

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Determining the Proper )  
Carrier Classification of, and Complaint for ) TV 170747  
Penalties Against: )  
)  
Transit Systems, Inc d/b/a MOVES FOR SENIORS )  
\_\_\_\_\_)

**POST HEARING MEMORANDUM OF TRANSIT SYSTEMS, INC  
dba MOVES FOR SENIORS**

**I. INTRODUCTION**

Transit Systems provides freight brokerage services throughout the United States, including Washington State, through its Moves for Seniors (“MFS”) operating division. It conducts its business through an interstate brokerage permit issued by the United States Commission of Transportation, FMCSA, MC 261796, US DOT No. 517872.<sup>1</sup>

The Commission has issued a complaint against Transit Systems alleging:

1. MFS has engaged, and is engaging, in the business of a for-hire household goods carrier within Washington State without having a permit to do so.<sup>2</sup>
2. MFS has advertised, solicited or offered its services as a household goods carrier without having a license to provide transportation of household goods.<sup>3</sup>

---

<sup>1</sup> CP 2

<sup>2</sup> Complaint ¶ 1.

<sup>3</sup> Complaint ¶ 2

## II. SUMMARY OF MFS' ARGUMENT

1. MFS does not transport household goods within the WUTC's jurisdiction. Instead, it is a moving coordinator. Through a network of licensed moving companies, MFS arranges transportation services to be provided by those other companies.

2. MFS does not transport household goods. Therefore it is not a household goods carrier subject to regulation under Title 81.80 R.C.W.

3. As a broker, licensed by the FMCSA, the state of Washington has no jurisdiction over brokerage operations. 49 U.S.C. §14501(b)(1) ("FAAAA") expressly pre-empts the field of state regulation over the rates, routes or services MFS offers.

4. Because MFS does not offer, or provide, household goods carriage services, the advertising prohibition in RCW 81.80.074(4)(b) does not apply.

5. Nothing contained in the Washington Motor Carrier Act, Title 81.80 prohibits household goods brokerage services. Nothing in the Washington Motor Carrier Act requires that household goods brokers be licensed. In fact, nothing in the Washington Motor Carrier Act imposes any regulation on brokerage other than the bonding requirement set forth in RCW 81.80.430.

The Commission's attempt to impose regulations on MFS is an *ultra vires* act of the agency. Notwithstanding the legislature's silence on the registration of household goods freight brokers, the Commission, through its *ultra vires* actions, has promulgated a brokerage

application.<sup>4</sup> It has adopted regulations the FAAAA preempts to the extent they do more than impose a bonding requirement.<sup>5</sup>

6. The charge that MFS has violated a restriction on advertising violates MFS' right of commercial speech as protected by the First Amendment to the United States Constitution and by Article I, Section 5 of the Washington State Constitution.

### III. ARGUMENT

#### A. MFS Is Not A Carrier.

RCW 80.80.010 governs the threshold question of whether the Washington Motor Carriers Act applies to MFS' activities. That statute is definitional. It provides,

(1) "Common carrier" means any person who **undertakes to transport property** for the general public by motor vehicle for compensation, whether **over regular or irregular routes**, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

(2) "Contract carrier" includes all motor vehicle operators not included under the terms "common carrier" and "private carrier" as defined in this section, and further includes any person who under special and individual contracts or **agreements transports property by motor vehicle for compensation.**

(3) "Common carrier" and "contract carrier" includes persons engaged in the business of providing, contracting for, or undertaking to provide transportation of property for compensation **over the public highways of the state of Washington as brokers or forwarders.**

\*\*\*

(5) "Household goods carrier" means a person **who transports for compensation**, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement **to transport household goods** as defined by the commission.

---

<sup>4</sup> WAC 480-12-100(2) defines a "broker" as "a person engaged in the business of providing, contracting for or undertaking to arrange for, transportation of property by two or more common carriers."

<sup>5</sup> Under FAAAA, states retain the police power to regulate safety (including insurance and bonding requirement, 49 U.S.C. 14501)

(6) “Motor carrier” includes “common carrier,” “contract carrier,” “private carrier,” and “exempt carrier” as defined in this section.

Nothing in RCW 81.80.010’s definitions extends the definition of “carrier” to a business that merely arranges transportation services performed by others. While RCW 81.80.075(1) requires a household goods carrier to obtain a license to provide transportation services, the law is silent about requiring a household goods broker to seek a license.<sup>6</sup>

In addition to accusing MFS of engaging in household goods carrier operations, the Commission alleges that MFS unlawfully advertises its services in violation of RCW 81.80.075(4)(a) which provides,

(4) Any person **who engages in business as a household goods carrier** in violation of subsection (1) of this section is subject to a penalty of up to five thousand dollars per violation.

