Decision 01-11-002 November 8, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Order Instituting Investigation and Order to Show Cause on the Commission's Own Motion Into the Operations and Practices of Federation Moving Services, Inc., a California Corporation, and its President, Elijah Green.	Investigation 00-05-019 (Filed May 18, 2000)

Travis Foss, Attorney at Law, and William Waldorf,
for Consumer Services Division

OPINION AND FINAL ORDER REGARDING FEDERATION MOVING SERVICES ET AL.

Summary

The household goods carrier permit of Federation Moving Services, Inc. (Federation), File No. T-189,080, is permanently revoked. Respondent Elijah Green (Green), Federation's President and Chief Executive Officer (CEO), is barred from applying, on behalf of himself or any entity, for authority to engage in business as a household goods carrier, unless this order is first modified pursuant to Rule 47 of our Rules of Practice and Procedure (Rules), or any successor to that Rule. Investigation (I.) 00-05-019 is closed.

Background and Procedural History

Federation is licensed as a household goods carrier. Green is the Qualifying Employee for the corporation under the Commission's licensing procedure. Federation has engaged in the business of moving used household goods since we granted its current operating authority on September 10, 1998. Previously, the company was operated as a partnership in which Green was one of the two partners.

On May 18, 2000, we issued an Order Instituting Investigation and Order to Show Cause (OII) in response to declarations filed by William C. Waldorf and Christy Jackman, investigators with our Consumer Services Division (CSD) staff, that indicated Federation and Green may have violated:

1. Pub. Util. Code § 5314.5 by advertising and holding out to the public that they are in operation as a household goods carrier, without a valid permit issued under Chapter 7 of the Pub. Util. Code.
2. Pub. Util. Code § 5139 and General Order (GO) 100-M by failing to procure, and to continue on file and in effect while conducting operations as a household goods carrier, adequate protection against liability, as imposed by law upon carriers.
3. Pub. Util. Code § 5286 by conducting operations as a household goods carrier after the suspension and revocation of their permit.
4. Pub. Util. Code § 5135 by failing to divulge to the Commission the criminal record and two counts of felony conviction of the Chief Executive Officer of Federation Moving Services, Inc.
5. Pub. Util. Code § 5139 by failing to furnish to each prospective shipper a copy of the information specified in Item 470 of Maximum Rate Tariff (MAX) 4, in violation of Item 88 of MAX 4.
6. Pub. Util. Code § 5245 by charging in excess of the maximum allowable charge on estimated services, and failing to issue a change order for increased charges in violation of Items 108 and 120 of MAX 4.
7. Pub. Util. Code § 5139 by failing to show required information, including a Not To Exceed Price, on its

shipping documents in violation of Items 128 and 132 of MAX 4.

8. Pub. Util. Code § 5139, and Item 92 of MAX 4, by failing to acknowledge and process loss and damage claims in a timely manner.
9. Pub. Util. Code § 5139 by permitting drivers, helpers, or packers who were not adequately supervised to work, in violation of GO 142.

Our Order initiated a formal investigation of these alleged violations and directed an administrative law judge (ALJ) to hold a hearing expeditiously at a time and date to be set at the prehearing conference (PHC). The OII ordered the respondents to appear and show cause why Federation's permit should not be revoked in view of these alleged violations. The OII was personally served on Green on May 25, 2000.

On June 21, 2000, ALJ Ryerson, the assigned ALJ, convened a PHC pursuant to a notice served June 9. The respondents failed to appear. The ALJ noted for the record that Green had contacted him by telephone late in the preceding afternoon and reported that he had hurt his back. ALJ Ryerson directed Green to talk to counsel for CSD, who reported at the PHC that Green had referred him to an attorney, with inconclusive results. In light of the uncertainty of Green's representation or intentions with respect to the OII, the ALJ continued the PHC for two weeks.

Following the PHC, ALJ Ryerson immediately wrote a letter to Green notifying him of the continued date and time of the PHC, and further advising him that he would either have to attend by representative or in person. The letter further advised Green that if he intended to represent himself he would have to do so in person unless he furnished a timely letter from a doctor indicating that he would be unable to do so. In the event that he could not attend personally, the ALJ indicated that he would have to do so by telephone.

The respondent failed to appear either in person or by representative at the continued PHC on July 5, 2000. The ALJ set an evidentiary hearing (EH) for July 18. The EH convened at the noticed date and time after written notice was mailed to the respondent. The EH concluded after one full hearing day. The respondent again failed to appear, but the ALJ permitted CSD to put on its case. After presenting the testimony of Waldorf and Jackman, CSD moved to have all of its exhibits received for the record. The ALJ took the motion under submission, having advised CSD's counsel that irrelevant, cumulative, and prejudicial matter would not be received in evidence.

