

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

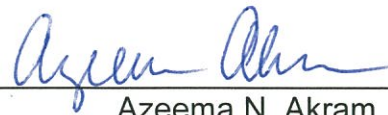
Allen R. Perl
Vlad V. Chirica
Perl & Goodsnyder, Ltd.
aperl@perlandgoodsnyder.com
vchirica@perlandgoodsnyder.com

Latrice Kirkland-Montaque
Chief Administrative Law Judge
Illinois Commerce Commission
latrice.kirkland-montaque@illinois.gov

PLEASE TAKE NOTICE that on June 25, 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 REPLY TO RESPONDENT'S POST-HEARING BRIEF**, 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 REPLY TO RESPONDENT'S POST-HEARING BRIEF**, was sent via electronic mail to the above listed persons on June 25, 2018.



Azeema N. Akram

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In re: :
: :
Protective Parking Service Corporation :
d/b/a Lincoln Towing Service, : Docket No. 92 RTV-R Sub 17
Respondent. : 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. :

STAFF'S REPLY TO RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, Martin W. Burzawa and Azeema N. Akram, pursuant to 83 Ill. Adm. Code 200.800, and for its Reply to Respondent's Post-Hearing Brief states as follows:

I. LINCOLN IMPROPERLY RAISES PREVIOUSLY REJECTED ARGUMENTS.

Repetition neither increases the strength of an argument nor revives a previously rejected argument. Lincoln's Table of Contents identifies six argument sections. Four of these arguments were previously resolved against Lincoln. For instance, Lincoln's *Emergency Motion to Strike Brief of Staff, Remove Brief from Illinois Commerce Commission's Public Website, and Post Retraction* also argued that: 1) Staff engaged in a "pattern of practice (sic) of unconstitutional and harassing litigation tactics;" 2) Respondent was deprived of due process of law; 3) Staff's brief should be stricken; and 4) Staff should be sanctioned. Respondent's *Emergency Motion to Strike Brief of Staff* was denied in its entirety.

Lincoln has also argued on many occasions prior to its motion to strike that its due

process rights were being violated and that the process and fitness hearing should have been governed by Commission rules governing revocation proceedings which require a formal complaint. These arguments were not directed to Staff, as Staff is not the trier of law and fact in this matter. These arguments were made to the Administrative Law Judge. All of these argument were explicitly or impliedly rejected. Had they not been, had the arguments any merit, this process would not be ongoing. Now, as then, Lincoln's arguments are unfounded and should be rejected.

II. STAFF'S CONCLUSIONS ARE BASED ON FACTS IN EVIDENCE.

Lincoln, yet again, continues to feign not understanding the evidentiary basis for Staff's conclusion concerning violations in order to make its specious argument that there was "no evidence adduced at the trial to support [Staff's] conclusion." Lincoln presumably would agree with the truism that exhibits admitted into evidence are evidence. Staff's Exhibits A, B, F, J, and K were admitted as evidence at the fitness hearing by the ALJ. *Tr. 2-14-18, p. 1731, ll. 14-16.* Staff's Exhibits A and B 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. Staff's Exhibit F comprises Relocator – Operator/Operator Permit information from MCIS. Staff's Exhibits J and K that consist of Lincoln's 24 Hour Tow Reports for the same period. Even if Lincoln's assessment of the testimonial evidence were accurate*, given that Staff specifically cites to Staff's Exhibits A, B, F, J, and K and bases its conclusions on facts contained therein, how can Lincoln argue that Staff's conclusions of violations are not

* Lincoln focuses on favorable excerpts of its cross examination of Sergeant Sulikowski and disregards his testimony wherein he identifies unauthorized tows when comparing Lincoln's Tow Reports to MCIS. *Tr. 5-31-17, p. 288, l. 19 – p. 289, l. 8; p. 421, l. 16 – p. 422, l. 19).*

premised on evidence adduced at trial? This not only conflicts with logic but also with Lincoln's statement concerning Staff's exhibits, which admits "the existence of the documents in the record." *Respondent's Post-Hearing Brief*, pg. 16. Staff's conclusions are direct inferences from the documents in the record. 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 adduced at trial lead to the conclusion that Section 1710.41 was violated. Lincoln merely disagrees with Staff's conclusions and the weight of the evidence.

