



By Initial Decision dated October 19, 2012, the ALJ found that Yellow Cab violated 52 Pa. Code §29.316(a)(1), 66 Pa. C.S. §1303 and 66 Pa. C.S. §1501. ALJ Hoyer imposed a civil penalty of \$1,500.

Yellow Cab hereby files Exceptions to the Initial Decision of the ALJ.

## **II. EXCEPTIONS**

- 1. The ALJ erred in concluding that Complainant saw that Mr. Foreman had \$1 bills in his possession; that Mr. Foreman told Complainant that he did not have any \$1 bills; and that the fare was \$10. (Finding of Fact No. 5, Initial Decision, Page 3).**
- 2. The ALJ erred in concluding that Respondent violated 52 Pa. Code §29.316(a)(1) and 66 Pa. C.S. §1303. (Conclusion of Law No. 2, Initial Decision, Page 12).**
- 3. The ALJ erred in concluding that Respondent violated 66 Pa. C.S. §1501. (Conclusion of Law No. 3, Initial Decision, Page 12).**
- 4. The ALJ's imposition of a \$1,500 penalty was excessive under the facts of this case. (Conclusion of Law No. 4, Initial Decision, Page 12).**

## **III. ARGUMENT**

- A. EXCEPTION 1: THE ALJ ERRED IN CONCLUDING THAT COMPLAINANT SAW THAT MR. FOREMAN HAD \$1 BILLS IN HIS POSSESSION; THAT MR. FOREMAN TOLD COMPLAINANT THAT HE DID NOT HAVE ANY \$1 BILLS; AND THAT THE FARE WAS \$10. (FINDING OF FACT NO. 5, INITIAL DECISION, PAGE 3).

On March 29, 2012 at approximately 11:15 p.m., Dave Foreman, a lease driver for Yellow Cab, provided cab service to Grant Schauer from Walnut Street to Murray Avenue and Hobart Street in the City of Pittsburgh. (H.T., 6-7).<sup>2</sup> The metered fare for the cab service was \$6.40. *Id.* Mr. Schauer testified that he gave Mr. Foreman \$20 and intended to tip him \$2.60. He also testified that Mr. Foreman told him that he did not have any ones; that the fare was \$10; that he saw that Mr. Foreman had ones; and that Mr. Foreman gave him \$10. (H.T., 8).

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<sup>2</sup> "H.T., followed by a number refers to the transcript page of the Initial Hearing before ALJ Hoyer on July 23, 2012.

David Foreman is a Fifty- five year old male with a Bachelor's degree in philosophy and liberal science with minors in economics and history. He has been driving a cab with Yellow Cab for a little under four years. (H.T., 21-22). There was no evidence that Mr. Foreman had a history of noncompliance with PUC regulations.

With respect to the transportation services at issue, Mr. Foreman testified that Mr. Schauer exited Mario's Eastside Saloon and requested a ride to the Squirrel Hill area of Pittsburgh. (H.T., 22). He provided the transportation and the metered fare was \$6.40. (H.T., 22-23). Mr. Schauer offered a twenty-dollar bill. Mr. Foreman checked his coat pocket for change and noticed that he had fives, tens and twenties, but no ones. (H.T., 23-24). He then searched the pockets of his pants and coat and located four ones. Mr. Foreman provided Mr. Schauer \$3.000. Mr. Schauer demanded the additional sixty cents and Mr. Foreman provided an additional one dollar bill for a total of \$14. (H.T., 25). Mr. Schauer began harassing Mr. Foreman with rapid-fire questions and refused to exit the cab. Mr. Schauer eventually exited the cab when Mr. Foreman indicated that he would call the police. (H.T., 26).

The ALJ erred in concluding that Mr. Foreman told Mr. Schauer that he did not have any ones and that the fare was \$10. Yellow Cab acknowledges that absent an abuse of discretion, it is "within the purview of the ALJ in evaluating the credibility of witnesses and the weight of their testimony to consider their demeanor, apparent candor, intelligence, and bias or lack thereof. Black Diamond Hose Co. # 2 v. PP&L Utilities Corporation, d/b/a PPL Electric Utilities, 2000 Pa. PUC LEXIS 26, \*7, (May 1, 2000), *citing* Danovitz v. Portnoy, 399 Pa. 599, 161 A.2d 146 (1960). In the case *sub judice*, ALJ Hoyer abused his discretion because the findings were not supported by substantial evidence.

