

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-192
Administrative Law Judge Division
August 24, 2006

RESOLUTION

RESOLUTION ALJ-192 in the Matter of the Appeal of Citation FC-024, dismissing in part and affirming in part, pursuant to Resolution ALJ-187.

Bill Cady, Attorney at Law, Legal Division, for Consumer Protection and Safety Division.

Chris N. Agoh, in pro per, for Chris N. Agoh dba Budget Ride.

Findings of Fact

1. On December 6, 2005, the Commission served Citation number FC-024 (the citation) on Chris N. Agoh dba Budget Ride (respondent). On December 20, 2005, respondent served a Notice of Appeal on the Consumer Protection and Safety Division of the Commission (CPSD).
2. Administrative Law Judge Victor D. Ryerson heard this matter in San Diego on February 10 and March 23, 2006. The hearing concluded and the matter was submitted on March 23, 2006.
3. Respondent is an individual doing business as Budget Ride, a charter-party carrier of passengers. On March 23, 2003, the Public Utilities Commission of the State of California (Commission) granted Class P Charter-Party Permit number TCP 15593-P to respondent. Respondent's permit was due to expire on March 26, 2006, unless respondent renewed the permit after this matter was submitted.

Certain conditions of respondent's permit prohibit respondent from operating any vehicle(s) that are not adequately covered by a public liability and property damage insurance policy or surety bond as required by Public Utilities Code Section 5392; operating any vehicle that does not comply with Commission orders, decisions, rules, directions and requirements governing its operations;

operating any vehicle not named in respondent's most recent equipment list on file with the Commission; and using top lights on its vehicles.

4. In addition to Budget Ride, Chris N. Agoh owns taxicabs operated under the names of two other businesses, Economy Cab and Budget Cab. Budget Cab's operating authority was issued by the Metropolitan Transit Development Board (MTDB) with a limitation that its taxis are not permitted to pick up fares in the City of San Diego.

5. CPSD initiated an investigation of respondent's operating practices after receiving a letter dated April 15, 2004, from John Scott, MTDB's Taxicab Administrative Supervisor, accompanied by a series of photographs of vehicles owned by Chris N. Agoh. The letter reported several incidents in which respondent allegedly used its charter-party vehicles in taxicab service. In response to the letter CPSD commenced an investigation of respondent's operations. Lourdes Garcia, a CPSD investigator, was assigned to investigate respondent's operations to determine if respondent had violated any statutes, rules, or orders administered by the Commission. Her investigation encompassed the period from January 1 through June 30, 2005, and she prepared the citation on the basis of evidence she obtained during this investigation.

6. On May 12, 2005, Garcia met with Chris N. Agoh to review the business records of the respondent. He showed her approximately 20 waybills for respondent's trips during the period under investigation. The form of the waybills he produced listed multiple trips on a single page rather than recording information for each trip on a separate page.

7. At the May 12, 2005 meeting respondent also told Garcia that he did not carry workers' compensation insurance coverage for his three employee drivers. A Worker's Compensation Declaration Form that was signed by respondent on June 16, 2002, and filed with the Commission certifies that respondent had no employees as of that date, and that if respondent subsequently hired employees, respondent would submit an amended declaration form and have a certificate of coverage mailed to the Commission. The Commission received no amended declaration form before the May 12, 2005 meeting. At that time respondent had one or more driver employees.

8. On May 26, 2005, Garcia met with respondent at the Commission's San Diego office. At the meeting respondent admitted to Garcia that he had engaged two drivers without first enrolling them in the Department of Motor Vehicles (DMV) Employee Pull Notice (EPN) program, and told her that he had

enrolled new drivers in the program on May 23, 2005, three days before their meeting.