Related to the question of the weight of the evidence, Lincoln seeks to reargue the admissibility of Staff's exhibits by arguing their weight. *Respondent's Post-Hearing Brief*, pgs. 14 – 21. Lincoln's argument that Staff's exhibits are inadmissible as unreliable and inaccurate has been resolved against Lincoln. The admission of Staff's exhibits containing Commission public records is governed by Rule 803(8), allowing admission of public records and reports as an exception to the hearsay rule, in conjunction with Rule 902(1), which allows for self-authentication of the records through an official certification. *Ill. R. Evid. 803(8); 902(1)*. The same arguments raised by Lincoln concerning the accuracy and reliability of the public records contained in Staff's exhibits have been rejected by the Administrative Law Judge when she admitted the exhibits.

III. PUBLIC RECORDS ARE GENERALLY RELIABLE AND ACCURATE.

If aside from the resolved question of admissibility it is Lincoln's position that the facts the evidence, contained in the public records admitted as Staff's Exhibits A, B, and F should be given little weight because the records are unreliable and inaccurate, Lincoln fails to meet its burden of persuasion. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). Lincoln offers no evidence and there is no indication that any of the relevant entries from the public records cited to by Staff as a basis for its conclusions contain errors. Instead, Lincoln relies on irrelevant entries that contain apparent errors (certain entries are dated with the year 1899) in an attempt to taint the public records as a whole. Lincoln also misrepresents the testimony of Sergeant Sulikowski when Lincoln states he testified that "the documents are not reliable and not accurate." Sergeant Sulikowski merely agreed that entries with apparent errors, such as ones containing the year of 1899, were inaccurate:

Q. So somebody put in 1889?

A. Yes.

Q. That information is not accurate then,
right?

A. No.

Tr. 1-30-18, pg. 1337, ll. 7-11. Sergeant Sulikowski affirmed the general reliability of the information in the exhibits and MCIS:

A. What I'm trying to say is I believe -- this information to be reliable. Now when I see the 1889, we know that can't be. Human error is a factor because humans do make errors. No one is incapable of making an error. So if I saw 1889 appear on another document, my red flag would go up. It would not go up if I did not see that, if all of the other information looked correct in the proper time frame. I'm not going to question every document that comes before me because I wouldn't have time in my day to complete what I need to complete.

Tr. 1-30-18. Pg. 1339, ll. 5-16.

Furthermore, Lincoln's statement that "public records are not inherently reliable and accurate" lacks any cite to authority because this is not the state of the law. It is quite the opposite, as this is the very rationale why public records are not excluded by the hearsay rule and can be self-authenticating with a certification under the Rules of Evidence. "It is a well-settled exception to the hearsay rule that records kept by persons in public office, which they are required either by statute or by the nature of the office to maintain in connection with the performance of their official duties, are admissible in evidence and constitute evidence of those matters which are properly required to be maintained and recorded therein. Such records are seen as inherently trustworthy based on the assumptions that public officers will perform their duties and are without motive to falsify." *Eastman v. Dep't of Pub. Aid*, 178 Ill. App. 3d 993, 997, 534 N.E.2d 458, 461 (2d

Dist. 1989); also see *People ex rel. Wenzel v. Chicago & NorthWestern Ry. Co.*, 28 Ill.2d 205, 212, 190 N.E.2d 780 (1963) (referring to *Cleary, Handbook of Illinois Evidence*, sec. 13.37).

These general principles hold true here as well. The information in MCIS is produced and maintained pursuant to a duty imposed by law on the Transportation Division of the Commission and as required by the nature of the Transportation Division. 625 ILCS 5/18c-1204. The information was entered at or near the time of the events noted in the records and also at a time when those events were not at issue or in dispute. This tends to support the notion that the information is reliable because there was no motive to falsify. Additionally, Lincoln's argument that the information contained in Staff's Exhibits A and B, which contain information of whether a contract has been filed with the Commission, is unreliable and inaccurate is weaker still because Lincoln inputs this information itself. Robert Munyon and Ethel Lores maintain E relocater accounts on behalf of Protective Parking Service Corporation. *2-14-18 Tr.*, pg. 1714, ll. 9-13. The information on the contract summary forms are electronically submitted to the Illinois Commerce Commission through E relocater. *2-14-18 Tr.*, pg. 1714, ll. 14-18.

