

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER of the Complaint of) TRANSPORTATION DIVISION
Rumble, Inc., d/b/a Classic Limo and)
Motion for Emergency Relief and Request)
For Order that Montana Mountain Express,) DOCKET No. T-08.40.COM
LLC Cease Operations as an Unlicensed) ORDER NO. 6962b
Montana Motor Carrier.)

FINAL ORDER

FINDINGS OF FACT

Procedural Background

1. On November 7, 2008, as amended on November 10, 2008, Rumble, Inc., d/b/a Classic Limo (Classic Limo or Complainant) filed its formal complaint against Montana Mountain Express, LLC (MME or Defendant) docketed as T-8.40.COM.
2. On December 2, 2008, the Commission issued its Notice of Prehearing Conference to convene at 9:30 a.m. on December 22, 2008 at the Commission offices, 1701 Prospect, Helena, Montana.
3. At the December 22, 2008 Prehearing Conference, appearances were entered by Michael J. Uda on behalf of Complainant-Rumble and by Jerome Anderson and Cory Swanson on behalf of Defendant-MME. The parties agreed to a procedural schedule for processing the formal complaint.
4. The Commission conducted a public hearing on Monday, March 9, 2009, commencing at 9:00 a.m. in the Bollinger Room, 1701 Prospect Avenue, Helena, Montana. The parties agreed that simultaneous initial briefs would be filed on March 16, 2009 and simultaneous reply briefs on March 30, 2009.

Relevant Statutes and Framing the Issues

5. Complainant alleges that MME is operating without necessary operating authority issued by the Commission. Section 69-12-106, MCA, provides in relevant part as follows:

"Any person or corporation maintaining...or by sign, symbol, or device or vehicle or clothing or by advertisement holding forth transportation for compensation or soliciting the transportation of persons or property for compensation among the public or soliciting for trips for compensation or ...Shall be deemed, prima facie, a 'motor carrier' subject to this chapter. The burden of proof shall be on such person or corporation to disprove such status."

6. In 1998, the U. S. Congress amended subsection (a) of 49 USC § 14501 to read as follows:

"(a) "Motor carriers of passengers.

(1) Limitation on State law. No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to--

* * *

(C) the authority to provide intrastate or interstate charter bus transportation."

7. On July 21, 1998, at its properly-noticed business meeting, the Commission approved as Commission policy, in view of the above-referenced Congressional action, a memorandum (the 1998 Memorandum) reflecting, among other things, charter bus characteristics. The 1998 Memorandum is attached hereto as Appendix A to this order and is hereby incorporated as though fully set forth herein. Among other provisions of the 1998 Memorandum, the Commission noted that "A conference report accompanying the Act [the Transportation Equity Act for the 21st Century, (TEA)] makes it clear that the pre-emption is not intended to limit the ability of a state to continue to regulate taxicab service and limousine service." In addition, the 1998 Memorandum provides that, a Commission "preliminary opinion" means that states are preempted from regulating motor carrier service with the following characteristics:

- (a) the transportation is of a group of passengers;
- (b) the group of passengers has a common purpose;

- (c) the transportation is based on a single contract;
- (d) the contract is entered a reasonable time in advance of the transportation and does not result from a spontaneous, "curbside" agreement;
- (e) the contract includes a single fixed charge, passenger fares not being assessed individually;
- (f) through the contract the group of passengers acquires exclusive use of the motor vehicle;
- (g) the transporting motor vehicle is not a limousine;
- (h) the group of passengers travels together to a specified destination.

Defendant maintains that its Montana-based operations are charter bus operations and are therefore federally preempted from Montana Public Service Commission regulation under 49 USC § 14591.

8. If, in fact, Defendant's Montana operations constitute a charter bus operation, the Commission would be federally preempted from asserting jurisdiction over Defendant's operations. The Supremacy Clause of the United States Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. "As a consequence, state and local laws are preempted where they conflict with the dictates of federal law, and must yield to those dictates." *Ace Auto Body & Towing, Ltd. V. City of New York*, 171 F.3d 765, 771 (2d Cir. 1999).

Summary of Evidence

Defendant MME

Prior Application with the Commission

9. The Commission finds that testimony addressing MME's initial application before the Commission for a Class B passenger authority (subsequently withdrawn) does not directly bear on the issue before the Commission, *viz.* whether MME's business is a charter bus operation. If the business constitutes a charter bus operation, than any prior applications for authority are irrelevant.

