

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

CONSOLIDATED MOTOR FREIGHT, INC.,)	FORMAL COMPLAINT
)	AND AMENDMENT NO. FC-1139
Complainant,)	
)	
vs.)	DISMISSED
)	
BEE LINE MOTOR FREIGHT, INC.,)	
)	
Defendant)	ENTERED: December 22, 1981

BY THE COMMISSION:

OPINION AND FINDINGS

By complaint filed February 13, 1981, Consolidated Motor Freight, Inc., Hastings, Nebraska, a holder of a certificate of public convenience and necessity in M-10610 and supplements thereto, alleges that Defendant, Bee Line Motor Freight, Inc. of Omaha, Nebraska and a holder of a certificate of public convenience and necessity issued in M-6487 and supplements thereto, has been conducting motor carrier operations in Nebraska intrastate commerce in willful violation of the rules and regulations of this Commission. More specifically, the Complainant alleges that Bee Line is "****transporting shipments moving under its irregular route authority at the same time and in the same vehicle with freight that it is transporting pursuant to its regular route authority" and that Defendant has been trucking some shipments in this manner from Omaha to Minden, Holdrege, McCook****and possibly other interior Nebraska points***." In the complaint it is admitted that Bee Line does hold proper Commission operating authority to serve all of the involved points on an irregular route basis.

Then Complainant specifically alleges "4. That Defendant (Bee Line) has been holding out to provide daily scheduled service to points which it is authorized to serve only on an irregular route basis * * *" in violation of cited statutes. Then it is alleged that such violations are willful on the part of the Defendant.

The Complainant further alleges that Defendant's alleged illegal operations are depriving Complainant of traffic to the detriment of the Complainant.

Complainant prays that this Commission enter an order revoking Defendant's certificate or in the alternative order Defendant to cease operations in violation of Commission rules and controlling statutes.

Subsequent to the filing of the subject complaint, Defendant filed a motion to make the complaint more definite and certain; an oral argument was held on the motion and thereafter that motion was denied and; then the Defendant filed an answer to the complaint preserving its motion. Further, Complainant filed an amendment to its complaint raising an issue not involved in the formal complaint and complaining that Defendant did not have the required authority to serve two points in Nebraska. Defendant filed an amended answer generally denying the allegations in the amended formal complaint.

Complainant did not present any evidence on the new grounds alleged in the amended formal complaint and, from a review of the Commission files and statement of counsel at the hearing, Complainant has apparently abandoned the new grounds contained in the amended formal complaint. Therefore, the Commission hereby finds the Complainant, with reference to the new grounds complained of in the amended formal complaint, and hereby dismisses that portion of the amended formal complaint.

E V I D E N C E

The traffic manager for Consolidated is the witness for Complainant. He is familiar with Consolidated's trucking operations.

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Consolidated's employees brought to the attention of the traffic manager that Bee Line was performing a certain truck service to Minden. This information was supplied in the form of four (4) Bee Line freight bills (T14, 15, 18). This transportation of Bee Line is said to be a matter of concern to Consolidated because Consolidated " * * needs all the LTL that we can possibly generate to these communities. * * * " (T16). The traffic manager states that Bee Line has the proper authority to serve Minden on an irregular route basis (T16).

Consolidated officials caused this complaint to be filed because they felt it was not feasible for Bee Line to handle the four (4) shipments in a separate trailer (T22).

The Complainants admit that Consolidated, in operating under Commission regular and irregular route authorities, "mixes" irregular route traffic in the same truck with traffic being transported over regular routes. Consolidated "mixes" its irregular route and regular route traffic in the same vehicle in both intrastate and interstate commerce without complaint from any regulatory agency (T40, 41, 42).

Further the traffic manager readily states " * * * in most cases * * " the mixing of irregular and regular route traffic in the same vehicle is the only economical method to truck Consolidated's irregular route traffic" (T40). Also, the witness states that this "mixing" of traffic whether in intrastate commerce, interstate commerce or combined is a common practice in this state (T43).

The president of Bee Line was called as a witness by counsel for Complainant. This witness supervised making the answers to the written interrogatories served by counsel for Consolidated upon Bee Line (Exhibit 5). The interrogatories involved eight (8) intrastate shipments and six (6) of these eight (8) shipments originated at Omaha destined to Minden (T49). All these shipments were moved under Bee Line's irregular route authority. These shipments moved from Omaha to Kearney at the same time and in the same vehicle with the shipments being transported on a regular route basis. Thereafter these shipments were transported from Kearney to Minden (T51). The witness saw the Commission order in Consolidated Motor Freight v. J.B.H. & Associates sometime after the filing of the involved complaint.