On July 31, the ALJ issued a Ruling that addressed matters pending at the conclusion of the EH, including the admission of exhibits. The Ruling established a briefing schedule and the submission date, and identified the exhibits, or portions thereof, which were admitted for the record. In response, CSD filed a motion on August 18 requesting interlocutory review of the ALJ's Ruling. CSD's motion seeks to have the Commission reconsider the Ruling and admit all of CSD's testimony and exhibits into evidence.

On August 21 CSD filed its brief in accordance with the briefing schedule established by the Ruling. No brief was filed by the respondents, and the proceeding was submitted on September 5, 2000, as specified in the Ruling.

The Evidentiary Issue

CSD relies largely upon the ex parte nature of the EH to support its position that essentially all of the exhibits it tendered should have been received in evidence. The only items CSD concedes were properly excluded are exact duplicates of documents already included in another exhibit that was, or in its view should have been, admitted. CSD argues that even CSD's cover sheets and indexes should have been admitted because they would be "helpful in providing guidance to the Commission."

CSD argues that the respondents' failure to appear and object to any of the tendered evidence operates as a complete waiver of their right to do so. Thus, in CSD's view, anything it offered should have been received automatically. CSD also argues that the ALJ's failure to (1) object to the evidence when offered, and (2) articulate the specific reason for excluding each item that was not admitted deprived CSD of its due process rights. Finally, CSD argues that the ALJ's evidentiary ruling, "more importantly, sends a disturbing signal to the Commission's enforcement program, and to the practice of serving prepared direct testimony on the opposing party. . . . "

CSD's argument overlooks the role performed by the ALJ in Commission proceedings, as well as the specific manner in which ALJ Ryerson carried out his duties in this proceeding. Under Section 311(b) of the Pub. Util. Code the ALJ may examine witnesses and receive evidence under rules that the Commission adopts. In any hearing over which the assigned ALJ presides, (s)he "may receive and exclude evidence offered in the hearing in accordance with the [Commission's Rules]." Rule 58 allows the ALJ at the EH to limit the number of witnesses or the time for testimony upon a particular issue in order to "avoid unnecessary cumulative evidence." Rule 63 allows the ALJ to control the course of the EH; receive evidence; rule upon all motions which do not involve final determination of the proceeding; and "take such other action as may be necessary and appropriate to the discharge of his or her duties, consistent with [controlling statutes and the Rules]."

Rule 64 specifically excuses the ALJ from ordinarily having to comply with technical rules of evidence at the EH, as long as substantial rights of the parties are preserved.[1] Rule 69 states that if matter other than relevant and material matter is embraced in a document offered in evidence, the document will not be received in evidence, but *at the discretion of the presiding officer*, the relevant and material matter may be read into the record or copies thereof received.

Taken together, these various provisions of the Code and our Rules do not merely afford the ALJ broad discretion to admit or exclude testimony and documentary exhibits, but plainly create a preference for excluding matter which is irrelevant, immaterial, or cumulative. The ALJ must also exercise his or her discretion to ensure basic fairness for all parties who choose not to be present. This may require the ALJ to exercise his or her discretion to exclude evidence which is more prejudicial than probative, even when relevant to a material issue. The assigned ALJ, as the Commission's delegated finder of fact in any proceeding, thus has full authority to create the record for the Commission, as long as the substantial rights of both parties are preserved.

Examination of the matter ALJ Ryerson received for the record and that which he excluded reveals that the latter was rationally selected for the reasons he had advised CSD's counsel throughout the course of the EH: it was irrelevant, cumulative, or highly prejudicial to the respondent. Although the respondent was not present to object, this fact alone did not give CSD free license to have every potentially relevant item of evidence received.

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[1] This Rule implements identical language in Pub. Util. Code Section 1701 (a). That section also states: "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any Commission order or decision."

The record before us is a body of evidence which fairly and rationally supports the result we have reached in our order. Not only was the respondents' right to a fair hearing safeguarded, but the substantial right of CSD to present relevant, material evidence in support of its case has also been preserved. We will not disturb ALJ Ryerson's Ruling on the admission of CSD's evidence.[2]

Discussion

The evidence of record, which is entirely uncontroverted, amply demonstrates that the respondents have committed serious violations of the Household Goods Carriers Act, Pub. Util. Code § 5101 et seq. These violations are sufficiently serious to justify permanent revocation of Federation's operating authority. Discussion of our decision follows, but inasmuch as the respondents failed to appear and contest or explain the evidence offered by CSD, we need not explain the basis for our findings in great detail.