(a) If the basis for the violation is advertising, each advertisement reproduced, broadcast, or displayed via a particular medium constitutes a separate violation.

The pre-requisite to RCW 81.80.075(4)(a)’s advertising prohibition is that the UTC’s target must have acted as a household goods carrier. Absent proof of this element, the advertising prohibition is not applicable.

The Commission’s sole witness, Susie Paul, conceded on cross examination that licensed carriers performed all of the regulated moves during the audit period. (Tr. 74:17-20). She was unable to opine whether these carriers charged rates within Tariff 15-C. (Tr. 75:4-11). The only “move” that was presented as evidence of MFS’ alleged unlawful operations was Attachment J to SP-1. That exhibit described the move for which the Commission sought a rate quote as an “inside pickup and delivery.”

---

<sup>6</sup> The statute provides, “No person shall engage in business as a **household goods carrier** without first obtaining a household goods carrier permit from the commission.”

When asked if she knew what “inside pickup and delivery” meant, Ms. Paul did not know. However, Chris Pienkowski, MFS’ Vice President for Business Development, testified that “inside pickup and delivery” describes a quote for an on-site move, rather than one using public roads.<sup>7</sup> As such, the only “evidence” the Commission presented, was irrelevant to the question of whether MFS had provided a regulated service or advertised that it was providing a regulated service.

The Commission may attempt to rely on its decision in *Ghostruck, Inc.*, Docket TV-161308 (May 31, 2017). However, that reliance would be misplaced for several reasons. Foremost, the doctrine of *stare decisis* has a limited role in administrative law. *Stericycle of Washington Inc. v. Washington Utilities & Transp. Comm'n*, 190 Wn. App. 74, 93 (2015). As such, *Ghostruck* is not a binding precedent.

Second, *Ghostruck* never addressed the issue of FAAAA’s field pre-emption under 49 U.S.C. 14501(b)(1). Third, it failed to recognize the essential difference in function between a brokerage business and motor carriage. According to *Ghostruck’s* analysis, every broker will be deemed a motor carrier even though it lacks the facilities *to transport* property. Plainly, this is outcome driven logic that ignores the functional differences between brokerage and carriage businesses.

For the foregoing reasons, MFS submits that *Ghostruck* provides no guidance here.

**B. MFS Does Not Transport Property. Therefore, it is Not A Household Goods Carrier.**

A party provides motor carrier services if it **transports** property for compensation. In like manner, a person is a household goods carrier if it “**transports**” household goods.<sup>8</sup> The

---

<sup>7</sup> Tr. 89:4-11

<sup>8</sup> For purposes of this action, MFS concedes that it is involved in **arranging** transportation of household goods.

operative word in both statutes is the transitive verb, “transports.” Washington law does not define, “transport.” Therefore, it should be given its dictionary meaning. *State v. Smith*, 405 P.3d 997, 1001 (Wash. 2017) [A nontechnical statutory term may be given its dictionary meaning; statutes should be construed to affect their purpose, and unlikely, absurd, or strained consequences should be avoided]. The Merriam Webster dictionary defines “transport” as, “to transfer or convey from one place to another.”<sup>9</sup>

The evidence presented at hearing plainly establishes that MFS does not transport household goods. Chris Pienkowski testified that MFS is in the business of facilitating the relocation of senior citizens by providing a host of relocation services, only one of which is arranging transportation by household goods carriers (Tr. 83:10-23) with whom MFS has broker-carrier agreements.<sup>10</sup> Plainly, the record fails to demonstrate that MFS is engaged in “transporting” the goods.

In contrast to MFS’s testimony, the WUTC has presented **no** evidence to contradict Chris Pienkowski’s testimony by establishing a regulated move performed by MFS. While the Commission obtained a quotation for service (Attachment J to the Jones Declaration – SP1), that “evidence” is deficient for several reasons.

First, the exhibit does not demonstrate the move was to be on public roads. Since the origin and destination zip codes are the same and the exhibit does not contain origin and destination addresses, this document fails to demonstrate that public roadways were contemplated.

Suzie Paul’s hearsay testimony offered to support this “evidence” should be disregarded. She was not the investigator so she cannot testify about what Rachel Jones told MFS. While the

---

<sup>9</sup> <https://www.merriam-webster.com/dictionary/transport>

<sup>10</sup> CP 4

Commission may in the usual case entrap a carrier by giving two addresses, Ms. Paul has no way to verify what Ms. Jones said. In fact, the document states the move was an “inside” move. Chris Pienkowski testified that this is MFS’ shorthand for a move occurring entirely on-site, not using public roadways. (Tr. 89:4-11).