9. During the investigation Garcia requested information from DMV regarding respondent's participation in the EPN program. DMV furnished two certified lists of enrolled drivers. The first shows that John Agoh and Henry Nduka were enrolled in the program on August 27, 2002, the date that respondent was first enrolled in the program; Chris N. Agoh is not listed. The second lists the names of six drivers who were enrolled in the program: Christopher Agoh, Henry Agoh, John Agoh, James Calvin, Dwayne Chew and Martin Nnoli. Four of these drivers were enrolled in the program on July 13, 2005. Garcia determined that the inclusion of James Calvin in this list was erroneous, as there was no evidence that he had ever been employed by respondent as a driver, and respondent disclaimed any knowledge of him, but that the other drivers were enrolled after they were first engaged to drive respondent's vehicles.

10. Respondent has had a contractual arrangement with the Substance Abuse Evaluation Resource Center (SAERC) since October 15, 2002, under which SAERC conducts the company's substance abuse testing and certification program. Garcia asked SAERC for the names of persons who had received pre-employment testing under the program. In response Ed Gasaway, SAERC's administrative director, furnished a letter on July 15, 2005, listing the names of five drivers who had received pre-employment testing. One of the drivers had not been tested until three months after he started driving for respondent.

11. As of July 12, 2004, the equipment list maintained by the Commission's License Section for respondent showed five vehicles utilized in charter-party operations. An additional vehicle that respondent owned, license number 6Y13067, was not shown.

12. On July 15, 2005, Garcia requested a list from respondent's insurance agent showing all vehicles covered under respondent's public liability and property damage policy. The list she received in response showed three vehicles that were insured. Two other vehicles respondent owned were not. Garcia ascertained from Chris N. Agoh that no other insurance company insured the remaining two vehicles, license numbers 6L01277 and 6Y13607.

13. On June 7, 2005, John McGuire, a Commission investigator, observed respondent's driver Martin Nnoli parked in one of respondent's vehicles (license

plate number 6Y13067) outside the Radisson Hotel in San Diego. McGuire testified that the vehicle had checkered markings like a taxicab on this date. McGuire identified himself to Nnoli and asked if he was on a prearranged charter. Nnoli responded that he was not, and that he was waiting for the bellman to call him. Nnoli was unable to show McGuire a waybill for a prospective prearranged trip. McGuire did not provide any testimony concerning use of the vehicle in the transportation of any passenger.

14. During her investigation, Garcia also reviewed a series of completed trip sheets that listed information for 86 trips conducted by respondent during the period under investigation. These documents are titled "WAY-BILL," bear the name "BUDGET RIDE," and show respondent's TCP number. They contain information about multiple trips on each page. The only information shown for each trip is the date, client's name, trip start, trip end and amount (price).

15. The photographs accompanying MTDB's April 15, 2004 letter show three light-colored Ford Crown Victoria sedans bearing respondent's TCP number and prominently marked, "Budget Ride" on the side door panels. Each of the three vehicles has a hollow sign, triangular in cross-section, mounted on the roof from the windshield to the rear window. The sides of each sign bear advertisements for a software company. The front and rear of each of these signs has an amber "peanut" light or reflector, and two of the signs also have small orange panels on the right and left. There is no lettering indicating that the vehicle is for hire, or identifying it as a taxi. There is no indication whether or not any of these features can be illuminated. None of respondent's vehicles in the photographs was equipped with taxi meters or displayed a rate card, and none had checkered markings.

16. MTDB's April 15, 2004 letter and testimony by MTDB investigator Scott Rains indicate that respondent's drivers were cited on two or three occasions for operating a taxi in the City of San Diego without a license from MTDB. The vehicles involved in these incidents belonged to respondent and bore respondent's TCP number. The only evidence that respondent was convicted in any of these instances for operating a taxi without a permit by reason of using limousines in taxi service is Rains' testimony about the outcome of each San Diego Police citation, and unsupported representations to this effect in the MTDB letter. Respondent and the driver involved in one of the incidents testified that respondent's limousines were not used as taxis. No eyewitness testimony was offered concerning the specific facts and circumstances

concerning any of the San Diego Police Department citations received by respondent.

