

Before the
Federal Communications Commission
Washington, D.C. 20554

In re)	
)	
AMERICAN PAGING, INC.)	File No. 720EF0009
(OF VIRGINIA))	
)	
Notice of Apparent Liability for Forfeiture)	
for Paging and Radiotelephone Service)	
Stations KNKC336 and KNKD363)	
)	
Virginia Beach, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: July 22, 1997;

Released: July 25, 1997

By the Chief, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau:

I. INTRODUCTION & EXECUTIVE SUMMARY

1. American Paging Inc. (of Virginia) (American), licensee of Paging and Radiotelephone Service Stations, KNKC336 and KNKD363, has filed a Response to a Notice of Apparent Liability for Forfeiture (NALF), requesting remission or reduction of forfeitures totaling seven thousand dollars (\$7,000). The forfeitures were imposed for violations involving the unauthorized relocation and subsequent operation of two transmitting facilities. See American Paging Inc. (of Virginia), 12 FCC Rcd 4980 (1997). For the reasons discussed herein, we deny the request for remission and uphold the full amount of the forfeiture.

II. BACKGROUND

2. American operates Paging and Radiotelephone Service stations in the Virginia Beach, Virginia area. In March of 1996, American received notification that the lease on one of its tower locations was subject to a rent increase upon renewal.¹ On July 22, 1996, American filed two FCC Forms 600 with the Commission requesting permanent authority to relocate two of its transmitting facilities from the aforementioned tower to a new location. On July 29, 1996, American applied for Special Temporary Authority (STA) to commence operation of the

¹ The property lease was to expire on July 31, 1996. For various reasons not relevant here, American did not renew the lease.

transmitters at the new location while its applications were pending.² The lease on the original tower location then terminated on July 31, 1996.

3. On at least three occasions in early August 1996, American's counsel inquired as to the status of its STA requests. On August 6, 1996, during one such inquiry, Commission staff requested more information from American regarding the application. After further review of the information provided by American, the Commission determined that the reasons provided by American did not constitute sufficient grounds to issue STAs, and advised American of its denial by telephone soon thereafter. On August 23, American met with Commission staff to discuss the denial of its STA applications. At that meeting American revealed to the Commission for the first time that the facilities had been relocated and the transmitters had, in fact, been in operation since July 27, 1996. Although there had been several contacts between the Commission and American in the interim,³ American had never given any indication that the transmitters were in operation.

4. On April 30, 1997, the Enforcement and Consumer Information Division of the Wireless Telecommunications Bureau released a NALF against American, assessing a forfeiture in the amount of \$7,000 (\$3,500 for each of two violations). The action was taken in response to American's violation of Section 301 of the Communications Act of 1934, as amended (the Act), which states in pertinent part, that no person "shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." 47 U.S.C. § 301. Section 22.3 of the Commission's Rules, 47 C.F.R. § 22.3, imposes a similar requirement on stations in the public mobile radio services.

III. DISCUSSION

5. It is American's contention that the Commission erred in three respects: 1) that the Commission did not take into account the factors set forth in Section 503(b)(2)(D) of the Act; 2) that the Commission failed to consider the fact that American voluntarily disclosed the violation to the Commission; and 3) that American's prior record of overall compliance should have mitigated the amount of the forfeiture.

6. In assessing a forfeiture amount, the Commission is required to follow the guidelines set forth in Section 503(b)(2)(D) of the Act, which reads, "In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and the gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(D). None of these factors are dispositive and there is no fixed

² American originally filed the application for STA on July 17, 1996. Due to errors in the submission, the Commission returned it to American which refiled it on July 29, 1996. Because such forms are considered filed once they have been *accepted by the Commission*, July 29, 1996 is the date used for filing purposes.

³ See Response to NALF at 3.

formula to be followed in determining their respective weights. Each case is reviewed on the merits as a whole given the individual circumstances. See, e.g., Centel Cellular Company of North Carolina, 11 FCC Rcd 10800 (1996).

7. The first special circumstance American points to is its claim that approximately 4,200 of the paging units it serves are reserved for emergency and public safety organizations. In its argument that such stations are deserving of special priority, American relies on Section 22.352(a) of the Commission's Rules, which states: "[A]ny licensee causing interference to the service of other stations by failing to operate its station in full accordance with the authorizations and applicable FCC rules *shall discontinue all transmissions*, except those necessary for the immediate safety of life or property, until it can bring its station into full compliance. . . ." 47 C.F.R. § 22.352(a) (emphasis added).

8. American's reliance on the above Rule section is misplaced and wholly inappropriate based on the facts at hand. While the Commission does recognize the importance of safeguarding public safety through the continuity of operation of such stations, Section 22.352(a) of the Rules was adopted to enable a station to continue providing previously *authorized* emergency operations, not the commencement of operations. Here, American intentionally began operating multiple transmitting facilities that were unauthorized from the very start. Thus, we do not believe that Section 22.352(a) of our Rules provides the Commission with any reasons to mitigate American's forfeiture.