Second, the quote does not identify the carrier to be used. A quotation from a broker will not necessarily identify the carrier at the time of the quotation. As such, the Commission has no way to demonstrate that the move was to be performed by an unlicensed carrier.

Finally, the commission has presented no evidence that MFS actually provided the services contemplated by the quote. Since the violation is for transporting household goods without a permit, the record fails because the Commission has not proven the necessary element of the violation - transporting the goods.

Since the burden falls on the Commission to prove the violation, it has failed to make even a prima facie case that MFS has provided services, or has offered to provide services, as a household goods carrier. As such, the Commission must dismiss the first charge (“MFS has engaged, and is engaging, in business as a household goods carrier within the state of Washington without the authority required by RCW 81.80.”)

**C. FAAAA Pre-Empts Washington State from Enacting or Enforcing any Statute, Regulation or Order with Respect to MFS Rates, Routes and Services as a Broker.**

49 U.S.C. 14501(b)(1) pre-empts Washington State from regulating, or attempting to regulate, any aspect of MFS’ household goods brokerage operation dealing with rates, routes or services. The statute is an unequivocal exercise of Congress’ right to pre-empt the field. The statute provides,

b) Freight forwarders and brokers.--

**(1) General rule.**--Subject to paragraph (2) of this subsection [regarding the state of Hawaii's continuing right to regulate brokers and forwarders], no State or political subdivision thereof and no intrastate 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 intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.**

49 U.S.C. 13102 provides the definitions relevant in this case. That statute defines broker, household goods and household goods carrier as follows:

**(2) Broker.**--The term "broker" means a person, **other than a motor carrier**.... that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

**(10) Household goods.**--The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

**(A)** arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

**(B)** arranged and paid for by another party.

**(12) Household goods motor carrier.**--

**(A) In general.**--The term "household goods motor carrier" means a **motor carrier that**, in the ordinary course of its **business of providing transportation of household goods**, offers some or all of the following additional services:

**(i)** Binding and nonbinding estimates.

**(ii)** Inventorying.

**(iii)** Protective packing and unpacking of individual items at personal residences.

**(iv)** Loading and unloading at personal residences.

The federal definition of household goods carrier is similar to the definition in RCW 81.80.010(5). In both statutes, "transporting" product is an indispensable element of both.



While 49 U.S.C. 14501(c)(2)(B) does preserve the states' right to regulate household goods **carriers** services, it does not create a separate right for the states to regulate household goods brokers. Since Congress addressed the preemption issue in 49 U.S.C. 14501(b)(1), and did not see fit to preserve the states' rights to regulate household goods brokerage as it did with respect to household goods carriers in 49 U.S.C. 14501(c)(2)(B), Washington lacks the power to create an exception to field preemption where Congress did not see fit to preserve the states' power to regulate household goods brokerage.

Because Congress has pre-empted the field of brokerage regulation, the Commission has no authority to impose any regulation, or apply any statute or regulation that has the effect of regulating MFS' brokerage rates, routes or services.

Based on field pre-emption, the Commission cannot impose any sanction on MFS for its brokerage activities, including its advertising of those activities.

**D. Since MFS Does Not Offer Household Goods Moving Services, the Advertising Restriction in RCW 81.80.075(4)(b) Does Not Apply.**

RCW 81.80.075 prohibits engaging in the business of a household goods carrier without a permit. Section 4(b), is a subordinate clause. It merely states that if an uncertificated household goods carrier advertises, then each separate advertisement is a separate violation. Thus, to assess a penalty for advertising, the Commission must first prove that MFS provided household goods carrier services without a license. For the reasons stated above, the Commission has not met its threshold burden of proof. Accordingly, the Commission must dismiss the second charge (“advertised, solicited, offered, or entered into one or more agreements to transport household goods within the state of Washington without first having obtained a household goods carrier permit from the Commission”). For the reasons stated above, the Commission has failed to prove that MFS **transports** household goods. In fact, the

evidence is to the contrary. Since MFS does not transport household goods, it is not acting as a household goods carrier. The statute on which the Commission relies has a predicate – unlawful household goods carriage. Absent that proof, as exists here, the advertising penalty does not apply.

**E. The Commission’s Efforts to Regulate Household Goods Brokerage is an Unlawful *Ultra Vires* Act. Its Actions are Void and Unenforceable.**

Ultra vires acts are those done ‘wholly without legal authorization or in direct violation of existing statutes...’” *Metropolitan Park Dist. v. Department of Natural Resources*, 85 Wash.2d 821, 825 (1975) [statute allowing state to enter into use deed supported agency actions, that, therefore, were not ultra vires].