17. Respondent explains that the objects on the roof of its vehicles were advertising signs, not top lights, and denies that the amber lights or reflectors were ever used to indicate that a vehicle was occupied or in service. On cross-examination Garcia admitted that Chris N. Agoh had shown her a check he had received as advertising revenue for the signs.

18. Chris N. Agoh's explanation for not having a separate waybill for each trip, and for not including information that should have been included in respondent's waybills, was that he did not receive a sample waybill in his informational packet when respondent initially received its permit, and that nobody explained the requirement until after the investigation.

19. Respondent denies that it ever owned more than three vehicles, and claims that all of the vehicles in its service were insured at any given time. These contentions are not supported by the documents in the record.

20. In a letter dated October 12, 2005, CPSD Supervising Investigator Suong Le directed Chris N. Agoh either to remove the top lights (or advertising signs) and any markings that caused respondent's charter-party vehicles to resemble taxicabs, or remove the TCP number from the vehicles, delete them from the equipment lists on file with the Commission, and cease operating them in charter-party service. Respondent promptly complied with these instructions by removing the devices from the top of its vehicles. Garcia's photographs of the vehicles following removal of the devices from the vehicles' roofs show them adorned only with the "Budget Ride" name and logo, and a patriotic flag design on the side, and show the TCP number displayed on their bumpers.

21. Respondent has no previous history of discipline by the Commission.

Conclusions of Law

1. Public Utilities Commission General Order (GO) 157-D, Item 3.03, prohibits a carrier licensed by the Commission from engaging in taxicab transportation service licensed and regulated by a city or county, and specifically prohibits the carrier from using vehicles which have top lights and/or taxi meters. Although there are strong indications that respondent might have engaged in providing transportation without the prearrangement required by its

charter-party permit, the evidence of such activity is not substantial enough to support a citation.

There is no substantial evidence that any of the City of San Diego citations for engaging in unlicensed taxi service (i.e., provision of taxi service using respondent's charter-party vehicles) resulted in a conviction, even though such information is readily available from certified court records. MTDB investigator Rains' testimony did not include specific details about what he may have observed during the arrangement of transportation or payment, or about other details of respondent's passenger engagements. Inaccuracies in his testimony about the vehicles' appearance and the identity of a driver affect his credibility. His testimony about the activities he observed is insufficient to support the allegation that respondent was operating as a taxi service, and there was no testimony given by any police officer who issued a citation to respondent.

Although CPSD investigator McGuire personally observed one of respondent's drivers waiting in one of its vehicles outside the Radisson Hotel, and although the driver could not produce a waybill for a charter, these facts alone do not make out a case that respondent was conducting a taxi service. There was no passenger; there was no trip; and there was no admission on the part of the driver that he was waiting to pick up a fare. The driver only stated that he was waiting for the bellman to call him, which is ambiguous and therefore insufficient to show the necessary intent.

CPSD relies heavily upon the resemblance of respondent's vehicles to taxicabs to show that respondent intended to deceive the public and operate as a taxi service. The principal fact that CPSD relies upon to support this contention is the use on the vehicles of what CPSD characterizes as top lights. Respondent denies that the devices were top lights, and claims that they were essentially small advertising billboards. MTDB's photographs of respondent's vehicles show that the devices resembled those on some taxicabs, and it is conceivable that they could have caused some confusion on the part of the public. But the photos also support respondent's testimony that the devices were merely advertising signs for software, an unrelated product. They did not include the name of the company, and did not serve as beacons to attract potential customers to flag down respondent's vehicles. Respondent's testimony that the amber reflectors or lights were not used, or did not indicate the availability of the vehicle for hire, is credible, and there is no testimony to the contrary.