First, there is substantial and uncontrovertible evidence that Green, as CEO of Federation and its only Qualifying Employee, more than once certified in his application documents that he had not been convicted of committing any felony or crime involving moral turpitude at the time he applied for operating authority. He made these representations in writing under penalty of perjury. In fact, Green had previously been convicted of two counts of robbery under

[2] If the ALJ's Ruling sends a "signal to the Commission's enforcement program," we emphasize that signal is that enforcement program participants must be appropriately selective in the evidence they offer at the hearing. The investigative file may be broader and more inclusive than what should comprise the Commission's formal record. Enforcement personnel should observe this important distinction in future enforcement proceedings, and should not offer the entire investigative file, irrespective of the absence of indicia of reliability for much of its contents.

Penal Code § 211, a crime which is not only a felony, but also involves the theft of property. These convictions relate directly to his fitness to take custody of the property of others, and his failure to disclose them relate to his honesty in dealing with the Commission. Although the application form provided for him an opportunity to disclose and explain his felony history, Green chose not to do so. His application contains a serious material misrepresentation, sufficient in itself to justify revocation of Federation's operating authority.

The record is also replete with evidence that up to the time of the EH, Federation persisted in performing household goods moving services, and holding itself out to potential customers as being authorized to do so, during periods when its license was either suspended or revoked for failure to maintain or report public liability and property damage insurance as required by the Commission. Our insurance requirements are the linchpin of our program to insure that members of the public do not suffer harm at the hands of household goods movers, who assume custody of their customers' most essential personal possessions when performing moving services. We regard violations of these requirements, particularly repeated ones, as an extremely serious matter with immediate bearing upon the carrier's fitness to operate. Federation's flagrant failure to obey our notices and suspend operations on more than one occasion illustrates its total contempt for consumer protections under the Used Household Goods Carriers Act. This conduct also justifies revocation of Federation's operating authority in the absence of any explanation which might exculpate Federation.

Finally, the record reveals egregious incidents where the respondents abandoned their responsibility to process loss and damage claims. In one particularly shocking instance Green overturned a truckload of customers' belongings in transit, fled from the scene, and refused to handle the ensuing claim, forcing the customers to bring a civil action in court to recover their possessions and seek damages.[3]

We cannot tolerate any household goods mover who engages in such behavior, because the risk to the public is simply too great. Our order grants CSD's request to revoke Federation's authority permanently, and bars Green from obtaining new authority unless this order is modified pursuant to Rule 47.

Appeal

CSD has appealed the portion of the presiding officer's decision that denies the admission of portions of CSD's investigative files, which were tendered in their entirety without any effort to remove documents that are irrelevant, immaterial, or unjustifiably prejudicial. With the exception of correcting a typographical error, we will deny the appeal.

The material issues in this proceeding are explicitly set forth in the OII, the substance of which we have already summarized above. It is clear to us upon reviewing the excluded evidence and the OII that the ALJ acted properly in refusing to receive the disputed items for the record, and that he had the discretion to do so. Many of the excluded documents are cumulative or share a common problem, so we will not discuss each one. It will suffice to provide a few examples of the kinds of items offered and explain the reasons we uphold their exclusion.

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[3] Indeed, Green frequently exhibited disturbingly erratic behavior in the conduct of his business, creating very difficult problems for Federation's customers and others. On one occasion Green literally hijacked a truckload of personal goods belonging to the customer of another mover, holding the goods hostage in an effort to resolve a business dispute he had with the other mover.

CSD's investigative files consist of the declarations of Christy Jackman, CSD's investigating Special Agent, and her supervisor, William G. Waldorf, with a series of documents attached to each. The documents, organized under lettered divider tabs, include Commission licensing records, various Superior Court and Municipal Court criminal and civil records and docket cards, Department of Motor Vehicle licensing records, correspondence, and declarations of witnesses who were not present at the hearing, as well as other items. Many identical documents are attached to both of the declarations. CSD asserts that even the document cover sheets and indexes, which were created by CSD, should have been received because they are "relevant for the reason that they tend to assist the finder of fact in examining the record." (Appeal, p. 4.)

CSD's effort to offer indiscriminately such documents as entire court files unearthed in its investigation is misguided. Docket cards, sentencing records, rap sheets, criminal complaints, copies of unpublished appellate opinions, and the like may lead an investigator to locate relevant evidence that is admissible at the hearing, but such documents should not automatically be received for our record. What was at issue in this investigation was whether the respondent on specific occasions violated specific rules and regulations we administer, not whether he had committed crimes or civil wrongs on other occasions that were unrelated to the allegations in the OII.