Upon receiving the complaint, Defendant made an evaluation of the merits thereof and arrived at the opinion that the Defendant's Minden operation is legal (T57). Bee Line has continued its Minden truck operation.

In its pattern of operations involving Kearney traffic, Defendant's trucks ordinarily are operated from Kearney to Omaha. The trucks leave Kearney depending upon the time required at Kearney to load available traffic. Once the truck arrives at Omaha it will leave for Kearney anytime from 7:30 p.m. to midnight or 1:00 a.m. the next day depending upon available traffic and loading time requirements.

At times two, three or four trucks may be dispatched from Omaha to Kearney depending upon the calls and demands for service made at almost anytime of the day or night (T60).

This witness is of the opinion that under its Commission authority, Defendant has an obligation to perform service in response to the calls for service, including calls for service under its irregular route authority (T61). The witness is also of the opinion that not only would it be uneconomical to operate two trucks down the same highway with one truck hauling irregular route traffic and the other truck hauling regular route traffic -- but such an operation would waste fuel and would be "absolutely ludicrous" (T61, 62).

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The highways to be operated over by Defendant transporting irregular or regular route shipments is dictated by the most expeditious, most economical and safest route to travel. An Omaha to Kearney regular or irregular route shipment would be routed over I-80, because such a routing meets the above three tests (T63).

The witness testifies that it is absolutely imperative for Defendant to continue to operate for a profit so that Defendant can give a good truck service to Nebraska towns and for the financial benefit of Bee Line's stockholders.

Prior to the filing of the complaint no person has ever complained to Defendant about its Omaha to Minden operations or operations from Omaha to any other Nebraska points (T64).

Defendant solicits traffic under its Commission operating authority One of its solicitation tools is a handout listing of service points (Ex. 7). This solicitation tool does not indicate that Defendant performs overnight service to Minden. In fact Defendant's personnel instructs its employees not to solicit on an overnight service to Minden (T69).

In defense to the complaint, Defendant caused to be introduced the testimony of a traffic consultant in the trucking industry. This witness has a broad background within the trucking industry and now as a consultant to that industry.

The consultant has studied the complaint and has conducted certain research with reference to the issues raised in the complaint including the matter of loading irregular and regular route traffic in the same vehicle.

After making the study the consultant found " * * * that the Interstate Commerce Commission in the Interstate Commerce Act as amended in 1980 does not define an irregular route carrier * * * " (T79). The witness testifies that: "Further, there are no decisions, administrative or general orders to my knowledge that have addressed the question of loading irregular or regular route traffic in the same trailer for the purpose of moving freight from any origin to any destination or to any intermediate point." (T79)

The consultant testifies that there is no prohibition of "mixing" irregular route and regular route traffic in the same trailer and that "mixing" is a common practice because of economic necessity. This "mixing" of traffic is an economic necessity, because without this ability to "mix" these kinds of traffic, a trucking company would have to operate two units of equipment side-by-side down the highway -- one trailer with irregular route traffic and the second trailer loaded with regular route traffic." The witness testifies " * * * it would be absolute economic suicide in inter or intrastate traffic for a motor carrier to segregate irregular route traffic from regular route traffic" (T82).

The expert witness then concludes his testimony by giving his opinion that, " * * * if a carrier is forced to uneconomical operations for any purpose, regulatory or otherwise, those additional costs must be paid for by increased rates. Increased rates, then, must be paid by the general public * * * " (T84).

In making this study, the consultant also conferred with a long time district supervisor of the Interstate Commerce Commission and that district supervisor was unable to point out any prior commission decision, administrative ruling or general order prohibiting the "mixing" of irregular and regular route traffic on the same trailer.

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DISCUSSIONS, FINDINGS AND CONCLUSIONS

The law is well established that the Complainant has the burden of proving by probative evidence the allegations made in its complaint. Generally, the complaint is made here that Defendant has been conducting intrastate truck operations in violation of Section 75-309, R.R.S. 1943 and the Commission rules. Specifically, it is alleged in the complaint that "* * * Defendant has been transporting intrastate shipments from Omaha, Nebraska to Minden, Holdrege and McCook, Nebraska and possibly other interior points which Defendant is authorized to serve only on an irregular route basis; that in serving said points, Defendant has been transporting shipments moving under its irregular route authority at the same time and in the same vehicle with freight that it is transporting pursuant to its regular route authority; * * *."