Rains' testimony that respondent's vehicles were adorned with taxicab-style checkered markings is apparently the product of misperception, confusion with Budget Cab's vehicles or faulty memory, and is not credible. There is no indication in the photographs that any of respondent's vehicles had such markings, and respondent denies that they ever did.

Even though the make, model, color and names on the vehicles operated by Chris N. Agoh's charter-party carrier and taxicab companies may have been similar (and possibly confusing), this does not constitute an impermissible taxicab operation by the respondent. To prove such a violation there must be a showing of engagement by a passenger other than by prearrangement, or acceptance of a metered fare, indicia of a true taxicab service. This is reflected in the equipment prohibitions set forth in Commission GO 157-D, as the prohibited features are those designed to attract and serve customers who hail a vehicle for hire rather than arranging transportation in advance.

Appearances may be deceptive, but they do not make respondent's activities impermissible without an additional showing of misconduct or specific intent to engage in misconduct. That showing is not present here. There is no "smoking gun," and the circumstantial evidence is not strong enough to prove that a violation occurred. Cause therefore does not exist to cite respondent as alleged in paragraph 1 of the citation.

2. Public Utilities Code Section 5378.1, subdivision (a), requires every charter-party carrier to file with the Commission either proof of workers' compensation coverage for its employees, a certification of consent to self-insure issued by the Director of Industrial Relations, or a statement under penalty of perjury that it does not employ any person in any manner so as to become subject to California's workers' compensation laws. Subdivision (c) requires a charter-party carrier that has filed a statement that it has no employee requiring coverage promptly to withdraw that statement and simultaneously file a certificate of coverage or consent to self-insure. Cause exists to cite respondent for violating this statutory requirement by reason of Findings of Fact 3 and 7.

3. Public Utilities Code Section 5374, subdivision (a)(2), GO 157-D, Item 5.02, and Vehicle Code Section 1808.1 require a charter-party carrier to enroll every driver in the DMV Pull Notice System. Cause exists to cite respondent for violating this requirement by reason of Findings of Fact 3, 8, and 9.

4. Public Utilities Code Section 5374, subdivision (a)(2), and GO 157-D, Part 10, require a charter-party carrier to enroll every driver, and conduct pre-employment testing of every driver, as part of a Controlled Substance and Alcohol Testing Certification Program. Cause exists to cite respondent for this violation by reason of Findings of Fact 3 and 10.

5. Public Utilities Code Section 5387 and GO 115-F require a charter-party carrier to procure specified public liability and property damage insurance coverage. Cause exists to cite respondent for violating this statutory requirement by reason of the facts set forth in Findings of Fact 3, 11, 12 and 19.

6. GO 157-D, Item 4.01, requires a charter-party carrier to report all equipment operated. Cause exists to cite respondent for violating this requirement by reason of Findings of Fact 3, 11, 12 and 19.

7. GO 157-D, Item 3.01, requires a charter-party carrier to provide transportation only on a prearranged basis, and further requires the driver to possess a waybill that includes the following information:

- Name of carrier and TCP number;
- Vehicle license plate number;
- Driver's name;
- Name and address of person requesting or arranging the charter;
- Time and date when the charter was arranged;
- Whether the transportation was arranged by telephone or written contract;
- Number of persons in the charter group;
- Name of at least one passenger in the traveling party, or identifying information of the traveling party's affiliation; and
- Points of origin and destination.

These requirements are intended as a means of documenting that the operations of a charter-party carrier are consistent with the operating authority it has received from the Commission, and different from the operations of taxicab operators who may serve the same geographical area.

Cause exists to cite respondent for violating the waybill recordkeeping requirements of GO 157-D, Item 3.03, by reason of the facts set forth in Findings of Fact 3, 6, 13, and 14. Respondent's explanation that he was ignorant of these requirements because he had not received a copy of the correct waybill format before the investigation does not constitute an excuse for his failure to comply. Particularly in light of the fact that he is personally licensed, Chris N. Agoh is presumed to know about respondent's obligations in this respect. The drivers employed by respondent should also be fully aware of these requirements. The absence of adequate waybill documentation has made the regulation of respondent's activities more difficult, and has enhanced the perception that respondent may have engaged in impermissible taxicab operations, whether or not that is true.