Advertising of MME

9. A significant amount of testimony was devoted to MME's advertising. Lance Child, a founder and principal of MME appeared and testified in support of

Defendant's positions. Mr. Child testified that MME never told customers that it operated a shuttle, as opposed to a charter operation. Tr., p. 32, lines 10-20; Tr., p. 44, line 8-p. 45, line 1; Tr., p. 49, line 14-p. 52, line 18. MME states that it uses the word "shuttle" in its advertising, to attract the attention of customers searching on the Internet using what it believed were the most common generic transportation search terms. See, Tr., p. 34, line 5-p. 36, line 10. Mr. Child maintains that MME never told customers that it provided a regularly-scheduled ride on a fixed route that could provide curbside service to customers who arrived at a fixed pick-up point. *Id.*, See also MME Exhibits 2-7. MME's Exhibit 11, however contains, among other things, the following statements:

"Private means NO BUSES and NO WAITING
Luxury Vans With Extra Storage..."

MME's Fleet of Vehicles—Not Limousines

11. Lance Child testified that MME does not operate "limousines." Tr., p 66, lines 19-22. MME operates Dodge Sprinter vans, and occasional overflow vehicles consisting of Suburbans and large vans. Tr., p. 68, lines 9- p. 69, line 4. See also, MME Exhibits 11 and 14. Mr. Child stated that MME's web site, literature and communications to customers inform them that they will be transported for compensation in vehicles that were designed, constructed, and/or used for the transportation of passengers. MME Exhibits 5, 6, 8 11 and 14.

Group of Passengers

12. Mr. Child testified that MME transports groups of passengers for hire. Tr., p. 61, lines 5-23. Only groups can complete a reservation with MME through the Defendant's established online system. Tr., p. 134, lines 17- p. 135, line 9. MME Exhibits 12 (summary of trips) and 13 (description of all trips conducted by MME through February 10, 2009). Tr., p.132, lines 8-22. See also, Tr., p. 57, line 6-p. 58, line 10.

Passengers with a Common Purpose to a Specified Destination

13. Mr. Child testified that through MME's reservation process, customers indicate their common purpose and destination. Tr., p. 61, line 24-p. 62, line 18. Each

group is kept together in a vehicle for their common purpose and multiple groups are not combined. Tr., p. 155, line 1-p. 156, line 2.

Single Contract

14. Mr. Child further testified that each group makes a single reservation with MME and that reservation is the contract for transport. Tr., p. 62, line 19-p. 63, line 8. MME Exhibit Nos. 12 and 13 also reflect that each group reservation resulted in a single contract.

Contract Entered a Reasonable Time in Advance

15. Mr. Child stated that MME accepts reservations only in advance of transport. MME policy requires a minimum of twelve hours advance notice. Tr., p. 57, line 2-p. 58, line 23. *See also*, Tr., p. 148, line 23-p. 149, line 18--MME will not transport people on short notice. MME drivers are instructed to refuse service to anyone who has not made a prior reservation. Tr., p. 63, line 9-p. 64, line 14. MME Exhibit 12, p. 1 reflects a summary of time lapse between MME's reservations and transport time and supports Mr. Child's assertions. MME Exhibit 13 also reflects reservation time in advance of transport.

Single Fixed Charge

16. In the fall of 2008, MME did take reservations on a variable pricing basis where it increased the charge with an increase in passengers. MME advertised a price for the transport of 1-4 passengers, a second price for 5 passengers, and a third price for 6-8 passengers in the group. Tr., p. 31, lines 2-7, Defense Exhibits 5 and 6. Mr. Child testified that no passengers were ever transported under this reservation policy, nor did it charge or collect passenger fares on an individual basis. Tr., p. 31, lines 19-p. 32, line 9. MME refunded money to groups that had reserved trips and charged the groups a single fixed rate. *Id.* MME changed its pricing policy and implemented a pricing policy charging a single rate for the use of the vehicle with no discounts if fewer than the number of expected passengers is transported. Tr., p. 64, line 15-p. 65, line 11.