Some of the proffered material, which we will not describe in detail, is particularly noteworthy, because it is far more prejudicial than probative of any violation alleged in the OII. The most egregious example is a double hearsay declaration by a disgruntled former employee, who stated that he knew the respondent "had a problem with crack cocaine," and that he had seen the respondent enter a crack house in 1999. His declaration, which was attached to the investigators' declarations, further states, "I believe that Green went in to buy some crack. Green asked me for money and admitted to me that he was addicted. Green told me that he had been addicted to crack for a long time." CSD insists that this declaration, and other documents that similarly have little independent support for their reliability, should be received as part of the record to demonstrate that the respondent is unfit and should have his license revoked. Due process prevents us from relying upon such incompetent, irrelevant, and immaterial evidence, particularly in the absence of the respondent.

In this investigation, and in every investigation, due process requires that our decisions in cases such as this be based on reliable evidence that pertains specifically to the alleged violations of rules set forth in our order. An investigative file is nothing more than that, and is not a substitute for prepared testimony or properly authenticated, competent documentary evidence. From the documents and declarations tendered by CSD the ALJ found enough competent evidence to support his proposed order. This is sufficient; we will not overturn his evidentiary ruling for the sole purpose of retracting a message intended to discourage an unsound litigation practice. The appeal is denied.[4]

Findings of Fact

1. In applying for Federation's current operating authority, as well as on at least one prior occasion, respondent Green represented to the Commission in writing, under penalty of perjury, that he had not been convicted of committing any felony or crime involving moral turpitude.

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[4] CSD criticizes the use of the word "prescribed" in the fourth line of page 7. This is a typographical error that survived the editing process. The correct word is "preserved." We have corrected this error in our final decision.

2. At the time he made the written representations referred to in the preceding paragraph Green had previously been convicted of two counts of robbery in violation of California Penal Code § 211, a felony.

3. On more than one occasion after Federation received its current operating authority, T-189,080, on September 10, 1998, Federation has conducted business as a used household goods mover during periods of administrative suspension or revocation of its operating authority for failure to maintain or report insurance coverage as required by statute and by Commission rules.

4. During periods of suspension or revocation Federation held out to the public that it was properly licensed and qualified to engage in the business of a used household goods carrier.

5. On more than one occasion since Federation received its current operating authority, respondents have failed to acknowledge and process loss and damage claims in a timely manner, as required by statute and by Commission rules.

6. Federation has failed, on more than one occasion documented by the record, to furnish to a prospective shipper a copy of information concerning consumer rights as specified in Item 470 of MAX 4.

7. Respondent Green failed to appear personally or by representative at the evidentiary hearing in this proceeding.

Conclusions of Law

1. CSD's motion for the Commission to reconsider the ALJ's July 31, 2000, Ruling with respect to the exclusion of certain evidence should be denied.

2. The respondents have violated Pub. Util. Code § 5314.5 by holding out to the public that Federation was a household goods carrier without possessing a valid permit.

3. The respondents have violated Pub. Util. Code § 5139 and GO 100-M by failure to procure, and to continue on file and in effect while conducting operations as a household goods carrier, adequate protection against liability, as imposed by law.

4. Respondent Green has violated Pub. Util. Code § 5135 by failing to divulge to the Commission his convictions of two counts of robbery in violation of Penal Code § 211 prior to submitting licensing applications to the Commission.

5. Federation violated Pub. Util. Code § 5139 by failing to furnish to each prospective shipper a copy of the information specified in MAX 4, in violation of Item 88 of that tariff.

6. Federation violated Pub. Util. Code § 5139 and Item 92 of MAX 4 by failing to acknowledge and process loss and damage claims in a timely manner.

7. By failing to appear at the EH in this proceeding, Green violated Ordering Paragraph number 1 of the OII.

8. Public health and safety require that respondents' operating authority be revoked, and that this revocation and other provisions of today's order be made effective immediately.

9. CSD's appeal of the presiding officer's decision should be denied to the extent that it seeks to overturn his July 31, 2000, Ruling.

O R D E R

IT IS ORDERED that:

1. The motion by the Consumer Service Division for review and reconsideration of the ALJ's July 31, 2000 ruling is denied.

2. The household goods carrier permit of respondent Federation Moving Services, Inc., File No. T-189,080, is permanently revoked for cause.

3. Respondent Elijah Green is barred from applying, on behalf of himself or any entity, for authority to engage in business as a household goods carrier, unless this order is first modified pursuant to Rule 47 of our Rules of Practice and Procedure, or any equivalent rule of this Commission which may then apply.

4. CSD's appeal is denied to the extent that it seeks to overturn the presiding officer's July 31, 2000, Ruling.

5. Investigation 00-05-019 is closed.

This order is effective today.

Dated November 8, 2001, at San Francisco, California.

LORETTA M. LYNCH
President

RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.