8. The matters set forth in Conclusions of Law 2 through 7 additionally violate Conditions of Permit TCP 15593-P.

9. In summary, we cannot conclude that respondent engaged in impermissible taxi service by using its charter-party vehicles for such a purpose. Even though this conclusion may be inconsistent with the result in one or more of the City of San Diego's citation cases, proof of the outcome of those cases is insufficient. It is clear, however, that respondent at very least has not been properly maintaining records concerning its various activities, or properly reporting its activities to the Commission. This has frustrated the Commission's responsibility to safeguard public safety and welfare. Respondent has also avoided complying with worker's compensation and public liability and property damage insurance requirements (presumably because full compliance would have engendered additional cost), contrary to its responsibility to the public. These matters are serious, and cannot be excused on the basis of ignorance or lack of sophistication. The Commission and the legislature have adopted these requirements after due deliberation, and they may not be ignored.

10. In recognition of the insufficiency of evidence that respondent engaged in taxi service, paragraph 1 of Citation FC-024 should be dismissed. Although respondent denies that it engaged in taxi service or that its vehicles resembled taxis, it nevertheless complied immediately with CPSD's instructions to remove the roof signs or cease charter-party operations, and respondent was cooperative throughout the investigation. In light of these circumstances the fine should be reduced from \$2,500.00, as proposed, to \$2,000.00.

Comments

This Resolution was issued for public review and comment in accordance with Public Utilities Code Section 311, subdivision (g). CPSD filed opening comments. Respondent did not serve reply comments.

CPSD disagrees with the conclusion that substantial evidence fails to support the allegations that respondent engaged in impermissible taxi service. The strongest direct evidence that respondent did so is a copy of a San Diego Police Department citation sponsored by a non-percipient MTDB witness, which contains a notation by the issuing police officer that an unnamed pedestrian “at the front door” said he had flagged over respondent’s vehicle. Otherwise, CPSD’s case is principally founded upon the circumstance that certain of respondent’s vehicles were equipped with an apparatus on the roof that carried software advertisements, and that some taxis are also equipped with such devices.

The written entry on the citation is an ambiguous double-hearsay statement that cannot be relied upon to support the allegation. At very least the written entry would have to be explained by the issuing officer to make it intelligible and reliable. This could be done at the hearing, or by declaration or deposition testimony.

Respondent’s un rebutted testimony was that the devices on the roofs of the vehicles in question were not top lights and were not utilized to enable passengers to flag down the vehicles.

There is no direct evidence that respondent actually provided taxi service except as noted above. The conclusions we have reached are not erroneous. Consequently, this Resolution has not been altered in response to CPSD’s comments.

IT IS THEREFORE RESOLVED that:

1. Citation FC-024 is affirmed except as provided herein.
2. Paragraph 1 of the citation is dismissed.
3. Respondent Chris N. Agoh dba Budget Ride shall pay a fine of \$2,000.00 pursuant to Public Utilities Code Section 5378 within 30 days of the effective date of this Order. Payment shall be made by check or money order payable to the California Public Utilities Commission and sent to the Commission’s Fiscal Office, 505 Van Ness Avenue, San Francisco, California 94102. Upon payment

the fine shall be deposited in the State Treasury to the credit of the General Fund and this Citation shall become final.

4. If respondent fails to pay the fine as provided herein, the Commission's Consumer Protection and Safety Division shall immediately revoke permit number TCP 15593-P, and may take any other action provided by law to recover the unpaid fine and ensure compliance with applicable statutes and Commission orders.

This resolution is effective today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on _____, by approval of the following Commissioners:

STEVE LARSON
Executive Director