Mr. Schauer's testimony was cursory; demonstrated bias and lacked foundation. For example, Mr. Schauer testified that he could see one dollar bills and thus distinguishing the same from five, ten and twenty dollar bills. Mr. Schauer did not explain how he could make this observation at 11:15 p.m. when it was obviously dark and while he was seated in the back seat. Mr. Schauer testified that he was subject to extortion, intimidation and that he believed that the driver would cause him physical harm. (H.T., 16). There was absolutely no evidence to support a conclusion that Mr. Schauer's fear of physical harm was reasonable. Mr. Schauer did not testify that Mr. Foreman threatened him or that he made any overt act tending to demonstrate offensive movement.

Additionally, Mr. Schauer did not make any attempt to contact the police when he felt he would be caused physical harm and when he was allegedly subjected to extortion and intimidation. *Id.* Mr. Schauer's explanation for not doing so, *to-wit*, he did not want to cause a waste of police resources, flies in the face of the effort and resources exhausted in this matter. Of course, Mr. Schauer eventually exited the cab when Mr. Foreman indicated that he would call the police. (H.T., 26).

Apparently, ALJ Hoyer was convinced by Mr. Schauer's argument that he had nothing to gain or lose by filing the complaint. (H.T., 39). It is equally plausible that Mr. Foreman would not risk termination of his leasing privileges and potential criminal action over \$3.60. Moreover, Mr. Schauer was going to tip Mr. Foreman \$2.60. As such, it is incredible that Mr. Foreman would engage in the alleged conduct for an additional \$1.00.

Lastly, Mr. Schauer was motivated by having Mr. Foreman fired. He testified that he told Jerry Campolongo that he was willing to go lenient on fines if he would fire the driver.

(H.T., 12).<sup>3</sup> However, Mr. Foreman had no history of complaints with Yellow Cab. (H.T., 30). Yellow Cab investigated the incident and did not believe that Mr. Foreman overcharged or threatened Mr. Schauer. (H.T., 34-35). After investigating the incident, Yellow Cab refunded the fare because he believed that he was overcharged and was adamant about getting his money back. (H.T., 31).

Yellow Cab has no doubt that Mr. Schauer believed that Mr. Foreman was attempting to refund only \$10. However, the record does not support that contention. Mr. Foreman checked his coat pocket for change and noticed that he had fives, tens and twenties, but no ones. (H.T., 23-24). He then searched the pockets of his pants, and located four ones and provided Mr. Schauer with \$3.00. Mr. Schauer demanded the additional sixty cents and Mr. Foreman provided an additional one dollar bill for a total of \$14. (H.T., 25). Mr. Schauer was not in a position to notice the denominations of the bills that Mr. Foreman originally pulled from his coat pocket because it was dark and he was in the back seat.

Accordingly, Yellow Cab respectfully submits that ALJ Hoyer erred in finding of fact No. 5.

**B. EXCEPTION 2: THE ALJ ERRED IN CONCLUDING THAT RESPONDENT VIOLATED 52 PA. CODE §29.316(A)(1) AND 66 PA. C.S. §1303. (CONCLUSION OF LAW NO. 3, INITIAL DECISION, PAGE 12).**

ALJ Hoyer concluded that Yellow Cab's conduct violated 52 Pa. Code §29.316(a)(1) and 66 Pa. C.S. §1303 for charging a rate greater than its metered rate, and thus, its tariff. 52 Pa. Code §29.316(a)(1) provides that "[e]very call or demand carrier shall charge according to its tariffs filed, posted and published in accordance with law and this title: (1) The amount as is calculated and registered on the meter." "No public utility shall, directly or indirectly, by any

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<sup>3</sup> Mr. Foreman is an independent contractor and not an employee. As such, while he could not be "fired", his lease privileges could be terminated. (H.T., 30).

device whatsoever, or in any wise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto....". 66 Pa. C.S. §1303.