Exclusive Use of the Motor Vehicle

17. MME's web site informs customers that their charter operates according to their desired schedule and that the group would not be sharing the vehicle with other

groups or individuals. Tr., p. 35, line 24-p. 36, line 10. *See also* Tr., p 65, line 12-p. 66, line 18; Tr., p. 138, line 22-p. 140, line 22; and Tr., p. 155, line 1-p. 156, line 2.

MME's Web Site

18. Chris Samuels, a partner in MME, appeared and testified in support of the Defendant's positions. Mr. Samuels addressed MME's web site stating that MME paid Vertical Media to advertise its services on the Internet. MME wrote a description of its service and Vertical Media placed the advertisement under various categories on various web sites in order to maximize its exposure to the public. Tr., p. 204, line 11-p. 206, line 8. In every listing where MME is incorrectly listed as either a shuttle, taxi or limousine service, came about by Vertical Media's placements on other web sites. The description of MME's services provided to Vertical Media by Mr. Samuels correctly identifies MME as a charter service. *See* Classic Limo Exhibit 4, Tr., p. 204, line 23-p. 205, line 2; Tr., p. 205, lines 23-25.

Complainant Classic Limo

19. Jesse Rumble, President of Classic Limo, appeared and testified in support of Complainant's positions. Classic Limo has a fleet of eight vehicles composed of full-sized Suburbans, a Sprinter van and three stretch limousines. Tr., p. 162, lines 19-22.

20. Mr. Rumble's internet searches indicates to him that MME has "been pretty consistent" in advertising themselves either as a limo, a taxi or a shuttle company, most often a shuttle company. Complainant was unable to find any MME advertisement stating that Defendant was a charter bus company. *See* Tr., p. 167, line 17-p. 168, line 12.

21. Mr. Rumble states that Classic Limo's business has been diminished significantly due to MME's operations. Tr., p. 168, line 21-p. 169, line 13. Mr. Rumble maintains that Classic Limo has lost at least 126 reservations due to MME's initiating service (Tr., p. 186, lines 9-18) although some of Classic Limo's diminished business may have been due to the economy. Tr., p. 187, lines 21-25.

22. Mr. Rumble assumes that a bus would be a large, 45-passenger vehicle (Tr., p.178, lines 7-9) but would also recognize a 32-passenger vehicle as a bus. Tr., p. 182, lines 2-4.

Analysis/Ruling

23. The central issue is whether MME's business constitutes a federally-preempted charter bus operation. The record would indicate that use of terms other than "charter bus" appearing in non-MME web sites is there because of marketing research performed by Vertical Media, a web site aggregator retained by MME. MME supplies Vertical Media with a description of MME's operations and Vertical Media attempts to place that listing wherever it feels it can realize the most traffic for MME. Tr., p. 204, lines 11-17. Essentially, Vertical Media is paid if a minimum number of "hits" are made on MME's web site, so it does not want their client to restrict how Vertical Media describes the client's operations. As Vertical Media is retained by MME, MME must be responsible for the choice of wording utilized by Vertical Media.

However, the Commission finds that MME's own advertising, specifically its Exhibit 11 sets forth problematic language for the Defendant. Exhibit 11 states "Private means NO BUSES and NO WAITING." The Commission cannot reconcile MME's efforts to convince this agency that it is operating a federally preempted charter bus operation when its own advertisements tell its potential clientele that there will be no buses. Mr. Child asserts that "no buses" in this context means:

"...it's a private transportation arrangement, that you're not waiting for anyone else, anyone else's plan to land, anyone else to get their baggage, you're not waiting to drop anyone else, you're not riding with anyone else, you're not getting onto a shared bus. It is your vehicle, and your vehicle is taking you to where you're going. And that has value, definitely, for what we're selling." Tr., p. 139, lines 10-18.

Mr. Child, when pressed on the "no bus" issue by Chairman Jergeson, further states:

"Because it's advertising and you've got a limited space and you're not going to spell out a paragraph, right, for people, you're going to try to hit them with what you believe in their mind they're thinking of what the transportation experience is going to be like, and you're trying to let them know, no, it's not. If you've come to Big Sky before and you've ridden on Karst bus, there is an alternative to that now. And that's what we're trying to convey, that you have the ability to be taken in our vehicle with no other groups, just your group, to your destination." *Id.*, lines 22-25 and p. 140, lines 1-7.