IV. SUBSTANTIVE DEFICIENCIES EXIST IN LINCOLN'S FITNESS TO HOLD A RELOCATOR'S LICENSE.

Lincoln takes quite a liberal license when it interprets the stipulation entered into by Staff and Lincoln as stipulating that Lincoln is fit to hold a commercial vehicle relocater's license. As the stipulation makes plain, Staff stipulated to "procedural application requirements." However, there is evidence of substantive deficiencies and failures in Lincoln's fitness to hold a relocater's license. While Lincoln possesses the technical and practical requirements to physically conduct relocation operations, that is,

employees, tow trucks, insurance, etc., the evidence reveals that it lacks the capacity to conduct those relocation operations in conformance with Commission's rules. Specifically, comparing Commission records to Lincoln's records uncovers evidence of hundreds of violations of the Illinois Commercial Relocation of Trespassing Vehicles Law and the Administrative Code. Whether this is gross mismanagement of its business operations or deliberately flouting the law in order to gain a competitive advantage, this demonstrates that Lincoln is not fit to serve the general public pursuant to a relocater's license issued to it by the Commission.

V. THE COMMISSION HAS THE AUTHORITY TO WEIGH THE EVIDENCE AND DETERMINE THAT THE PROVISIONS OF THE ICRTVL AND THE COMMISSION'S ADMINISTRATIVE ARE BEING OBSERVED.

Lincoln repeatedly argues that what Staff concludes were violations cannot be considered as such because there were "no investigations opened, no citations were written, and no violations were adjudicated by an administrative law judge" and there were no "actual citations, or even actual violations that had been adjudicated." *Respondent's Post-Hearing Brief*, pgs. 30, 32. Lincoln appears confusingly to argue that for the Commission to be able to find that Lincoln violated the Illinois Commercial Relocation of Trespassing Vehicles Law ("ICRTVL") within the context of the fitness hearing there must first have been a previous adjudication of the same violation. The authority of the Commission during a fitness hearing is not limited in this fashion. Rather, the Commission has the authority to make determinations of fact and law in the first instance.

Section 401 of the ICRTVL provides that "the Commission may at any time during the term of the license make inquiry into the management, conduct of business, or otherwise determine that the provisions of the ICRTVL and the Commission's

Administrative Rules, 92 Ill. Adm. Code 1710.10 *et seq.*, are being observed.” 625 ILCS 5/18a-401. The authority to make inquiry or otherwise determine that the provisions of the law and rules are being observed necessarily implicates the authority to actually make that determination. How else does one reasonably interpret the language used by the General Assembly in granting the Commission the power to *determine* that the law and rules are being observed? In absence of this reasonable interpretation – that that the Commission is authorized to determine whether a violation occurred based on its inquiry – the language would be rendered superfluous and a large portion of the Section 401 meaningless. Accordingly, the Commission can weigh Staff’s argument and the evidence in support of it and “determine that the provisions of the ICRTVL and the Commission’s Rules are being observed,” that is, whether a violation occurred.

By way of example applicable to each of Staff’s arguments, Staff’s Ex. J, pg. 220 (Lincoln’s Tow Reports) shows Lincoln towed one vehicle from 225 N. Columbus on January 29, 2016. Staff’s Ex. B, pg. 2 (MCIS) shows Lincoln’s contract for 225 N. Columbus was cancelled on January 25, 2016, and replaced by another relocater’s contract on January 26, 2016. Based on these pieces of evidence, Staff argues that Lincoln violated 92 Ill. Adm. Code 1710.41 by towing a vehicle without property owner or agent authorization on January 29, 2016, from 225 N. Columbus. The Commission will weigh the evidence in support of this conclusion. It will determine whether Staff’s Ex. J, pg. 220 (Lincoln’s Tow Reports) is credible and, if so, whether it more likely than not leads to the conclusion that Lincoln towed a vehicle on January 29, 2016, from 225 N. Columbus. (Presumably, Lincoln does not dispute its own records.) Similarly, the Commission will determine whether Staff’s Ex. B, pg. 2 (MCIS) is credible and, if so,

whether it more likely than not leads to the conclusion that Lincoln did not have a contract for 225 N. Columbus on January 29, 2016. If the Commission determines that both of these premises more than likely occurred, the next step in its analysis will be to determine if these premises lead to the conclusion that Lincoln more than likely violated Section 1710.41 and towed the vehicle without authorization.

