

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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| Nebraska Bulk Transport, Inc. |) | FORMAL COMPLAINT NO. FC-1162 |
| P.O. Box 215 |) | |
| Bennet, Nebraska, |) | |
| |) | |
| Complainant, |) | |
| |) | DISMISSED |
| vs. |) | |
| |) | |
| MTR, Inc. |) | |
| P.O. Box 632 |) | |
| Fremont, Nebraska, |) | |
| |) | |
| Defendant. |) | ENTERED: March 22, 1983 |

APPEARANCES:

Bradford E. Kistler, Esq.
P.O. Box 82028
Lincoln, Nebraska
Appearing for complainant.

A. J. Swanson, Esq.
P.O. Box 1103
Sioux Falls, South Dakota
Appearing for defendant.

BY THE COMMISSION:

OPINION AND FINDINGS

By formal complaint filed June 10, 1982, Nebraska Bulk Transport, Inc. alleges that MTR, Inc. has conducted intrastate motor carriage of crude soybean oil from Fremont without authority, and that the defendant charged and collected a lesser rate than prescribed by the Commission for the alleged transportation. Hearing on the complaint was held October 22, 1982 before Commissioner Harold Simpson in the Commission Hearing Room in Lincoln, with appearances as shown.

The complainant produced four witnesses, Charles Butler, Mason Myers, Dean L. Petersen and Melvin W. Buchholtz.

Charles Butler testified: He is vice-president and plant manager of the Lauhoff Grain Company at Crete, Nebraska. He has been at Crete Mills since 1976. He is a graduate of Kansas State University with a bachelor of science in milling science of cereal grains. He has been in milling since 1963. To him milling is grinding, sifting, aspirating and purifying. No chemical treatment is included. Water would be the only thing added to grain being milled in a milling operation. He has talked with people in generalities about soybean processing. He does not have a lot of knowledge of it but he knows the general process. A soybean processing plant would have receiving and storage. The soybeans would go to a prep room, which would be the dry cleaning, cracking or flaking to prepare it to go to a solvent extraction operation whereby, he guesses, hexane is used as a solvent that extracts the oil. It then goes from the machine of some sort that the soybeans are introduced to that contains solvent and that is taken to a collector of some kind that evaporates the hexane and the oil comes out. That is a solvent extraction process and not a milling operation. He would not consider soybean oil to be a milled product. He is not familiar with either the Archer-Daniels-Midland facility in Fremont or Lincoln with respect to their production of crude soybean oil. The hexane solvent processing method is the most popular method today. There were other methods earlier. He is also familiar with the screw press expeller method of extracting soybean oil. He is not familiar with the hydraulic press method. Today "they" do not speak of milling soybeans. "They" speak of processing soybeans. In his field today, people talk of milling corn, wheat, oats, and sorghum and pro-
cessing soybeans.

Mason Myers testified: He is rate analyst for the Commission. He is familiar with the tariffs and rates that have been in effect for the past several years. He understands that the complaint involves transportation of soybean oil

in bulk in tank vehicles from Fremont to Lincoln. On March 6, 1978, the rate for edible soybean oil was 23 cents per hundred pounds, according to the Commission's official tank transport tariff 6-B. On February 19, 1979, the rate was 24.4 cents. On June 11, 1979, the rate went up to 25.5 cents. On July 12, 1979, the rate went up to 26.1 cents. On October 12, 1979, the rate went up to 26.6 cents. On January 14, 1980, the rate went up to 27.7 cents. On January 26, 1981, the rate up to 29.9 cents. On April 12, 1982, the rate went up to 32.3 cents. On June 16, 1982, the rate was cut to 22.6 cents. The minimum amount for which those rates would apply is 45,000 pounds. The edible oil rate on traffic between Fremont and Lincoln would be lower than the inedible rate. Exhibit #2 shows the applicable rate for edible and inedible soybean oil on the dates indicated.

Dean L. Petersen testified: He is employed by Nebraska Bulk Transports, Inc. as president and the general operating manager. Exhibit #3 contains the bulk of his testimony. He would be satisfied if the Commission entered a cease and desist order in this proceeding. All of the soybean oil moving from Fremont to Lincoln is edible in his opinion. In Application MR-154 he was striving to get one rate table to cover all soybean oils and vegetable oils. When he filed his application in MR-154, he was attempting to bring the intrastate rates in line with the ICC rates. The rate was reduced on the Fremont to Lincoln haul, in particular, because the traffic is volume traffic, nine or ten loads a day.