The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied. *McGuire v. State*, 58 Wash.App. 195, 198, 791 P.2d 929 (1990) [attempt by the Gambling Commission to confer upon an employee rights from which the employee is statutorily exempt would be ultra vires and void].

Washington law does not regulate freight brokerage beyond requiring a bond. The law is silent on household goods brokerage regulation. In fact, by virtue of FAAAA, Washington cannot regulate either brokerage business beyond requiring a bond. As such, the Commission’s application of RCW 81.80.357 to MFS’ brokerage business is ultra vires and void.

**F. MFS’ Advertising is Protected Speech.**

Both the United States and Washington State Constitutions protect commercial speech. For the state to limit commercial speech a court must determine: (1) whether the speech concerns a lawful activity and whether the speech is misleading; (2) whether the government’s interest is substantial, (3) whether the restriction directly and materially serves the asserted government interest, **and** (4) whether the restriction is broader than necessary to serve the

government interest. The party seeking to uphold a restriction on commercial speech carries the burden of satisfying all four requirements. See, *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506 at 512 (2005).

Before the Commission may impose a fine for MFS' advertising, it bears the burden of satisfying **all four elements** in *Mattress Outlet*. It cannot.

First, as argued above, MFS' household goods brokerage business is lawful for three reasons: First, nothing in Washington law prohibits the brokerage of transportation of household goods. In fact, had the state enacted such a statute, it would be void under 49 U.S.C. 14501(b)(1)'s field preemption. Second, the record fails to demonstrate that MFS acted as a household goods carrier without a license. Third, nothing in the advertising is misleading. The advertising makes it clear that MFS is not the carrier. SP Exhibit 1 (page 14) makes this point on the home page of its website. MFS states, "Our nationwide *partner network of movers*, specialty move coordinators and other service providers are committed to delivering the highest level of customer service." (Emphasis added). It makes the same statement on its LinkedIn home page (SP Exhibit 1, Page 17). Nowhere do these two advertisements state that MFS is a household goods carrier. While the phrasing of these websites may be less precise than the Commission desires, they are not false or misleading. Certainly, by the time a consumer decides to book a move through MFS, the consumer is well aware of the carrier's identity.<sup>11</sup>

The Commission bears the burden of proving that the advertising was misleading. For the reasons stated above, it has failed to do so.

The Commission must also demonstrate that the speech it seeks to prohibit directly advances a governmental interest. Since household goods transportation brokerage is not

---

<sup>11</sup> As Mr. Pienkowski testified, before a consumer books a move, a moving company representative visits the pick-up location to provide an on-site moving estimate. As this witness testified, at that time of the on-site estimate, the consumer receives the consumer rights information required by both federal and state law. (Tr. 87:2 through 89:20)

regulated, the Commission has failed to demonstrate any enforceable state interest. Given this failure of proof, the Commission cannot satisfy the third prong of the *Mattress Outlet* test.

Finally, to prevail, the Commission must demonstrate that its prohibition in this context is narrowly tailored to satisfy its legitimate interest without overreaching. Here too, the evidence fails. Here, the Commission has two interests. First, regulation of household goods carriers enhances market stability by restricting the number of carriers and regulating their business operations. Equally important, continued economic regulation of household goods carriers protects a shipping public that is generally unsophisticated about the moving business. Regulation also protects the public against unlicensed, and unscrupulous, movers. As the Commission argued at hearing, its concern is heightened by the fact that it perceives (without evidence) that the senior citizen market is one that is particularly vulnerable to sharp business practices.

While that regulatory purpose is certainly within the state's police power, the record contains no evidence demonstrating that seniors are more susceptible to deceptive trade practices than any other segment of the moving market.

Since MFS is not acting as a mover, this proceeding does nothing to further the Commission's interests. Instead of evidence demonstrating a problem in need of a remedy, the Commission's opinion of vulnerability is just that...an opinion unsupported by any market studies, research or even anecdotal evidence to substantiate the opinion.

On this further basis, the Commission has failed to sustain its burden of proof. Since the Commission has failed to satisfy even one of *Mattress Outlet's* four elements, the Commission must dismiss the complaint with respect to the advertising claim.

### **G. Late Filed Exhibit.**

At the close of the evidence on December 19, MFS indicated that it was in the process of rebuilding its website. The administrative law judge requested a copy of the website when it was completed. Attached to the accompanying declaration of Chris Pienkowski is the text for the new website. The first page of Exhibit A to the Pienkowski declaration is the text for the new home page for the Moves for Seniors website.

