

STATE OF MICHIGAN
COURT OF APPEALS

FEDERAL ARMORED SERVICE, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

UNPUBLISHED
July 26, 1996

No. 172844
LC No. 00013501

FEDERAL ARMORED SERVICE, INC.,

Appellant/Cross-Appellee,

v

CITY TRANSFER CO., INC. and LOOMIS
ARMORED, INC.,

Appellees-Cross-Appellants,

and

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

No. 172845
LC Nos. 00013501;
000T-1213

FEDERAL ARMORED SERVICE, INC.,

Appellant,

v

No. 172846
LC No. 00023409

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

FAS-LAR, INC., et al.,

Appellants,

v

No. 173034
LC Nos. 00013501;
000T-1213

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

Before: Gribbs, P.J., and Hoekstra and Charles Stark,* JJ.

PER CURIAM.

In Docket Nos. 172844, 172845, and 172846, plaintiff Federal Armored Service, Inc. (Federal) appeals orders entered by the Michigan Public Service Commission (PSC) on December 20, 1993, January 7, 1994, and February 9, 1994. In Docket No. 173034, plaintiffs Fas-Lar, Inc. (Fas-Lar), et al. appeal the PSC's December 20, 1993 and February 9, 1994 orders. In a cross-appeal in Docket No. 172845, defendants City Transfer Co., Inc. (City Transfer) and Loomis Armored, Inc. (Loomis) appeal the PSC's December 20, 1993 and February 9, 1994 orders. We affirm in all cases.

Federal is a for-hire carrier engaged in the transportation of certain commodities, including cash, commercial paper, and other valuables, between points in Michigan and several locations in northern Indiana. The majority of Federal's movements are carried out via ground-based vehicles, such as armored cars; however, Federal also has an air division.

Fas-Lar is the sole shareholder of Federal. Fas-Lar has eight shareholders, Harry and Jo Ann Larkin, Mike and Sue Larkin, Bill and Mary Larkin, and Robert and Marlene Larkin.

*Circuit judge, sitting on the Court of Appeals by assignment.

The Michigan Motor Carrier Act (MCA), MCL 475.1 *et seq.*; MSA 22.531 *et seq.*, regulates the for-hire transportation of property by motor vehicle in Michigan intrastate commerce. As of late 1991, Federal and its predecessor had held MCA authority for over 20 years. In addition, Federal held air carrier authority pursuant to a certificate issued by the Federal Aviation Administration.

On December 31, 1991 Federal's MCA authority was revoked by operation of law for failure to renew. MCL 479.10; MSA 22.575. Federal filed applications to reinstate its authority, and continued to operate under temporary authority. That temporary authority allowed Federal to serve the shippers it previously served, but not to expand.

On September 3, 1992 City Transfer filed a complaint against Federal. The complaint alleged, *inter alia*, that Federal performed unauthorized moves, failed to charge its customers in accordance with published tariffs, failed to prepare appropriate shipping documents, illegally interlined traffic with another courier, and engaged in deceptive practices by alleging preemption of strictly ground movements.

Federal's application for renewal of authority and City Transfer's complaint were consolidated. While the cases were pending, the PSC issued an order in *In the Matter of Federal Armored Service, Inc*, Case No. 23409 (Case No. 5). Case No. 5 dealt with an application by Federal to extend its authority. In that case, Federal contended that the PSC had no authority to regulate the transportation of property by motor vehicle if that service was incidental to continuous transportation by air. Relying on 49 USC 1305(a)(1), which precludes states from enacting any law, regulation, etc. "relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation," and *Federal Express Corp v California Public Utilities Comm*, 936 F2d 1075 (CA 9, 1991), which held that the use of motor vehicles as an integral part of an air delivery system is within interstate commerce and is not subject to state regulation, the PSC found that Federal's rates and billing practices for its air-ground service were not subject to its jurisdiction and that instances of noncompliance were irrelevant to a determination of fitness. The PSC found that the record demonstrated the existence of a number of ground-based violations, including billing not in compliance with published tariffs, and improper billing and documentation practices. The PSC granted the application for extension of authority, but assessed Federal \$10,000 for its violations of the MCA, the PSC rules, and the published tariffs. City Transfer claimed an appeal. In *City Transfer Co v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, decided March 2, 1994 (Docket No. 156558), this Court affirmed the PSC's decision.

The Motor Carrier Enforcement Division of the Michigan State Police conducted an investigation in City Transfer's complaint case against Federal. Based on the results of that investigation, the PSC Staff alleged that Federal knowingly and intentionally conducted illegal operations and disregarded the MCA and PSC rules.