Melvin Buchholtz testified: He is the president of MTR, Inc. The corporation was formed in 1969 and he has been president ever since. He has been involved in truck transportation since 1946. Exhibit #5 is a copy of the permit held by MTR, Inc. MTR has contracts with ADM, Supersweet and perhaps others. Exhibit #6 is a copy of its contract with ADM. At first he transported soybean oil for ADM under his permit. That was on July 17, 1978. He hauls approximately 15 loads per week per truck or 45 loads per week for ADM from Fremont to Lincoln. Exhibit #7 is copies of freight bills which he furnished to complainant that show operations between February 14, 1981 and May of 1982. The charges shown compute to 28.3 cents per hundred pounds. When he first started moving traffic from Fremont to Lincoln the applicable rate that was to be charged was supplied to him by ADM. Tom Porter indicated what that rate was. Exhibit #6 was drafted by A. J. Swanson who also inserted the reference to tariff 4-A. MTR has never leased vehicles to Schroetlin Tank Lines. ADM has furnished one trailer for use in the movements performed by MTR. MTR maintains the trailer. The traffic represented by the movement of crude edible oil from Fremont to Lincoln is 42% to 48% of his business. At the time he started hauling in July of 1978, the rate was 24 cents per hundred pounds. Prior to the time he contracted to haul the oil, he obtained an opinion from his lawyer which is shown in Exhibit #8. He is now charging 24 cents. He understands that is in excess of the tariff rate. Inspector Shane of the Public Service Commission visits his office at least once a week. During the period of time he has been in business, he has never tried to hide the fact that he has been transporting soybean oil from Fremont to Lincoln. From 1978 to 1981 he assumed the product was edible. He was sure the product was used for cooking oil. When the oil is loaded in Fremont it cannot be used as a feed ingredient. It has so much trash in it that it has to be refined. He hauled the oil under his attorney's opinion that it was a related milled product. At no time was tariff 4-A used in computing the rate, although paragraph four of the contract provided therefor. No addendum nor subsequent contract was made. He knew there was a rate published by Schroetlin. He intended to haul at the common carrier rate and did not intend to use the contract carrier prerogative to negotiate at a different rate. He has instructed his counsel to prepare an amended contract to circulate to ADM so that the question of equaling the common carrier rate would be clarified.

It was stipulated between the parties that defendant sent additional bills to those introduced to Exhibit #7. One was for January 1981 and the others were for June 1982, July 1982 and August 1982. The charges assessed on those bills were all in excess of the Tariff 6-B rate.

Charles Shane testified: He is an inspector for the Commission. He is familiar with the defendant and its president Melvin Buchholtz. When he first saw MTR equipment running on the road pulling tank trailers, he assumed the company was leasing to Schroetlin. When he went to the office of MTR he was told

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that MTR was not leasing. He asked Mr. Buchholtz if he was getting the rate. Mr. Buchholtz said he was getting the rate. He (Shane) never asked how Buchholtz arrived at the rate. Since that time, Buchholtz has exhibited his books and records whenever he is questioned.

On rebuttal, Mr. Petersen testified: He has toured the soybean processing plant of ADM in Fremont. ADM uses a hexane extraction method. He does not believe there has been a soybean milling plant in operation in Nebraska since 1962 or 1963. There was only one, and that was at West Point.

The issues raised by the complainant are: (1) The defendant's transportation of crude soybean oil from Fremont to Lincoln is not authorized under its authority because defendant's authority permits transportation of milled products. Complainant contends that the soybean oil produced at the Fremont facility is a product process other than milling. (2) The defendant has been charging and collecting a lesser rate than prescribed by the Commission for the performance of such service in violation of §75-126 R.R.S 1943.

The evidence shows that MTR, Inc. holds a permit in Application No. M-11901 granted by this Commission in 1969 to perform transportation which says:

SERVICE AUTHORIZED:

Processed or manufactured animal and poultry feeds, seeds, grain and related milled products, in bag and bulk.

TERRITORY AUTHORIZED:

Between points in the State of Nebraska, over irregular routes.

In July 1978, defendant entered into a contract with Archer-Daniels-Midland Co., Inc. to transport shipments authorized by that permit. The contract was filed with the Commission. From July 1978 through the time of the hearing, defendant transported soybean oil from the ADM plant in Fremont to Lincoln. Each shipment was covered by a freight bill which set out the commodity, the amount hauled and the rate charged. Complainant introduced a number of those freight bills in evidence for shipments made in 1981 and 1982 which showed that the rate charged was 1.6 cents less than the rate established by the Commission. There appears to be no dispute between the parties that the commodity hauled was edible soybean oil. The rates for edible soybean oils are shown in Exhibit #2 from March 6 through June 16, 1982. Prior to the period covered by the freight bills in evidence, the defendant transported the commodity at or above the prescribed rate. After the period shown by the freight bills, defendant again performed the transportation at or above the prescribed rate.