In essence, it appears that Complainant alleges that Defendant is "mixing" its regular route and irregular route traffic in the same vehicle and that this "mixing" of traffic by itself is illegal and that act, standing alone, transforms an otherwise irregular route shipment to a regular route shipment.

Section 75-309, R.R.S. 1943; provides that it shall be unlawful for a motor carrier to engage in intrastate operations unless there is in force and effect with respect to such motor carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations.

The involved Commission rules are contained in Chapter III, Article I, Section 1.2(d). It is unnecessary to set forth the rules here. It is sufficient to state that the rules set forth contain characterizations of regular and irregular route operations, but neither rule mentions the "mixing" of irregular route and regular route traffic in the same vehicle.

It is important to note that under its Commission certificate Defendant has regular route authority to perform an intrastate motor carrier service from Omaha, Nebraska to Kearney, Nebraska and irregular route authority to perform an intrastate route motor carrier service from Omaha, Nebraska to all points involved in the complaint. This conclusion is undisputed by Complainant.

Complainant principally bases its argument on a prior Commission decision in Consolidated Motor Freight, Inc. v. J.B.H. & Associates, Inc. (unreported). Defendant here was not a party to that decision and the decision is not binding upon the Defendant. Further, the uncirculated above order involves three important facts not present herein, i.e. J.B.H. did not have the prerequisite operating authority, J.B.H. vigorously solicited traffic to irregular route points, which resulted in the "mixing" of irregular and regular route traffic on the movement of large volumes of this traffic.

Here the Commission finds that the evidence presented to support the complaint involves only six (6) shipments transported from Omaha to Minden, Nebraska by Defendant on four (4) days over more than a 100 day period of time. The practical thrust of the complaint is that Defendant is, in fact, conducting a regular route service from Omaha to Minden, Nebraska. This Commission finds that the evidence fails to support that allegation and contention. Further the Commission finds that the evidence presented by Defendant shows that the pattern of Defendant's truck operations involved here and Defendant's solicitation does not characterize those operations to be regular route in nature.

On the issue of "mixing" in the same vehicle of regular and irregular routes traffic, the Commission finds that in this case there

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are no Nebraska State Supreme Court cases, Federal Regulations or Court Decisions supporting Complainant's position in this case. For the Commission to hold here that such "mixing" is illegal would result in finding contrary to the evidence and unsupported by sufficient legal precedence.

There is evidence in this case, that the holding by this Commission that "mixing" of traffic to be illegal would result in uneconomical motor carrier operations contrary to the public interest. It might be well for the Commission in the future, through an administrative proceeding, to study the question of the "mixing" of regular route and irregular route traffic in the same vehicle.

However, in this case, the Commission does find that the evidence and law is insufficient to support the amended complaint; that the Complainant has failed to sustain its burden of proving the allegations made in its complaint as amended, and, therefore, the amended complaint should be dismissed.

WHEREFORE, based upon the evidence of record, the Commission files and the applicable laws, the Commission finds:

1. That the Defendant, Bee Line Motor Freight, Inc. of Omaha, Nebraska has not willfully failed to comply with the rules and regulations of the Nebraska Public Service Commission and the provisions of the Nebraska Motor Carrier Act as alleged in Formal Complaint No. FC-1139, Consolidated Motor Freight, Inc. v. Bee Line Motor Freight, Inc. as amended.
2. That Complainant has failed to sustain its burden of proving the allegations made in Formal Complaint No. FC-1139, as amended, Consolidated Motor Freight, Inc. v. Bee Line Motor Freight, Inc.
3. That Formal Complaint No. FC-1139, as amended, Consolidated Motor Freight, Inc. v. Bee Line Motor Freight, Inc. should be and is hereby dismissed.

O R D E R

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that Formal Complaint No. FC-1139, as amended, Consolidated Motor Freight, Inc. v. Bee Line Motor Freight, Inc. be, and the same is hereby, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 22nd day of December, 1981.

NEBRASKA PUBLIC SERVICE COMMISSION

Harold D. Simpson

Chairman

ATTEST:

Terence L. Kubicek

Executive Secretary

COMMISSIONERS CONCURRING:

Quane D. Gay