9. American next contends that the Commission improperly relied on case precedent in not distinguishing the present case on the facts. In Allcity Communications Co., 10 FCC Rcd 12217 (1995), the Commission determined that \$3,500 was a proper amount for violations involving failure to obtain proper authorization from the Commission. Although our treatment of American's violation may appear mechanical because the amounts assessed against American and Allcity are the same, the determination in this case is the product of individual assessment, as well as thoughtful application of the factors in Section 503(b)(2)(D). The violations involved in Allcity were similar to those at hand, and therefore, the determination of the same forfeiture amount against American was well founded.

10. American further attempts to distinguish its case on the grounds that Allcity did not serve a large number of public safety units. That issue has been disposed of above, however, and need not be discussed further except to say that it is irrelevant to the Commission's reliance on AllCity in assessing the instant forfeiture.

11. In its response, American also seeks special consideration based on its claim that it was forced to move the transmitters on short notice. That American now attempts to rely on an excuse for a violation that was already dismissed as insufficient grounds for issuance of the STAs only serves to weaken its case. The record indicates that American was first alerted to the rent increase on its tower lease on March 13, 1996, and thus it should have been able to arrange to relocate the transmitters within a reasonable time to ensure continuing compliance with the Commission's Rules. American, however, attempts to divert its responsibility by claiming that its regional manager in charge of such property leases failed to take the proper steps, and the

manager has since been terminated. This argument is specious to say the least. The Commission has long held that "the fact that the misconduct was attributable to an employee is not relevant. A licensee is fully responsible under the doctrine of *respondet superior*, whether or not violations were intentional or inadvertent." Dial-A-Page, Inc., 8 FCC Rcd 2767 (1993). That the actions of an employee are imputed to the employer is a basic tenet of agency law and "the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations." Triad Broadcasting Company Inc., 96 FCC 2d 1235 (1984). Accordingly, we are not convinced that the failure of American's manager to correct the tower relocation problem absolves American of its ultimate responsibility for the violation.

12. American also seeks rescission of the forfeiture on the grounds that its disclosure to the Commission was voluntary and that it made a good faith effort to bring the transmitting facilities into compliance. The Commission has considered voluntary disclosure to be a mitigating factor in the past where the licensee brought the violation to the attention of the Commission immediately upon the discovery, and when the violation itself had been inadvertent and minor. See, e.g., Hospers Telephone Exchange, 10 FCC Rcd 12001 (1995). In the present case however, American knew it was operating the stations without authorization from July 27, 1996. Nearly a month passed before it disclosed this fact to the Commission even though American had made several contacts with Commission staff during that time regarding its request for STA. Any mitigating effect of a voluntary disclosure is thus abrogated by American's delay. Additionally, American learned during that time that the STA had been denied yet continued to operate the stations unlawfully. Therefore, we find that American did not make a good faith attempt to comply, as it now claims, but instead, appears to have attempted to deceive the Commission, or at least to conceal pertinent facts where there existed a duty to disclose.

13. Finally, American contends that the Commission should have taken into consideration its record of past overall compliance in assessing the forfeiture. Past compliance is but one of the factors taken into account under Section 503(b)(2)(D) in determining the forfeiture amount. See supra ¶ 6. The Commission expects, at a minimum, that all licensees will comply with its rules and regulations. Telepersonal Communications Inc., 11 FCC Rcd 12268 (1996). While not specifically mentioned in the NALF, the Commission fully considered all factors, including American's record, in making its forfeiture amount determination. Furthermore, the cases that American relies upon in its response are inapposite in that none involve a failure to disclose the violation for a significant period of time after discovery, nor does any involve such a violation committed in knowing or intentional disregard of the Commission's Rules. American's request to consider its past compliance is further weakened by the fact that even a cursory search reveals that the Commission issued at least two NALFs against American for violations of Commission Rules in the past six years. See American Paging, Inc (Of Virginia), 7 FCC Rcd 3480 (1992); American Paging, Inc, 7 FCC Rcd 3494 (1992). Both of these prior violations involved willful and repeated failures to properly maintain tower lighting. These violations were considered by the Commission to be quite serious due to the danger posed to aircraft, and they therefore weigh against any mitigation to American for past record of compliance. See, e.g., Radio Beaumont, 13 FCC 2d 965 (1968);

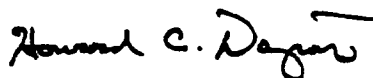
14. For the reasons set forth above, we deny American's request for rescission or remission, and we uphold the full amount of the forfeiture set forth in the NALF.

IV. CONCLUSION AND ORDERING CLAUSES

15. Accordingly, it is ORDERED, pursuant to Section 504(b) of the Communications Act of 1934, as amended, that American Paging Inc. (of Virginia), shall forfeit to the United States the sum of seven thousand dollars (\$7,000) for violations of Section 301 of the Act and Section 22.3 of the Commission's Rules. Payment of the forfeiture shall be made by mailing a check or similar instrument made payable to the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference the captioned file number.

16. It is further ORDERED that a copy of this Order shall be sent by Certified Mail - Return Receipt Requested, to counsel for American, R. Edward Price, Esq., at Koteen & Naftalin, L.L.P., 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION



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