Complainant's expert witness was of little assistance in resolving the issue raised by complainant surrounding the word milled in defendant's authority. He admitted that he knew little of bean processing. The words processed and milled appear to be used interchangeably in the permit and nothing in Mr. Butler's testimony would compel the Commission to distinguish between processed and milled products. His testimony shows that in the industry jargon, the separation of grain into various products is called milling where corn, wheat and oats are concerned but where soybeans are concerned, the term processing is used. Complainant did not produce a witness who was closely associated with the soybean processing industry, so there is no evidence as to whether soybean processors maintain any significant distinction between the terms processing and milling.

The only legal authority furnished by either party was furnished by defendant who cited Iowa Milling Company vs. Cedar Rapids & Iowa City Railway Co., 292 ICC 557 (1954) which states:

At Page 557:

The Complainant is a corporation engaged in the milling of soybeans, soybean cake and meal, and soybean oil at Cedar Rapids, Iowa. . .

At Page 559:

There are three methods of extracting soybean meal: the hydraulic-press method, the screw-press expeller method, and the solvent method. The solvent method is generally considered to be the most efficient. The Complainant uses the solvent method at its plant in Cedar Rapids and the expeller method at its plant in Springfield. The solvent process extracts more oil and produces meal with a higher protein content and a lower fat content. The primary use of soybean meal is as an ingredient in mixed feeds.

At Page 560:

About 20 per cent of the weight of the soybeans is lost in the milling process, depending on the method of extraction used. . . .

At Page 562

Using 20 per cent of this tonnage as the weight of the oil obtained in the milling process results in 11,235,000 pounds of soybean oil. Assuming, . . . the weight of the oil extracted in the milling process.

At Page 564:

Other illustrations. . . compare the total cost of soybeans . . . milled into meal shipped to Chicago and oil shipped to New York.

At Page 567:

It is clear that the milling loss, consisting principally of soybean oil, is not entitled to transit. The transit tariffs require that the shipper. . . must certify to the actual weight of the milling loss, including the weight of the soybean oil.

Complainant would distinguish against this case on the grounds that it is a railroad rate case; however, complainant offers no authority which is more in point. The files and the records of the Commission show that the permit in question was granted in Application M-545 Supplement No. 1. Although the record in that case is not now available, it is quite apparent that the language in that permit was formulated in the infancy of the Motor Carrier Act. Mr. Petersen's testimony shows that at that time there was a plant that processed soybeans by what he concedes was a milling operation. Apparently complainant would have the Commission conclude that defendant's authority to transport processed grain and related products expired when the last soybean mill closed. In 1976, there was apparently no question that the permit was worded correctly, was viable, and appropriate to the service being conducted under it which included transportation of soybean products. In short, the Commission can only find on the basis of this record that complainant is straining at gnats on the first issue. That issue should be laid aside with the finding that the terms processed and milled are synonymous for purposes of construing defendant's permit.

The evidence on the second issue is clear and uncontradicted that defendant failed to implement the January 26, 1981 rate increase for at least 15 shipments between February 14, 1981 and April 10, 1982, and he failed to implement the January 26, 1981 increase and the April 10, 1982 increase in one shipment on May 15, 1982. On the 14 shipments defendant charged 1.6 cents per hundred pounds less than the established rate. On the May shipment, defendant was under the rate by four cents. The evidence is equally uncontradicted that the defendant's rates were in compliance before and after the shipments mentioned.

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In consideration of all the evidence adduced as to the defendant's operations, the Commission cannot find that defendant's illegal action was willful nor contumacious. Nevertheless, it is appropriate that this Commission admonish defendant to exercise a higher degree of care in conducting his operations. With that admonition the complaint should be dismissed.

O R D E R

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that Formal Complaint FC-1162 of Nebraska Bulk Transport, Inc. vs. MTR, Inc. be, and it is hereby, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 22nd day of March, 1983.

NEBRASKA PUBLIC SERVICE COMMISSION

Harold D. Simpson
Chairman

ATTEST:

John E. Murrigan
Acting Executive Secretary

COMMISSIONERS CONCURRING:

Duane D. Gay