In a proposal for decision (PFD) issued on August 2, 1993 the administrative law judge (ALJ) focused in particular on Federal's armored car service. The ALJ limited its examination to Federal's work for a single shipper, Paychex, during the period February 5, 1992 through May 7, 1993. This period represented the time from the close of Case No. 5 through the close of the record in the instant proceeding. The ALJ reviewed representative records from March, July, and October of 1992.

The ALJ found that Federal committed 23,975 violations. These violations fell into various categories: (1) recordkeeping violations of MCA rules; (2) operations beyond the commodity and territorial scope of its existing authority; (3) tariff violations involving failure to assess and collect charges in accordance with published tariffs; (4) the giving of unlawful rebates and concessions; (5) falsification of records for the purpose of creating the false impression of good faith; (6) unlawful interlining service; (7) failure to obtain PSC decals; and (8) conduct constituting a subterfuge to evade the MCA and PSC rules, including the attempt to coerce a shipper. The ALJ recommended an assessment of \$1 million. Rejecting Federal's argument that it had made a good faith effort to bring its operations into compliance, the ALJ recommended that Federal's application be denied, that its present authority be suspended for two years, and that a moratorium on new applications be imposed for two years.

In an order dated December 20, 1993 the PSC denied Federal's application and granted City Transfer's complaint. Stating that the threshold issue in the case was whether federal law preempted state regulation of Federal's intrastate motor carrier operations, the PSC noted that 49 USC 1305(a)(1) provided in pertinent part:

Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The PSC acknowledged that Federal held a certificate issued by the Federal Aviation Administration which qualified it to operate as an air carrier. In addition, the PSC acknowledged that in Case No. 5, it found that §1305(a)(1) and *Federal Express, supra*, supported a finding that Federal's rates and billing practices in its air-ground service could not be regulated by the state. Based on *Federal Express, supra*, §1305(a)(1) (the application of which the PSC found was not limited to interstate air service), and *Morales v Trans World Airlines, Inc*, 504 US 374; 112 S Ct 2031; 119 L Ed 2d 157 (1992), in which the Supreme Court held that the words "relating to" in §1305(a)(1) were to be broadly construed, the PSC rejected the argument made by its Staff and other parties that its holding in Case No. 5 regarding preemption of regulation of Federal's air-ground service should be overruled.

The PSC rejected Federal's argument that all of its movements in Michigan, including strictly ground-based movement, were preempted by §1305(a)(1) simply because it was an air carrier. The

PSC found that Federal did not operate an integrated air-ground delivery system. The evidence showed that Federal's motor vehicle operations were far more extensive than its air operations, and that Federal was a motor carrier with an air division. Only 35% of Federal's customers made any use of its air service.

The PSC specifically rejected Federal's argument that its status as an air carrier was all that was necessary to preempt state regulation of all of its operations, including strictly ground-based movements. The PSC found that *Morales, supra*, was distinguishable. The *Morales* Court held that under §1305(a)(1), states were precluded from prohibiting deceptive airfare advertisements through enforcement of consumer protection statutes because such regulation related to a carrier's air rates, air routes, and air services. The *Morales* Court determined that the phrase "relating to" in §1305(a)(1) should be broadly construed; however, the Court addressed only air-related operations of a carrier, and did not discuss state regulation of non-air operations conducted by a carrier. The PSC found that *Morales, supra*, did not hold that a carrier's strictly ground-based activity could not be regulated by the state. The PSC rejected Federal's argument that the holding in Case No. 5 in effect adopted the "status" argument.

The bulk of the PSC's December 20, 1993 order dealt with the issue of Federal's fitness to act as a common carrier. The PSC did not examine those operations found to be preempted from state regulation. The PSC found that the ALJ's finding that Federal committed numerous violations in various categories was supported by the requisite evidence. The PSC granted City Transfer's complaint, denied Federal's application for authority to extend its operations, and imposed an assessment against Federal in the amount of \$200,000. The PSC imposed the assessment against Federal, its shareholder Fas-Lar, and Fas-Lar's individual shareholders, jointly and severally. Federal was ordered to refrain from filing new applications for one year.

In an order entered on January 7, 1994 the PSC granted Federal temporary authority to operate through February 11, 1994, provided that Federal cease and desist from further violations of the law. The PSC extended Federal's authority in order to provide shippers with additional time to find alternative transportation services.

Federal filed a motion for reconsideration of the PSC's December 20, 1993 order and a motion for immediate consideration. In an order entered on February 7, 1994 the PSC denied the motions.

