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Appearing for complainants.

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Sioux Falls, SD 57101
Appearing for defendant
Arthur E. Smith & Son Trucking, Inc.

On May 13, 1983, Z & S Construction Co., Inc., J.C. Tank Truck Service and Larry's Tank Truck Service filed their complaint against Arthur E. Smith & Son Trucking, Inc., Steve Gueck dba D & S Tank Truck Service and Jet Tank Truck Service. The complainants alleged: (1) They were certificated motor carriers. (2) Smith is a certificated motor carrier who in 1982 and thereafter leased its authority to defendants D & S and Jet without approval of the Commission in violation of section 75-318 R.R.S., 1943. (3) Defendant Smith had no authority to transport water under its authority. The complaint also contained allegations against defendants D & S and Jet as transportors of water in intrastate service without authority from the Commission.

On June 6, 1983, defendant Smith filed its separate answer in which it generally denied the allegations and alleged that it had proper authority to transport water and that it did so under equipment lease arrangements with D & S which formerly leased to J. C.

Hearing on the complaint was held July 14, 1983, at Kimball pursuant to notice to all interested parties with appearances as shown. At the hearing Donald Gueck under the name Jet Tank Truck or Jet Tank Service entered a special appearance. Steve Gueck was not represented.

Rule 6(2) of the Commission's rules and procedures provides: "A complaint, show cause order, order to appear and a subpoena shall be served personally by a Commission inspector or, except a subpoena, by certified mail." The only service shown by the file is a cover letter to the complaint filed by counsel for the complainants in which the following language is found: "A copy of this complaint is being served on all parties of record by first class mail, postage prepaid, this date." There had been no proper service on any of the defendants. Those who have not acquiesced in the jurisdiction of the Commission by having filed answers or other pleadings except a special appearance cannot be held subject to the jurisdiction of the Commission; therefore, the complaint must be dismissed against all parties other than Smith which filed an answer.

At the hearing, Monte W. Smith and Donald R. Gueck moved to quash a subpoena duces tecum issued by the Commission and served on them on grounds that there is no indication, as required by the Commission rules, as to who requested the subpoenas, no copy of the precipe having been attached; that the subpoena did not comply with Rule 13(9) of the Commission's Rules of Procedure in that it did not state specifically which papers, books or documents were required and the facts expected to be proved thereby; subpoenas are limited by Section 25-1225 et. seq. and particularly 25-127(3): "No other subpoena except from the District Court can compel a witness to attend for examination on the trial of a civil action, except in the county of his residence nor attend to give his deposition out of the county where he resides or where he may be when the subpoena is served upon him." Monte W. Smith is a resident of Scotts Bluff County and the hearing was held in Kimball County. It is readily apparent that the motion to quash is good and should be sustained with respect to Mr. Smith on the all grounds stated. With respect to the subpoena of Mr. Gueck, it should be sustained only on the grounds that the subpoena did not state what facts were expected to be proved by the subpoena.

The complainants called five witnesses in support of their complaint.

David L. Haack testified: He is secretary of Z & S Contruction Company, Inc. Z & S transports water to frac sites to load tubing, for well treatment, for disposal and for loading and emptying of treaters. There is a difference between a well drilling site and a site from which he moves water. The actual drilling operation is being performed at a drilling site. At the other sites there is not such activity. The site becomes a drilling site when a drilling rig is on the location. It stops being a drilling site when the drilling rig is moved.

Joseph Roy Culek testified: He is president of J.C. Tank Truck Service at Kimball. His company filed a formal complaint because he has seen, and believed that he has seen, defendant hauling water through Jet Tank Truck Service without authority. During 1982 he saw Jet transporting water after that company gave up its lease with J.C. on June 30, 1982. He has seen D & S transporting in 1983.

Stephen Lynn Martin testified: He is employed by Larry Martin Tank Service. He is the son of the owner. Martin filed the complaint because defendant has been seen hauling water, and complainant has reason to believe defendant does not have the right authority. On July 13, 1983 at 5:30 p.m. he saw Smith loading water at Meier's Water Well. He did not know where the truck was going. In other instances he has seen Smith trucks hauling water.