As stated in the first exception, Mr. Foreman provided the transportation service to Mr. Schauer at the metered fare of \$6.40. (H.T., 22-23). Mr. Schauer offered a twenty-dollar bill. Mr. Foreman checked his coat pocket for change and noticed that he had fives, tens and twenties, but no ones. (H.T., 23-24). He then searched the pockets of his pants and coat and located four ones and gave Mr. Schauer \$3.00. Mr. Schauer demanded the additional sixty cents and Mr. Foreman provided an additional one dollar bill for a total of \$14.00. (H.T., 25).

Accordingly, Yellow Cab did not charge an illegal fare.<sup>4</sup>

C. EXCEPTION 3: THE ALJ ERRED IN CONCLUDING THAT RESPONDENT VIOLATED 66 PA. C.S. §1501. (CONCLUSION OF LAW NO. 2, INITIAL DECISION, PAGE 12).

“Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public...” 66 Pa. C.S. §1501. ALJ Hoyer erred in concluding that Yellow Cab failed to provide reasonable service.

Yellow Cab did not provide unreasonable service. There is no dispute that Mr. Foreman transported Mr. Schauer as requested, or that he failed to take a direct route. There is no allegation that the cab was unsafe or inadequate. There is no allegation that Mr. Foreman drove

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<sup>4</sup> Yellow Cab acknowledges that the total refunded by Mr. Foreman exceeded the metered rate by \$.40. However, given the dispute and rising tensions with the passenger, Mr. Foreman acted reasonably in not demanding the \$.40 to defuse the dispute.

in a reckless or dangerous manner. In fact, there is no evidence in the record that could reasonably lead to a conclusion that passenger safety was at risk.

ALJ Hoyer, in his discussion with respect to the penalty analysis, acknowledges that he is “not aware of any Commission decisions involving conduct of this nature by a cab driver”. (Initial Decision, Page 10). Likewise, Yellow Cab has not located any decisional authority that is factually analogous to the instant action. However, there have been cases where something less than a complete failure to provide service has been considered.

In PUC v. Cooper, 2000 Pa. PUC LEXIS 22 (June 9, 2000), the Bureau of Transportation and Safety filed a Complaint against a utility alleging that it provided unreasonable service when it ordered a passenger from its cab prior to reaching the intended destination and that the driver was belligerent. There, the ALJ found that:

The *Complaint* does not appear to involve allegations that the acts complained of amounted to a complete failure to provide service or, otherwise, a failure to provide service consistent with the accommodation and convenience of the involved patrons. A successful defense showing that the safety of the patrons was not at risk would support, in any event, a conclusion that the service was reasonable and consistent with accommodation and convenience of the patrons. *66 Pa.C.S. § 1501*.

Id. at \* 19-20.

In the case at hand, as in Cooper, there was no complete failure to provide service. Indeed, Mr. Foreman transported Mr. Schauer to his final destination without any allegation of impropriety. There is absolutely no evidence in the record to support a conclusion that Mr. Schauer’s fear of physical harm was reasonable. Mr. Schauer did not testify that Mr. Foreman threatened him, or that he made any overt act tending to demonstrate offensive movement, or that he drove in a reckless manner. The fear or threat must have been one which would have caused a reasonable person to be in fear or feel threatened. Id.

ALJ Hoyer wrote that Mr. Foreman ordered Complainant out of the cab “because he knew his conduct was reprehensible” (Initial Decision, Page 6), and “to conceal his identity and avoid potential consequences.” (Initial Decision, Page 9). There is nothing in the record to support these statements and findings. To the contrary, Mr. Foreman ordered Mr. Schauer out of the cab because he completed the transportation services, to-wit, transporting the passenger to his destination. While Mr. Foreman did not identify himself, there was no active concealment. In fact, a PUC complaint decal and the name and telephone number to file complaints with Yellow Cab are affixed in the vehicle. (H.T., 31). How this can be interpreted as concealment is questionable particularly when Mr. Schauer testified that he attempted to contact Yellow Cab within minutes of the incident at 11:23. (H.T., 10).