VI. LINCOLN OFFERED IMPERMISSIBLE EVIDENCE ON THE EXISTENCE OF CONTRACTS.

Lincoln notes that it “called its General Manager, Robert Munyon to the stand, who is the keeper of records for Respondent. Mr. Munyon consistently testified that Lincoln had contracts for all of the lots throughout the relevant time period.” *Respondent’s Post-Hearing Brief*, pg. 39. Whether a contract is in effect and valid necessarily depends on the terms of the contract, that is, the contents of the contract. Mr. Munyon did not testify that he remembers that each contract for each of the properties at issue was entered into by him on a particular date and remained in effect. Instead, he testified that he reviewed the contracts to determine whether they were active. That is, his testimony is not based on personal knowledge but on reviewing contracts that he may not even have been personally involved in and concerns what was contained in the contract. However, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *Ill. R. Evid. 602*. Additionally, to prove the contents of a writing, in this instance the terms of a contract, the original or a duplicate of the writing is required. *Ill. R. Evid. 1002; 1003*.”

Mr. Munyon's testimony reveals that it was not based on personal knowledge but on a supposed review of the contracts, and should not have been allowed consistent with Staff's objection at the time.

Q Going back for a second, you've heard
Sergeant Sulikowski's testimony, correct?

A Yes.

Q And they went through Exhibits A, B -- A
and B, and compared and contrasted them to the
24-hour tow sheets, correct?

A Yes.

Q Did you, then, go back and look through
your records to determine whether or not Lincoln
Towing had an active contract for each and every one
of those lots that they towed from during the
relevant time period?

A Yes.

Tr. 3-15-18, pg. 1805, ll. 9-21. Mr. Munyon, rather than testifying from personal knowledge, impermissibly testified about the contents of the contracts based on his out-of-court review of these contracts. However, "it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible." *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 130, 595 N.E.2d 177 (2d Dist. 1992). "In other words, '[a] witness is * * * not permitted to testify as to the contents of the document or provide a summary thereof; the document 'speaks for itself.'" *In re A.B.*, 308 Ill. App. 3d 227, 236, 719 N.E.2d 348, 356 (2d Dist. 1999) citing M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 803.10, at 825 (7th ed.1999).

This raises an important question. Why is it that Lincoln failed to produce the contracts at the fitness hearing? Mr. Munyon, as the “keeper of records” for Lincoln, has control over the contracts. Mr. Munyon would not have been able to testify to their contents, but he would have easily been able to lay a business records exception to the hearsay rule to have them admitted into evidence, thereby conclusively answering the question. Mr. Munyon's testimony, quoted above, indicates he became aware of this question during Sergeant Sulikowski's testimony concerning Staff's Exhibits A and B, which contain the contract information from MCIS. Sergeant Sulikowski testified on May 31, 2017, June 1, 2017, July 7, 2017, and July 10, 2017. *Trs. 5-31-17, 6-1-17, 7-7-17, 7-10-17*. Mr. Munyon testified on March 15, 2018, ten months later. When a party fails to offer evidence within its power to produce, a presumption arises that the evidence the party fails to produce would be adverse to him. *Illinois Pattern Jury Instructions, Civil, No. 5.01.*[†] Here, that adverse presumption is that the contracts do not exist.

WHEREFORE, for the reasons discussed above, Staff respectfully requests that the Illinois Commerce Commission find Protective Parking Service Corporation d/b/a Lincoln Towing Service unfit to hold a relocators license in the State of Illinois under the Illinois Commercial Relocation of Trespassing Vehicles Law.

[†] 5.01 Failure To Produce Evidence or A Witness If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements: 1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence. 2. The [evidence] [witness] was not equally available to an adverse party. 3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him. 4. No reasonable excuse for the failure has been shown.


Respectfully Submitted,

Staff of the Illinois Commerce

Commission

Martin W. Burzawa
Attorney Registration 6277206
Illinois Commerce Commission
Office of Transportation Counsel
160 N. LaSalle Street, Suite C-800
Chicago, Illinois 60601
Phone: 312.814.1934
Facsimile: 312.814.1818
martin.burzawa@illinois.gov

By: 
Martin W. Burzawa
Transportation Counsel

By: 
Azeema N. Akram
Transportation Counsel

Azeema N. Akram
Attorney Registration 6312237
Illinois Commerce Commission
Office of Transportation Counsel
160 N. LaSalle Street, Suite C-800
Chicago, Illinois 60601
Phone: 312.814.2859
Facsimile: 312.814.1818
azeema.akram@illinois.gov