The Principal Appeals

The standard of review for PSC orders is narrow and well-established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Commission*, 389 Mich 624; 209 NW2d 210 (1973). A

party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term “unlawful” has been defined as an erroneous interpretation or application of the law, and the term “unreasonable” has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Commission*, 377 Mich 259; 140 NW2d 515 (1966). Moreover, Const 1963, art 6, §28 also applies, and provides that a final agency order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. *Attorney General v Public Service Commission*, 165 Mich App 230, 235; 418 NW2d 660 (1987). A reviewing court gives due deference to the PSC’s administrative expertise, and is not to substitute its judgment for that of the PSC. *Yankoviak v Public Service Commission*, 349 Mich 641, 648; 85 NW2d 75 (1957); *Building Owners and Managers Association of Metropolitan Detroit v Public Service Commission*, 131 Mich App 504, 517; 346 NW2d 581 (1984), *aff’d* 424 Mich 494 (1986).

Initially, Fas-Lar argues that the PSC erred by imposing the assessment against Federal on Federal’s shareholder, Fas-Lar, and Fas-Lar’s eight individual shareholders because neither Fas-Lar nor its shareholders had any notice that the PSC would seek to impose responsibility for an assessment against Federal on any other entity or individual. We disagree. Although Fas-Lar and its shareholders were not named as parties in the proceedings before the PSC, they do not deny that they had actual notice of the proceedings. No violation of due process occurred. The PSC did not mandate that Fas-Lar and its shareholders pay the assessment out of their personal funds. Rather, the PSC noted that the amount of the assessment, \$200,000, was the approximate amount of Federal’s retained earnings, and appeared to be within Federal’s ability to pay.

The language of the MCA supports the PSC’s imposition of the assessment against Fas-Lar and the individual shareholders. Federal applied to hold common carrier authority. A “motor common carrier of property” is defined as “any person who holds himself or herself out to the public as being engaged in the business of a for hire common carrier as at the common law, either directly or through any device or arrangement . . .” MCL 475.1(f); MSA 22.531(f). The term “through any device or arrangement” is defined as “any and all methods” by which one undertakes to, *inter alia*, “control” the transportation of property on the highways of the state. MCL 475.1(1); MSA 22.531(1). The ownership of stock constitutes a device or arrangement by which a stockholder undertakes to control transportation. A stockholder falls within the statutory definition of a carrier. This Court gives deference to the PSC’s administrative expertise. *Yankoviak, supra*.

In the principal appeals, the gravamen of appellants’ argument is that given Federal’s certified status as an air carrier, its operations were preempted from state regulation by. 49 USC 1305(a)(1). Appellants also argue that an amendment to §1305(a)(1) (reenacted as 49 USC 41713(b)(1)), which now provides that a state cannot enact or enforce any law or regulation related to the prices, routes, or service of an air carrier when a carrier is transporting property via aircraft or motor vehicle, whether or not the property has had or will have a prior or subsequent air movement, confirms that §1305(a)(1)

preempted regulation of Federal's movements. *American Airlines, Inc v Wolens*, 513 US ____; 115 S Ct 817; 130 L Ed 2d 715 (1995), confirms that §1305 preempts air carriers based on status.

This argument is without merit. State regulation of Federal's intrastate ground-only movements was not preempted by §1305(a)(1) as it read prior to amendment. Section 1305(a)(1) prohibits states from enacting or enforcing laws or regulations relating to an air carrier's air routes, air rates, or air services. The PSC recognized as much in the Case No. 5 proceedings when it held that Federal's air-ground services were exempt from state regulation. Section 1305(a)(1) does not preempt a carrier's movements based solely on its status as an air carrier. Appellants' argument gives no respect to congressional intent. In revising the Interstate Commerce Act, Congress preserved state motor carrier jurisdiction over intrastate ground transportation. 49 USC 10521(b). *Federal Express, supra*, and *Morales, supra*, do not support appellants' position that status as an air carrier results in preemption of all movements. In *Federal Express, supra*, the court held that the use of motor vehicles as an integral part of an interstate air delivery system was not subject to state regulation. In *Morales, supra*, the Supreme Court held that while the words "relating to" in §1305(a)(1) should be broadly construed, states could not enforce guidelines regulating the content and format of airline fare advertising. Such regulation was preempted by §1305 because it related to the airlines' rates, routes, and services. Here, the PSC asserted jurisdiction only over Federal's intrastate ground movements.

The legislation which amended §1305(a)(1) does not affect the PSC's decision regarding preemption. That legislation became effective January 1, 1995, and has been found by the PSC to be prospective only. *In the Matter of Contested Case Proceedings for an Order Regarding the Michigan Motor Carrier Act, Federal Preemption, and Continuing Jurisdiction of the Commission*, PSC Case No. T-1273 (January 11, 1995). The instant proceedings dealt with Federal's actions and status in 1992. This Court declines to read into the legislation an intent to apply it retroactively.