Donald Gueck testified: He has owned Jet since January 1983. He lives in Kimball. In 1981 and 1982 he and his son, Steve, operated D & S Truck Service. He ceased doing business under that form in January 1983. Jet does not hold authority from the Commission. He is leased to Smith. The trucks were leased to Smith under the name D & S and the leases have not been changed since he became sole owner of the business and changed the name. He has hauled some water during July 1983. The July 13 move was an interstate move. The water is signed for at the well. Prior to June 30, 1982, D & S leased equipment to J.C. Tank Line. After that D & S leased to Smith. On November 29, 1982, Steven Gueck signed a lease to Smith of D & S equipment effective January 1, 1983. Leases for a 1970 Mack Truck and a 1977 Ford were entered into. Gueck charges \$40.00 an hour for use of the truck and 12¢ a barrel for the water he hauls. The customer is billed through Smith. Gueck receives all the money for the water and 85% of the amount billed for truck time. This subpoena was not effective because it was filed with the Commission on July 11 and the hearing was July 14. The statute, 25-1226, requires that the subpoena be served not less than 6 days before trial date. He hires two drivers. The movements he has made have not involved movement of water from the water well to other than a well site. The company has not transported water to a pit or from a pit for disposal. His company has transported water to load tubing, to a frac job, to load or empty treaters to empty production tanks between January and June of 1983. Much of his work is done strictly on leases without involving use of the public road. He is paid by Smith twice per month. At times he hauls water from tank batteries to other points on the reserve without going on the public road.

It was stipulated that water is being hauled by Smith under Supplement #5 of its authority. It was also conceded by defendant Smith that D & S (and Jet) has transported water under lease with Smith.

Monte Smith testified: He is president of Smith. Exhibits #2 & #3 show leases Smith has with D & S. Smith hauls water under its authority, Supplement #5. Don Gueck sends a work sheet showing the water hauled. Smith sends invoices to customers, collects the charges and remits to Mr. Gueck. The drivers wages are subtracted from the money remitted to Mr. Gueck. The water is billed separately. All the money collected for water is remitted to Mr. Gueck.

The issues raised by this complaint are: (1) Whether defendant has authority to transport water. (2) Whether defendant Smith properly hauled water assuming it had authority.

The evidence shows defendant Smith offers to haul water under the following authority:

SUPPLEMENT NO. 5

(1) Machinery, equipment, materials and supplies used in or in connection with the discovery, development, production, refining, manufacturing, processing, storage, transmission and distribution of natural gas and petroleum and their products and by-products; and

(2) Machinery, equipment, materials and supplies used in or in connection with the construction, operation, repair, servicing, maintenance and dismantling of pipelines, including the stringing and picking up thereof, between points in and west of Deuel, Garden and Sheridan Counties, Nebraska, on the one hand, and, on the other, points in Nebraska, over irregular routes.

RESTRICTIONS: (1) restricted to traffic originating at or destined to oil well drilling sites, or oil field equipment storage yards, or oil field equipment supply stores; and (2) restricted against the transportation of drilling rigs.

The authority in Supplement #5 clearly authorizes Smith to transport materials and supplies used in or in connection with the discovery, development, production, refining, manufacturing, processing, and storage of petroleum so long as the traffic originates or terminates at an oil well drilling site, oil field equipment storage yard or oil field equipment supply store. The evidence shows that Smith offers to haul water to sites where oil wells are being drilled or have been drilled and development and production is in progress. The evidence supports the proposition that water is a material and supply used in connection with the discovery, development and production of oil. The Commission finds that defendant has and had the authority to haul water to and from oil well drilling sites, and that an oil well drilling site includes a site where an oil well is being discovered, developed or where oil is being produced.

The evidence shows that defendant Smith had on file proper leases with D & S. The evidence also shows that although D & S was a partnership which had been dissolved, one of the partners continued in the business in the same manner and form as the partnership under the name of Jet Tank Truck Service. Donald Gueck was apparently the "D" of D & S and the sole proprietor of Jet. Although it would have been preferable to obtain new leases with Mr. Gueck after the partnership dissolved and the name of the business was changed to Jet, the lapse in procedure by failing to obtain proper leases with Jet in lieu of D & S was a minor infraction of the Commission's rules and would not warrant a penalty in this instance. Smith is hereby admonished to obtain proper leases with Jet if it intends to continue to use the equipment of Jet.

The evidence does not show any serious infraction of the Commission rules. The complainant has not furnished proof to sustain the allegations of the complaint. Even if defendant Smith had been shown to have not had the proper authority, the evidence shows that most of the operations conducted by

FORMAL COMPLAINT 1179

Page Five

Gueck were buying and selling of water for which no authority would have been required. The evidence further shows that most of the operations were conducted off the public way, and would have, therefore, been exempt from regulation of this Commission.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds is that Formal Complaint FC-1179 should be dismissed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Formal Complaint 1179 of Z & S Construction Co., Inc., J.C. Tank Truck Service and Larry's Tank Truck Service, Complainants, vs. Arthur E. Smith & Son Trucking, Inc., Steve Gueck dba D & S Tank Truck Service and Jet Tank Truck Service, Defendants, be, and it is hereby DISMISSED.

MADE AND ENTERED in Lincoln, Nebraska this 22nd day of November, 1983.

NEBRASKA PUBLIC SERVICE COMMISSION

Harold D. Simpson
Chairman

ATTEST:

Terrence L. Kubicek
Executive Secretary

COMMISSIONERS CONCURRING:

Duane D. Gay