### **CONCLUSION**

The Commission should dismiss the instant complaint for a host of reasons.

First, the Commission's evidence fails to demonstrate that MFS acted as a household goods carrier. The estimate on which this claim is based is deficient. It fails to demonstrate that MFS was the intended carrier. It also fails to prove that the move was to occur on a public roadway. To the contrary, the "inside" description indicates that the move would NOT use public roadways.

Rachel Jones, the staff investigator who allegedly baited the hook by calling and asking for a quotation, failed to appear to testify. As such, the record contains no competent evidence that Ms. Jones actually gave two addresses requiring the use of public roadways to the individual with whom she spoke. The evidence points to the contrary. The quotation states that the bid was for an "inside" move. This statement connotes that the service was to be performed on site, **not using public roads**. While WAC 480-07-495 allows the administrative law judge to consider all relevant evidence, that broad rule is tempered by its "necessity, availability, and trustworthiness." The Commission wholly failed to demonstrate Ms. Jones unavailability. It also failed to buttress its argument that Ms. Jones conducted her investigation according to whatever processes existed at the time. That conclusion was purely Ms. Paul's

speculation. Accordingly, this proffered evidence fails the trustworthiness test. It should be disregarded and the Commission should strike and disregard Attachment J to exhibit SP 1.

Further, the price quotation did not demonstrate that MFS was the intended carrier. As Mr. Pienkowski testified, this is a preliminary step, followed by an on-site pre-move survey by the carrier that performs the move.

For the foregoing reasons, the Commission should dismiss count one (acting as a household goods carrier without a permit).

Second, the prohibition against advertising is tied to proof that MFS held itself out as a household goods carrier. RCW 81.80.075(1) does not make it unlawful to advertise. RCW 81.80.075(4)(b) merely states that if a defendant **holds itself out as a household goods carrier** and lacks the license to do so, the maximum fine is \$5,000 per advertisement. Here, MFS's website and Linked In ads both make it clear that they arrange moving services through a "network of movers." "Network of Movers" necessarily means that someone other than MFS is providing the moving service. Any other construction of MFS' advertising materials, taken in their totality, is unreasonable.

Third, MFS' services as a broker of household goods moving services are not prohibited by Washington law. In fact, Washington cannot prohibit the activity because FAAAA preempts any state regulation of brokerage rates, routes or services. 49 U.S.C. 14501(b)(1). Thus, to the extent the Commission is using this proceeding as a mere pretext for stopping MFS from engaging in lawful brokerage services that it cannot regulate or prohibit, its actions are preempted by FAAAA.

Fourth, MFS' advertisements are commercial speech protected by the First Amendment to the United States Constitution and Article I, Section 5 to the Washington State Constitution.

The Commission's desire to punish MFS for its advertizing intrudes on MFS' right of commercial speech.

For all of the foregoing reasons, the administrative law judge should dismiss the Commission's complaint with prejudice.

Dated this 31<sup>st</sup> day of January 2018.

SIMBURG KETTER SHEPPARD  
& PURDY, LLP

*/s/ Andrew D. Shafer*

---

Andrew D. Shafer, WSBA # 9405  
Attorney for Transit Systems, Inc.  
d/b/a Moves for Seniors  
999 Third Avenue; Suite 2525  
Seattle, WA 98104  
206-330-2054 (direct)  
[ashafer@sksp.com](mailto:ashafer@sksp.com)

## CERTIFICATE OF SERVICE

I certify that on January 31, 2018, I electronically filed the foregoing Post-Hearing Memorandum of Transit Systems, Inc. d/b/a Moves For Seniors with the Washington Utilities and Transportation Commission through its Records Service Center E-filing web portal and also delivered a copy via email to counsel for the Washington Utilities and Transportation Commission as follows:

Julian Beattie: [jbeattie@utc.wa.gov](mailto:jbeattie@utc.wa.gov)  
Assistant Attorney General

Jeff Roberson: [jroberson@utc.wa.gov](mailto:jroberson@utc.wa.gov)  
Assistant Attorney General

Office of the Attorney General  
Utilities and Transportation Division  
1400 S Evergreen Park Drive SW  
P.O. Box 40128  
Olympia, WA 98504-0128  
Phone: (360) 664-1225 / (360) 664-1188

Dated: January 31, 2018

*/s/ Andrew D. Shafer*

---

Andrew D. Shafer, WSBA # 9405  
Attorney for Transit Systems, Inc.