The Commission finds Mr. Child's attempts to explain that "no buses" doesn't really mean "no buses" are neither compelling nor persuasive. The Commission finds MME's advertising telling its potential customers that MME uses "no buses" to be inconsistent with its position before the Commission that it is a federally preempted charter bus operation. Section 69-12-106, MCA, bears on this matter as the Commission finds that MME is holding itself out to perform a regulated service, i.e., a service that does not use buses without Commission authority, behavior that is prohibited by the Montana statute.

Comporting with the 1998 Memorandum

24. The Commission finds that the record clearly supports findings that MME's operations possess the following characteristics that were set forth in the 1998 Commission Memorandum:

- (a) the transportation services is of a group of passengers (FOF No. 12 above);
- (b) the group of passengers has a common purpose (FOF No. 13 above);
- (c) the transportation is based on a single contract (FOF No. 14 above);
- (d) the contract is entered a reasonable time in advance of the transportation and does not result from a spontaneous "curbside" agreement (FOF No. 15 above);
- (e) through the contract, the group of passengers acquires exclusive use of the motor vehicle (FOF No. 17 above);
- (f) the group of passengers travels together to a specified destination (FOF No. 13 above.)

25. The Commission further finds that while MME initially contracted with eleven specific groups quoting a "tiered" rate, MME did not assess the tiered rates. MME changed its pricing policies to assure that contracts include a single fixed charge and passenger fares are not being assessed individually. *See* FOF No. 16 above. The Commission, therefore, finds that MME's current operations reflect contracts that impose a single fixed charge without charging passengers on an individual basis.

26. While Complainant Classic Limo contends that MME's vehicles are limousines (*See* Tr., p. 190, lines 5-8; p. 171, lines 4-p. 172, line 7; Tr., p. 179, line 17-p. 179, line 9, Tr., p. 181, Lines 2-3; and Tr., p. 182), there is no cited authority upon which to base such a conclusion. The 1998 Memorandum concluded that one of the qualifications of a federally preempted charter bus company would be that the carrier would not use "limousines" in providing the charter service. The Commission finds that the MME fleet of two Dodge Sprinter vans and occasional overflow traffic use of Suburbans and large vans do not constitute limousines. The Commission finds this based on the fact that there is no authoritative case or statutory precedent of record defining "limousine." MME had a legitimate, reasonable expectation that the vehicles it uses would not be designated "limousines."

27. MME has met the eight criteria set forth in the Commission's 1998 Memorandum. The lone remaining contested issue pressed by Complainant is whether the vehicles used by MME are "buses" for purposes of determining whether MME is conducting a federally preempted charter bus operation.

Charter bus operations

28. Classic Limo contends that the vehicles used by MME are not buses. The Commission has already found that these vehicles are not "limousines." FOF No. 26 above. Complainant correctly contends that the primary rule of statutory interpretation is that the legislative intent is to be divined from the plain and ordinary words used in the statute. *Cites omitted. Classic Limo Reply Brief*, p. 2. The statute at issue, cited in FOF No. 6 above, precludes states or local governments from passing laws relating to the authority to provide intrastate or interstate charter bus transportation. The only controversy is the meaning of the word "bus."

29. Among other arguments, MME states that "bus" is defined by Montana statute, *viz.*, § 61-1-101(3), MCA, which provides as follows:

"Definitions. As used in this title, unless the context indicates otherwise, the following definitions apply:

...

(3) `Bus' means a motor vehicle designed for carrying more than 10 passengers and used for the transportation of persons **and any other**

vehicle, other than a taxicab, designed and used for the transportation of persons for compensation." (emphasis added).

MME contends that its vans are buses under this definition because they are designed and used for the transportation of persons for compensation, and they are not taxis. MME Reply Brief, pp. 4 & 5.

30. Classic Limo contests the use of this definition stating that this bus definition is only applicable for purposes of Montana highway safety laws set forth in Title 61, MCA. The Commission's authority and all rules pertaining to regulation of motor vehicles in Montana are found in Title 69, MCA. Moreover, Classic Limo contends that the very words following "Definitions" in § 61-1-101, MCA, *viz.*, "As used in this title, unless the context indicates otherwise, the following definitions apply..." limits the definition to Title 61. This argument ignores Montana statutory construction statutes. Section 1-2-107, MCA, provides as follows:

"Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears."