Lastly, Yellow Cab submits that the gravamen of the Complaint in this matter surrounds one issue - a fare dispute. Mr. Foreman agreed to transport Mr. Schauer to his destination, and did in fact transport the passenger directly to his destination. This is not a case involving the safety of the service provided or the manner in which the transportation was conducted. Instead, it is a fare dispute that arose after the transportation service concluded.

Accordingly, Yellow Cab respectfully request that the Complaint with respect to unreasonable service be dismissed.

**D. EXCEPTION 4: THE ALJ’S IMPOSITION OF A \$1,500 FINE WAS EXCESSIVE UNER THE FACTS OF THIS CASE. (CONCLUSION OF LAW NO. 4, INITIAL DECISION, PAGE 12).**

Initially, it should be noted that Yellow Cab contests the imposition of any penalty for the reasons as set forth in the within first three exceptions. To the extent that those exceptions are denied, then Yellow Cab submits that the fines imposed are unreasonably excessive.

Yellow Cab acknowledges that the PUC may impose a maximum civil penalty of \$1,000 for every violation. 66 Pa. C.S. §3301. However, the ALJ is bound to follow the penalty guidelines as set forth in Rosi v. Bell Atlantic-Pa., Inc., Docket No. C-00992409 (February 10, 2000) and as codified at 52 Pa. Code §69.120(c). The factors to be considered are:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

Id.

Application of the penalty guidelines to this case does not warrant the imposition of the maximum civil penalty imposed by ALJ Hoyer. Judge Hoyer, in applying the factors, focuses almost exclusively on 52 Pa. Code §69.120(c)(1) and (3). ALJ Hoyer gives little deference to the remaining factors. For instance, while acknowledging that the conduct complained of did not result in bodily injury or property damage (52 Pa. Code §69.120(c)(2)), he still concludes that the maximum penalty is warranted. This factor should mitigate in favor of a lesser penalty.

The following factors should have justified a civil penalty that was less than the maximum:

1. Yellow Cab investigated the incident and refunded Mr. Schauer the entire fare. 52 Pa. Code §69.120(c)(4).
2. Only one customer was affected and the violation of a brief duration. 52 Pa. Code §69.120(c)(5).
3. No evidence was introduced to suggest a poor compliance history. 52 Pa. Code §69.120(c)(6). Additionally, Mr. Foreman had never been the subject of any complaints.
4. Yellow Cab informed Mr. Schauer about the Commission's complaint procedure which is a mitigating factor. 52 Pa. Code §69.120(c)(10). (Initial Decision, Page 11).

With respect to the \$1,000 penalty for the alleged unreasonable service, the Bureau of Transportation and Safety issued Penalty Guidelines effective April 11, 2011, that provide for a \$500 penalty for inadequate, unreasonable service- major violations under 66 Pa.C.S. § 1501. Assuming *arguendo* that the conduct complained of constituted a major violation, the appropriate fine considering the guidelines and facts of this case should have been \$500 – not \$1,000.

#### **IV. CONCLUSION**

WHEREFORE, Yellow Cab respectfully requests that the Commission enter an order dismissing the Complaint, or alternatively, reduce the civil penalties imposed by ALJ Hoyer.

Respectfully submitted,

Yellow Cab Company of Pittsburgh

Date: November 29, 2012

By: /s/ Paul S. Guarnieri

Paul S. Guarnieri, Esquire  
Attorneys for Respondent

MALONE MIDDLEMAN, P.C.  
Northridge Office Plaza  
117 VIP Drive, Suite 310  
Wexford, PA 15090  
(724) 934-6888  
[guarnieri@mlmpclaw.com](mailto:guarnieri@mlmpclaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 29<sup>th</sup> day of November 2012, served a copy of the above Exceptions to Complainant by first class, United States Mail, postage pre-paid, addressed as follows:

Grant Schauer  
5835 Douglas Street  
Apartment #1  
Pittsburgh, PA 15217

I also certify that a copy of the Exceptions was electronically served upon the Commission's Office of Special Assistants at [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov).

*/s/ Paul S. Guarnieri*  
Paul S. Guarnieri, Esquire