles and to enroll in the DMV Pull Notice Program; (2) to comply with all GO 158 requirements and use only bona-fide employee drivers; and (3) to post representative fares in their vehicles.

5. In 1996 Staff learned that apparently Respondents had not been adhering to their Stipulation Agreement; that they continued to utilize non-employee drivers, lease arrangements, and were engaging in other unlawful practices. Consequently, the Commission issued I.96-10-034.

6. In a Ruling issued February 28, 1997, Assigned Commissioner Duque identified I.96-10-034 as a sample proceeding pursuant to Resolution ALJ-170, and categorized it as "adjudicatory to be processed under the Experimental Rules of Practice and Procedure made applicable for interim management of Commission proceedings under requirements of SB 960 for sample proceedings.

7. Duly noticed public evidentiary hearings were held on September 8, 9, and 10 by the assigned ALJ with submission for decision on October 20, 1997.

8. Of the $7,000 punitive fine ordered by D.95-01-034 for Respondents' prior transgressions under I.93-09-003, Respondents paid $5,600 in reasonably timely fashion, another $700 after submission of the subsequent I.96-10-034 proceeding, but 20 months late, and have not paid the remaining $700.

9. Through at the least a failure to have exercised reasonable care and diligence, Respondents engaged Khanzetyan, an operator with an expired license, to operate its vans, and did not enroll him as well as other drivers in the DMV Pull Notice Program during parts of 1996 when they drove for Airtrans.

10. For at least five months after signing the Settlement Agreement in I.93-09-003, Respondents continued operations with drivers not treated legally as bona-fide "employees," and thereafter, while leasing to at least 1 driver, set up a facade payroll scheme only in part supported by waybill evidence or passenger count information, and used a "for the record" paycheck cashing scheme that was not credible and involved kickbacking procedures.

11. Respondents took inadequate steps to display representative fares, but at least in Ontario even these were not always on display.

12. Respondents' submission to Staff of waybills and checks (without source material) alone could not verify their revenue reports, and Staff auditing using Airport passenger counts indicated that Respondents were reporting less than ½ actual revenues, and underpaying PUCTRA fees.

13. By use of non-bona fide employee drivers Respondents violated LAX Rules and Regulations.

14. While Respondents' drivers in the Ontario area regularly operated beyond the authorized Airtrans' service territory, Respondents, while aware through waybills, took no meaningful steps to stop the practice.

15. In view of continuing knowing and willful nature and scope of their transgressions, to fine and/or suspend Respondents' operating authority would be ineffective. Respondents have provided ample evidence that they are neither capable or willing to operate a passenger stage airport shuttle operation in compliance with the PU Code, the Cal. Veh. Code, Commission decisions, or General Orders, and do not keep their agreements.

Conclusions of Law

1. By not paying the full fine levied for prior transgressions by D.95-01-034, Respondents have disobeyed a Commission order; the terms of their Stipulation Settlement, and their two-year probation.

2. By failing to enroll all drivers operating under their direction and control in the DMV Pull Notice Program, Respondents violated Cal. Veh. Code § 1808.1 as well as Commission GOs 157B and 158, Parts 1.06 and 5.02, actions showing a willful and knowing disdain for the public safety.

3. By engaging drivers not bona-fide employees in their operations, Respondents willfully and knowingly violated provisions of D.95-01-034 and GO 158, Part 5.03.

4. By failing to exercise reasonable care to fully comply with the requirement to conspicuously display representative fares in their vans operating out of Ontario, Respondents violated provisions of D.95-01-034 and GO 158, Part 8.04.

5. By filing revenue reports calculated to understate their actual revenues, thereby avoiding payment of their total PUCTRA fees, Respondents violated PU Code § 1033.5(c)(2).

6. By use of non-bona fide operator or operators at LAX, Respondents violated the LAX agreement covering their operations at the airport; this in turn being a violation of GO 158, Part 3.0.

7. By failing to take reasonable steps to stop drivers operating under their control from serving areas outside the Airtrans authorized service territory, Respondents violated PU Code § 1031.

8. Staff failed to prove that Respondents permitted drivers to drive more than 10 consecutive hours, or for more than 10 hours over a total of 15 hours; accordingly no violation of Cal. Veh. Code § 21702(a) was made.

9. By their various willful and knowing violations of statutory law, the PU Code, Commission orders and General Orders, and failure to keep prior agreements and mend their ways, Respondents have abundantly demonstrated their unfitness to hold and exercise a passenger stage certificate to operate on California streets and highways.

10. The Certificate of Public Convenience and Necessity to operate a passenger stage shuttle van operation in various areas of Southern California (PSC 6369) held by Respondents doing business as Airtrans Express should be revoked immediately.

11. This matter is an enforcement proceeding brought against Khalil Homeidan, Farahat Abdelmalek, Edward Chernyak and Fira Chernyak, a partnership doing business as Airtrans Express, and so the order that follows is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1.

ORDER

IT IS ORDERED that:

1. The Certificate of Public Convenience and Necessity to operate a passenger stage shuttle van operation in various areas of Southern California (PSC-6369) held by Respondents Khalil Homeidan, Farahat Abdelmalek, Edward Chernyak, and Fira Chernyak, a partnership doing business as Airtrans Express, is hereby revoked and annuled, and said Respondents are ordered to cease and desist all passenger stage shuttle van operations thereunder within 7 days from the date hereof.

2. The Executive Director is directed to cause a certified copy of this order to be personally served upon Respondents Khalil Homeidan,Farahat Abdelmalek, Edward Chernyak and Fira Chernyak, partners doing business as Airtrans Express, 9100 South Sepulveda Blvd., #104, Los Angeles, CA 90003.

3. The Executive Director is directed to cause a certified copy of this order to be mailed to the directors of Los Angeles International Airport, Long Beach Airport, John Wayne Airport, Ontario Airport, Burbank Airport, and Los Angeles Harbor, and to the district attorneys of Los Angeles and Orange Counties.

4. I.96-10-034 is closed.

This order is effective today.

Dated June 4, 1996, at San Francisco, California.

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