Therefore, unless the words "As used in this Title" limits use of the definition to Title 61 matters, the definition of "bus" would apply to MME's vehicles due to the provisions of § 1-2-107, MCA.

31. The Commission finds that the wording of § 61-1-101 does **not** limit use of the definition to Title 61 issues. In *Dept. of Rev. v. Gallatin Outpatient Clinic*, 234 Mont. 425 (1988), 763 P.2d 1128, the Montana Supreme Court found that the phrase "as used in parts 1 through 4 of this chapter" did not show that the Legislature meant for the definitions at issue to be applied only in those parts of the code, specifically parts 1 through 4 of the designated chapter. The Court found that those words only indicated that the legislature:

"intended the particular application of the definitions in those parts of the code, without limitation to the general use of the definitions in other parts of the code, pursuant to Section 1-2-207, MCA." 234 Mont. at p. 430.

The Commission, therefore, finds that the statutory definition of bus in § 61-1-101, MCA, to be applicable in determining whether MME's fleet of two Dodge Sprinter

vans are buses. The analysis, therefore, turns to a proper interpretation of the § 61-1-101(3), MCA, definition of "bus."

32. In the construction of a statute, the intent of the legislature is to be pursued, if possible. § 1-2-102, MCA. Words in statutes are to be construed according to the context and the approved usage of the language. § 1-2-106, MCA.

It is readily apparent that in § 61-1-101(3), MCA, the Montana Legislature intended "buses" to include motor vehicle's designed for carrying more than 10 passengers and used for the transportation of persons. The Commission further finds that by its use of the conjunctive "and" instead of the disjunctive "or," the Legislature added a further requirement to what constitutes a bus; *viz.*, "any other vehicle, other than a taxicab, designed and used for the transportation of persons for compensation." *See Montana Trout Unlimited et al. v. Montana Department of Natural Resources and Conservation*, 331 Mont. 483, at p. 494, 133 P.3d 224, 2006 MT 72 – addressing the Legislature's use of the conjunctive "and." The Commission is persuaded that a bus under this definition must be capable of carrying more than ten passengers, used for the transportation of persons, and, other than a taxicab, transports passengers for compensation. Defendant's 8-passenger Dodge Sprinter vans do not qualify as buses under this statutory definition and MME's operations are therefore not a federally preempted charter bus operation. Defendant must, therefore, seek and secure a Class B authority to transport passengers in the State of Montana before they can utilize their Dodge Sprinter vans to transport passengers for compensation.

33. The Commission, therefore, finds that Defendant is in violation of §§ 69-12-401 and 69-12-312(1), MCA. Defendant must seek appropriate authority from this Commission prior to engaging in for-hire transportation of passengers in Montana with its current fleet of vehicles capable of transporting only eight passengers. Should the Defendant continue its operations, the Commission will issue citations under §§ 69-12-106 and -108, MCA.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter under the provisions of Title 69, ch. 12, MCA and ARM §§ 38.2.2101 *et seq.*—Filing of Complaints.

2. The Defendant-Montana Mountain Express, LLC, is not operating a charter bus operation as the vehicles used by Defendant do not qualify as "buses" under Montana law.

3. Continued operation of the Defendant -- Montana Mountain Express, LLC's business with its current fleet will be in violation of §§ 69-12-401, 69-12-312(1) and 69-12-106, MCA.

ORDER

The Formal Complaint of Rumble, Inc., d/b/a Classic Limo should be, and is hereby SUSTAINED, and Defendant Montana Motor Express must seek appropriate Commission-issued operating authority to continue its Montana operations with its current fleet of vehicles.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chair

KEN TOOLE, Vice Chair

GAIL GUTSCHE, Commissioner

BRAD MOLNAR, Commissioner

JOHN VINCENT, Commissioner

ATTEST:

Verna Stewart
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Final Order issued in Docket T-08.40.COM in the matter of the Complaint of Rumble, Inc. dba Classic Limo and Motion for Emergency Relief and Request for Order that Montana Mountain Express LLC Cease Operations as an Unlicensed Montana Motor Carrier has today been sent to all parties listed.

MAILING DATE: July 1, 2009

FOR THE COMMISSION

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