Appellants' remaining arguments are without merit. The PSC reviewed the record as required by Const 1963, art 6, §28. It examined the major categories of violations identified by the ALJ, and specified the evidence on which it relied to find that Federal had committed numerous violations. The PSC was not required to identify each piece of evidence in the record and state why that evidence was accepted or rejected.

The PSC's finding that Federal's actions demonstrated the opposite of good faith was supported by the record. Federal's tariff consultant acknowledged that he advised the company that its practice of providing a return shipment at no charge was not covered by the tariff; nevertheless, the practice continued. Furthermore, in spite of the PSC's warning in its August 25, 1992 order in Case No. 5 that continuing violations would not be tolerated, Federal did not begin putting required information on its invoices. Federal's assertion that documents were altered as part of a training exercise was contradicted by testimony from Officer Fisher of the Motor Carrier Enforcement Division.

The PSC gave great weight to the testimony of witnesses such as Staff Member Cook and Officer Fisher. The PSC's finding that Federal did not act in good faith was supported by these witnesses. *Great Lakes Steel v Public Service Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983), lv den 419 Mich 895 (1984).

The PSC's finding that Federal's strictly ground-based movements were not preempted from state regulation was correct. The PSC did not disregard its holding in Case No. 5. The holding in the instant case was entirely consistent. The issue of fitness was not irrelevant. The other grounds cited as support for the finding of unfitness, violation of documentation requirements and tariff regulations, were supported by the evidence. Federal's tariff consultant testified that an invoice could be considered a freight bill because it was a demand for payment. This testimony supported the PSC's finding that Federal's documentation violated PSC rules because it did not contain the required information. Moreover, Federal's consultant testified that Federal's practice of furnishing a return shipment for no charge violated the provisions of its tariff. This testimony constituted substantial evidence on which the PSC could base its finding that violations of documentation requirements and tariff regulations occurred. *Great Lakes Steel, supra*.

The PSC's finding that Federal engaged in illegal interlining with its subsidiary was supported by the evidence. Federal did not possess the type of double certification needed for such activity. Federal's own consultant testified that only general commodity carriers are allowed to engage in interlining. Federal did not establish that it was such a carrier.

The PSC's finding that Federal intimidated and coerced a shipper was also supported by the evidence. The shipper testified that it was told that service would be halted the next day if the support statement was not signed without changes. Testimony on these issues differed; however, the PSC was entitled to choose between differing views. *Great Lakes Steel, supra*.

Finally, appellants' argument that the assessment of \$200,000 imposed by the PSC was punitive and was not supported by the evidence is without merit. The ALJ examined records from a representative period, calculated 23,975 violations, and concluded that an assessment of \$11,987,500, based on a \$500 per violation charge as provided in MCL 479.18; MSA 22.583, could be imposed. Nevertheless, the ALJ recommended that an assessment of \$1 million be imposed. The PSC imposed an assessment of only 20% of that recommended by the ALJ and supported by the evidence. Such an assessment cannot be considered to be punitive.

The Cross-Appeal

In their cross-appeal, defendants City Transfer and Loomis Armored argue that the PSC's decision on the issue of preemption is not entitled to deference in this instance. Such deference should be accorded only to a decision within the agency's area of expertise. The PSC's area of expertise does

not extend to questions of federal preemption. Specifically, cross-appellants claim that the PSC's conclusion that a portion of Federal's ground operations, specifically those movements connected to flights, was preempted was erroneous.

Cross-appellants' claims are without merit. The doctrine of collateral estoppel bars relitigation of the issue of preemption. In its August 25, 1992 order in Case No. 5, the PSC held that certain of Federal's ground-based movements, specifically those connected to air transportation, were preempted from state regulation. City Transfer claimed an appeal from that order. Federal was an appellee. In its brief on appeal, City Transfer argued that the PSC erred in concluding that §1305(a)(1) preempted state regulation of certain segments of Federal's intrastate ground movements. City Transfer raised arguments based on the plain language of §1305(a)(1), and contended that *Federal Express, supra*, was distinguishable. This Court rejected those arguments and affirmed the PSC's decision on the issue of preemption. Relying on §1305(a)(1), *Federal Express, supra*, and *Morales, supra*, this Court held that the PSC's finding on the issue of preemption was supported by competent, material, and substantial evidence on the whole record. The issue of preemption was actually litigated in Case No. 5, and in the appeal of that order. In its December 20, 1993 order in the instant litigation the PSC reexamined its holding on the issue, and expressly declined to overrule its decision in Case No. 5. The issue of preemption cannot be relitigated in this subsequent proceeding.

Affirmed.

/s/ Roman S. Gribbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark