

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In the Matter of:

Protective Parking Service Corporation
d/b/a Lincoln Towing Service,
Respondent.

Docket No. 92 RTV-R Sub 17
100139 MC

Hearing on fitness to hold a Commercial
Vehicle Relocator's License pursuant to
Section 401 of the Illinois Commercial
Relocation of Trespassing Vehicles Law,
625 ILCS 5/18a-401.

NOTICE OF FILING

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Honorable Judge Latrice Kirkland-
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Chief Administrative Law Judge
Illinois Commerce Commission
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PLEASE TAKE NOTICE that on May 24, 2018, I caused to be filed with the Director of Processing, Transportation Division, Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, **STAFF'S RESPONSE TO EMERGENCY MOTION TO STRIKE BRIEF OF STAFF, TO REMOVE BRIEF FROM ILLINOIS COMMERCE COMMISSION'S PUBLIC WEBSITE, AND POST RETRACTION**, a copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure that a copy of the attached **STAFF'S RESPONSE TO EMERGENCY MOTION TO STRIKE BRIEF OF STAFF, TO REMOVE BRIEF FROM ILLINOIS COMMERCE COMMISSION'S PUBLIC WEBSITE, AND POST RETRACTION** was sent via electronic mail to the above listed persons on May 24, 2018.



Martin W. Burzawa

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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STAFF'S RESPONSE TO EMERGENCY MOTION TO STRIKE BRIEF OF STAFF, TO REMOVE BRIEF FROM ILLINOIS COMMERCE COMMISSION'S PUBLIC WEBSITE, AND POST RETRACTION

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, Martin W. Burzawa and Azeema N. Akram, and for its response to Emergency Motion to Strike Brief of Staff, to Remove Brief from Illinois Commerce Commission's Public Website and Post Retraction states as follows:

I. THE COMMISSION HAS COMPLIED WITH THE AUTHORITY VESTED TO IT BY THE GENERAL ASSEMBLY PURSUANT TO THE ILLINOIS COMMERCIAL RELOCATION OF TRESPASSING VEHICLES LAW.

The arguments that Lincoln makes regarding the mechanism by which the Commission initiated this proceeding are incorrect. Lincoln asserts that the Commission failed to follow its own Rules of Practice in bringing this proceeding, and did not provide Respondent's Counsel with the "reason behind the hearing." *Respondent's Emergency Motion to Strike*, pgs. 4 – 5. Here, the Commission brought forth this proceeding under Section 18a-401 of the Illinois Commercial Relocation of Trespassing Vehicles Law ("ICRTVL"), 625 ILCS 5/ *et seq.*, which gives the Commission an independent statutory basis to determine the fitness of a licensee. By including a separate and specific provision

in the ICRTVL setting forth the authority to initiate fitness hearings, the General Assembly clearly contemplated a separate and specific proceeding to determine the fitness of relocater licensees to hold such licenses.

Under the authority vested to it by the General Assembly, the Commission issued an Order initiating a fitness hearing pursuant to Section 18a-401 of the ICRTVL "to inquire into Lincoln's towing operations to determine whether it is fit, willing, and able properly to perform the service of a commercial vehicle relocater and to conform to the provisions of the ICRTVL and the Commission's Administrative Rules." *2-24-2016 Commission Order 92 RTV-R Sub 17*, pgs. 1 – 2. This Section of the ICRTVL explicitly allows the Commission to "*at any time* during the term of the license make inquiry into the management, conduct of business, or otherwise *to determine*" compliance with the ICRTVL and Commission's Administrative Rules ("Rules"), 92 Ill. Adm. Code 1710.10 *et seq.*; *625 ILCS 5/18a-401* (emphasis added). In determining the fitness of a licensee, the Rules mandate the Commission to "consider, with regard to applications for new or renewed relocater's licenses . . . the compliance record of [the applicant, its owners or controllers, directors, officers, members, managers, employees and agents] . . . *and other facts that may bear on their fitness to hold the license.*" 92 Ill. Adm. Code 1710.22(a)(1). Accordingly, the relief that Staff is seeking under this proceeding is the conclusion that Lincoln is unfit to hold its relocation towing license, which is to be accomplished by revoking its current license.

II. IN ARGUING THAT THAT STAFF'S BRIEF IS NOT PREMISED ON THE EVIDENCE, LINCOLN HAS DISREGARDED PROCEDURAL HISTORY AS WELL AS PROPERLY ADMITTED EXHIBITS AND TESTIMONY.

Lincoln cannot dispute that Staff's Exhibits A and B that consist of information from

the Commission's Motor Carrier Information System ("MCIS") Contract Listing By Property Address for the period of July 24, 2015, through March 23, 2016, as well as Staff's Exhibits J and K that consist of Lincoln's 24 Hour Tow Reports for the same period were properly admitted as evidence at the fitness hearing by the Administrative Law Judge ("ALJ"). *Tr. 2-14-18, p. 1731, ll. 14-16.* Given that Staff's Post-Hearing Brief ("Brief") specifically cites to and bases its conclusions on facts contained in Staff's Exhibits A, B, J, and K, it strains logic for Lincoln to argue that Staff's Brief is not premised on properly admitted evidence. The arguments in Staff's Brief are direct inferences from the facts contained in these exhibits. As a general example, Exhibit J indicates that Lincoln towed a vehicle from a property address on a certain date. Exhibit B indicates that at that time Lincoln did not have a tow contract for that property address. Commission rules provide that no vehicle shall be relocated from private property without express, written authorization from the property owner. *92 Ill. Adm. Code 1710.41.* Accordingly, these two pieces of evidence lead to the conclusion that Section 1710.41 was violated. This is a proper closing argument. Especially when considering that "parties are allowed wide latitude in closing argument, and comments of counsel must be evaluated in the context in which they were made." *People v. Burgess*, 176 Ill. 2d 289, 319, 680 N.E.2d 357, 370-71 (1997). Though in a criminal case, this legal principle should be equally applicable to a regulatory and enforcement proceeding.

Furthermore, the ALJ has previously addressed and rejected similar assertions that Staff's arguments were not based on properly admitted evidence. The same result should occur here. For instance, at the close of Staff's case-in-chief, Lincoln brought an oral motion for directed finding. In response, Staff argued what it believes the evidence

admitted at the fitness hearing shows, essentially, a condensed version of the argument in Staff's Brief. At that time, the ALJ signaled her understanding of the context of Staff's argument and that Staff's argument was its interpretation of the evidence and that Lincoln's counterarguments, similar to the ones it makes in its emergency motion, are aimed at the weight of the evidence or are different interpretations of the same evidence, which Lincoln will have an opportunity to argue in its closing argument.

JUDGE KIRKLAND-MONTAGUE: Okay. You are saying you didn't know that but -

MR. PERL: I didn't.

JUDGE KIRKLAND-MONTAGUE: -- this entire time all he's been -- I mean, Mr. Burzawa just put into words what the officers have been -- or Officer -- Sergeant Sulikowski, they are pointing out or they are showing inconsistencies based on the MCIS printout. I mean -

Tr. 2-14-18, p. 1701, l. 22 - p. 1702, l. 7.

JUDGE KIRKLAND-MONTAGUE: I think at this point really we are just talking about arguments. I mean, the evidence is what it is, whether you want to label it -- characterize it as weak or strong. It is what it is. And Mr. Burzawa is just, I think, stating what -- how he plans to -

MR. PERL: To do what? You can't -

JUDGE KIRKLAND-MONTAGUE: Well, his argument -- I have got to imagine that's his argument that he is planning to make. I mean, that's just an argument based on the evidence. You have the opportunity to make a different argument based on the same evidence. And as you've done throughout this entire proceeding, you point out various issues with the evidence presented. I mean, you have that opportunity to do that in your brief, in your reply brief.

Tr. 2-14-18, p. 1702, l. 22 – p. 1703, l. 18.

To circumvent this apparent resolution of the issue and to once again argue that Staff's conclusions are not based on the evidence, Lincoln's emergency motion focuses only on those portions of Sergeant Sulikowski's cross examination that Lincoln interprets in its favor. Lincoln's emergency motion fails to acknowledge all other evidence introduced at the hearing, be it Exhibits A, B, J, and K, mentioned above or testimony unfavorable to Lincoln. For example, Lincoln disregards Sergeant Sulikowski's direct examination where he stated what he found when he compared Lincoln's Tow Reports (Exhibits J and K) to MCIS (Exhibits A and B):

Q. From looking at the tow sheet and then looking at the information that you saw in MCIS, just using an example of an address, can you give an example of something that you saw that, quote, unquote, "wasn't right?"

A. I saw contracts that were cancelled before the date of the tow. I saw contracts belonging to other relocators, and I saw contracts where tows were done prior to the contract being e-filed or filed in the e-relocator. I also found tows that were done based on calls or patrol lot errors as well.

Tr. 5-31-17, p. 288, l. 19 – p. 289, l. 8. Lincoln also disregards Sergeant Sulikowski's testimony concerning specific addresses:

MS. PARKER-OKOJIE:. Q. Sergeant Sulikowski, do you see the address 344 North Canal on Page 142 of Exhibit J?

A. Yes.

Q. And, Sergeant Sulikowski, if you could turn to Page 276.

A. Okay.

Q. Do you see address 344 North Canal on Page 276?

A. Yes.

Q. Sergeant Sulikowski, if you could just keep

your finger on Page 276 and just go back to Page 142 of Exhibit J. What date is on the tow sheet?

A. On Page 142, 11-18 of 15.

Q. And on Page 276 what was the date of tow?

A. 3-23 of 16.

Q. Sergeant Sulikowski, according to MCIS and the record that you reviewed Page 3 of Exhibit B, do you reach any conclusions about the status of the contract at 344 North Canal Street?

A. Yes.

Q. And what conclusion is that?

A. According to this printout, there is no contract on file for Lincoln Towing.

Q. On any date?

A. On any date.

Tr. 5-31-17, p. 421, l. 16 – p. 422, l. 19.

III. LINCOLN IS ARGUING THE MERITS AND WEIGHT OF THE SAME EVIDENCE CITED IN STAFF'S BRIEF, THEREBY REFUTING ITS OWN ASSERTIONS THAT STAFF'S BRIEF IS PREMISED ON MATTERS NOT IN EVIDENCE.

Lincoln appears to argue that because Sergeant Sulikowski did not directly testify that a violation occurred, there is no evidence that supports this conclusion, again disregarding all other evidence. However, independent of Sergeant Sulikowski's testimony, there is group of facts in evidence introduced through Exhibits A, B, J, and K that when viewed in relation to each other lead to the inference. Lincoln may disagree with this inference and may disagree with the amount of weight that should be afforded to the Commission's records (one reasonably presumes that Lincoln does not take issue with its own records), but the inference comes from properly admitted evidence at the fitness hearing, specifically Staff's Exhibits A, B, J, and K.

Nevertheless, it is a specious argument to present the lack of Sergeant Sulikowski having an opinion on whether a violation occurred as somehow dispositive of that question. The role of Sergeant Sulikowski, as a fact witness, is not to render legal conclusions. That is the role of the ALJ as both the trier of fact and law. Here, the ALJ

is presented with two pieces of direct evidence for each tow Staff argues was unauthorized. One piece of evidence from Lincoln's Tow Reports (Exhibit J) indicates that Lincoln towed a vehicle from a property address on a specific date. Another piece of evidence from MCIS (Exhibit B) indicates that Lincoln did not have a tow contract for that property during that period. Staff contends that the facts established by these two pieces of evidence lead to the conclusion that in that instance Lincoln more likely than not violated Commission's rules requiring written authorization prior to a tow occurring. 92 Ill. Adm. Code 1710.41. Lincoln, presumably, disagrees and does not accord the evidence the same weight as Staff does. It will have an opportunity to present its interpretation of the evidence and the weight it should be afforded in its closing argument. The ALJ will then issue her proposed order for consideration by the Commission wherein she weighs the evidence and reaches a conclusion of law, whether the evidence sustains a violation or not.

Furthermore, when condensed, Lincoln's arguments as to why it believes Staff's Brief should be stricken are that the facts in Exhibits A, B, J, and K cannot be interpreted to support the conclusions proffered by Staff and that those conclusions are contradicted by other evidence, specifically, Sergeant Sulikowski's cross examination. If Lincoln's position is that Staff's argument misinterprets the evidence, assigns undue weight to the evidence, or Staff's interpretation is contradicted by other evidence, this necessarily refutes Lincoln's criticism that Staff's Brief is "unsupported by any evidence adduced at the hearing" because Lincoln is arguing the weight of the same evidence. Arguments to the weight and interpretation of evidence are for Lincoln's post hearing brief and not a basis for a motion to strike.

IV. ASSUMING, ARGUENDO, STAFF'S BRIEF REFERS TO FACTS NOT IN EVIDENCE, LINCOLN IS NOT ENTITLED TO HAVE STAFF'S BRIEF STRICKEN ON THESE GROUNDS.

For the sake of argument, let us assume that Lincoln is correct and Staff's Brief mentions facts that are not in evidence; this does not entitle Lincoln to having Staff's Brief stricken, let alone entitle Lincoln to any other relief it seeks. In furtherance of its argument to have Staff's Brief stricken, Lincoln relies on *Watkins v. Am. Serv. Ins. Co.*, 260 Ill. App. 3d 1054, 1067, 631 N.E.2d 1349, 1358 (1st Dist. 1994)("A statement in closing argument regarding facts not in evidence is improper and constitutes reversible error if so prejudicial as to deprive a party of a fair trial."). However, for that proposition *Watkins* cites to *Mazurek v. Crossley Const. Co.*, 220 Ill. App. 3d 416, 418, 581 N.E.2d 59, 60 (1st Dist. 1991), which was a jury trial. *Watkins*, just two lines down from the line cited by Lincoln, recognizes that a bench trial is treated differently. "[I]n a bench trial it is presumed that the trial judge has only considered competent evidence in reaching his decision." *Watkins*, 260 Ill. App. 3d at 1067. This is because a judge, as a trained lawyer and experienced jurist, is able to only focus on competent evidence. There is no such presumption for juries or lay people. In fact, as a result of this presumption, the *Watkins* Court went on to hold that allowing the improper remarks during closing argument at the underlying bench trial was harmless error. *Watkins*, 260 Ill. App. 3d at 1067. The same presumption applies here where the ALJ is the trier-of-fact and law.

V. PORTIONS OF LINCOLN'S EMERGENCY MOTION FOCUS ON MATTERS IRRELEVANT TO ITS RESOLUTION.

Portions of Lincoln's emergency motion are not devoted to the substance of Staff's Brief but rather to its form, that is, how its arguments were articulated. For example, Lincoln laments as disparaging Staff's statement that "The implication of Lincoln's

argument strains logic.” *Respondent’s Emergency Motion to Strike*, pg. 23. This is neither a disparaging remark nor a direct attack on Lincoln or its counsel. It is directed towards an argument and is tantamount to referring to an argument as unreasonable. The statement is also an accurate criticism of the implied argument that it refers to. Specifically, Staff’s statement was referring to testimony introduced by Lincoln that during the relevant time period the Commission never brought to Lincoln’s attention instances where it was towing vehicles where it had no contract for the property. *Tr. 3-15-18, pg. 1800*. The implication of this testimony is illogical. As pointed out in Staff’s Brief, how was the Commission to notify Lincoln of such instances as they were occurring when such instances were not identified until much later as a result of comparing Lincoln’s Tow Report to MCIS records during the fitness hearing to make inquiry into Lincoln’s relocation operations? In any event, if the phrase is on the offensive spectrum, it is so mild that it is even often used by courts in their opinions when determining which interpretation of the law or facts to apply and which ones to dismiss. In the end, Lincoln manufactures outrage to a slight that one must strain to even perceive.

On a related note to form, Lincoln asserts that “in violation of the Rules, [Staff’s] 32 page brief lacked appendices, a table of contents, and a summary of the position of the party filing.” *Respondent’s Emergency Motion to Strike*, pg. 17. Staff is not responding to the substance of this assertion because it does not appear that Lincoln is seeking any relief premised on any procedural omissions. However, the way Lincoln chooses to make the assertion raises an interesting question. Lincoln takes issue with Staff’s use of the term “violation” in Staff’s Brief. How is Staff’s use of the term “violation,” which is based on evidence Staff cites to in the record, any different from the manner

used by Lincoln? Lincoln cites to Staff's 32 page brief lacking appendices, a table of contents, and a position summary and concludes that this is in "violation of the Rules." Similarly, in its Brief, Staff cites to evidence indicating that Lincoln towed a vehicle from a property address and that Lincoln did not have a tow contract for that property and concludes that this was in "violation" of Commission rules requiring written authorization from the property owner prior to tow. *92 Ill. Adm. Code 1710.41*.

VI. THERE IS NO FACTUAL OR LEGAL BASIS TO GRANT LINCOLN THE RELIEF IT SEEKS OR TO HAVE COMPLIED WITH ITS PRIOR DEMANDS.

Staff objects to each of the prayers of relief requested by Lincoln.^{*} Staff's failure to particularly address any of the assertions made in Lincoln's emergency motion should not be interpreted as conceding any of those issues. Many of Lincoln's assertions have no bearing on the relief it seeks. More importantly, none of the assertions form any bases for granting the relief Lincoln seeks. Given this, they can all be addressed together because they fail for the same reason.

A moving party bears the burden of persuasion. At the very least, they must provide points of law or authority which would entitle them to the relief they seek. This is not only to allow the nonmoving party an opportunity to provide contrary points of authority but also to provide the ALJ a basis upon which to grant the relief sought if that is the decision she is to make. This is absent from each of Lincoln's prayers for relief. As a practical matter, Lincoln simply makes a demand. However, entitlement is not inherent

^{*} (1) order Staff to immediately post a retraction disclaimer on the Illinois Commerce Commission's public website; (2) order Staff to remove Staff's Brief and Closing Argument from the Illinois Commerce Commission public website; (3) strike the entirety of Staff's brief; (4) enter a directed verdict in favor of Respondent; or in the alternative, (5) strike Staff's Brief and Closing Argument and direct Staff to file a revised closing argument, consistent with the testimony adduced at trial, and allow Respondent thirty (30) days thereafter to file its Closing Argument, re-set the oral argument to a date and time thereafter; award Respondent reasonable attorneys' fees incurred in bringing this Motion. *Respondent's Emergency Motion to Strike*, pg. 31.

in the act of making a demand. Entitlement must be justified. This is most noticeably exemplified by the section of Lincoln's emergency motion titled "Unlawful dissemination to the media." This section is completely untethered from fact and law. As a matter of fact, Staff's Brief, a public document similar to all court filings, was accessible to the general public through a link on the Commission's website. There was no dissemination to the media. As a matter of law, the entire section fails to include any citation to law or legal precedent for such a bold statement that making a public document accessible to the public was "unlawful."

Lincoln laments that the articles were brought to the attention of Staff and the ALJ during a telephone conference, wherein Lincoln requested "that Staff's Brief and Closing Argument be taken offline and a retraction be posted" but "Staff has refused to take any action to clarify that its Brief is merely Staff's argument and not a finding of the Commission." One, missing from any of these demands then, as now, was an actual basis that would entitle Lincoln to have such a request honored. Two, even if there were a basis to issue clarification, as was pointed out during the telephone conference, neither Staff nor the ALJ have the authority to make the type of public statements requested by Lincoln on behalf of the Commission. Therefore, Lincoln's characterization of its demand and Staff's "refusal" is misleading. In any event, a retraction or corrections were and remain unnecessary. Though media coverage may contain some errors, such as referring to the brief as a report and the oral argument as a public hearing, media coverage accurately describes the procedural posture of the fitness hearing and that a decision by the Commission has not been made. It appears that Lincoln has taken issue with editorial opinions and public comments about the articles, such as on Twitter. Staff

cannot be responsible for the misstatements or opinions of the media or be responsible for how the public interprets and comments on press articles.

Lastly, Lincoln's emergency motion notes that "Although receiving calls all week from the news outlets, Respondent's counsel declined to comment on the fitness hearing, so as to not try the fitness hearing case in the public by way of the media." *Respondent's Emergency Motion to Strike*, p. 27. Even if Lincoln did not want to comment on the merits of the fitness hearing itself, nothing prevented commenting on what it perceived to be errors in the media coverage and adding clarification where Lincoln believed it was needed. In fact, Lincoln did offer one clarifying comment to the *Chicago Tribune* concerning the significance of Staff's Brief:

Allen Perl, a Chicago attorney representing Lincoln Towing, said that he can't comment on the details of the case since it's still pending, but referring to the report, he said: "This is just their closing argument, and we'll have a chance to do ours."

Respondent's Emergency Motion to Strike, Exhibit 3. One could interpret this comment as recognizing that Staff's Brief is the first step of the parties offering counter arguments on the same evidence. This would seem to run counter to Lincoln's assertion in its emergency motion that Staff's Brief goes beyond this.

WHEREFORE, for the reasons discussed above, Staff respectfully requests that the Administrative Law Judge deny the Emergency Motion to Strike Brief of Staff, to Remove Brief from Illinois Commerce Commission's Public Website and Post Retraction brought by Illinois Commerce Commission find Protective Parking Service Corporation d/b/a Lincoln Towing Service.

Respectfully Submitted,
Staff of the Illinois Commerce
Commission

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