

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer, Inc., and)	Formal Complaint No. FC-1183
Trans-Nebraska Xpress, Inc.)	
)	
Complainants)	
)	
vs.)	
)	Complaint Sustained In Part
Roger L. Huls, dba Huls)	and Denied In Part
Transfer)	
)	
Defendant)	ENTERED: March 27, 1984

APPEARANCES:

For the Complainants:
Bradford E. Kistler, Esq.
P.O. Box 82028
Lincoln, Nebraska 68501

For the Defendant:
Arlyn Westergren, Esq.
9202 West Dodge Road
Omaha, Nebraska

BY THE COMMISSION:

OPINION AND FINDINGS

On August 19, 1983, Mills Transfer, Inc. (Mills) and Trans-Nebraska Xpress, Inc. (TNX) filed a formal complaint against Roger L. Huls, dba Huls Transfer (Huls) or (defendant). Hearing was held November 4, 1983 in the Commission Hearing Room before Commissioner Harold Simpson.

The complaint alleged that Huls had willfully failed to comply with the provisions of the Nebraska Motor Carrier Act and the rules and regulations of the Commission in that the defendant (1) had not actively performed services under his certificate and had failed to hold himself out to provide service pursuant to said certificate, and had not requested the Commission to suspend operations under his certificate; (2) had leased his certificate to another individual without obtaining prior Commission approval; (3) had held out and permitted his lessee to hold out scheduled regular route service under his irregular route certificate; and had held out and permitted his lessee to hold out service at lower rates than those prescribed by the Commission. An answer in the form of a general denial was filed by the defendant.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer
Page Two

Gary Mills testified: He is president of Mills a motor common carrier operating under certificate M-12682 providing regular route service between Lincoln and Omaha. Mills operates equipment suitable for providing this service, and its equipment represents a sizable investment. Mr. Mills first became aware of Huls operations when he saw an advertisement for the defendant's service which he believed was advertising daily service. To Mr. Mills' knowledge the advertisement he referred to had not been withdrawn by the defendant, and Mr. Mills had seen the advertisement posted on a bulletin board as recently as the day prior to the hearing.

Terry Miller testified: He is president and general manager of TNX and that TNX is a general commodities carrier that operates between Omaha, Lincoln, and Saunders County under authority granted by the Commission in M-11685. His company hauls general commodities out of Omaha and to Lincoln and Saunders County and has daily service to most of the towns in Saunders county and Omaha and Lincoln. Mr. Miller testified that one of his customers in Omaha showed him the advertisement of Huls in late June or early July, 1983. Having never heard of the defendant in the twenty years that he has been in the business, he started checking it out as to where Huls came from. He is concerned about the defendants operations because TNX has idle equipment and loss of business is hurting the company.

Roger Huls was called by the complainants as an adverse witness, and testified: That he is in business as a motor carrier in Sterling, Nebraska conducted under the name of Roger Huls dba Huls Transfer. He is the holder of certificate M-12101, which authorizes the following service: Commodities generally, except those requiring special equipment. Irregular routes from within a 150-mile radius of Steinauer, to and from Omaha occasionally to and from Beatrice and points generally within a 150-mile radius of Steinauer. Supplement #1: Sand and gravel and road and dam construction materials requiring the use of dump trucks between points in Nebraska, over irregular routes.

Mr. Huls obtained his certificate from his father in 1975 and in the hearing held on that transfer, Mr. Huls testified that he was familiar with the rules and regulations of the Commission and that he considers himself still familiar with most of the Commission's rules and regulations.

Mr. Huls testified that for a one year period from July, 1982 through June, 1983, only one freight bill was produced from the traffic moving under his authority. That freight bill was dated May 12, 1983 and covered one shipment of 36,400 pounds of fertilizer hauled by Mr. Huls father from Omaha to Sterling using equipment which he leased to the defendant. Prior to June, 1983, Mr. Huls did not have an advertisement for his business in the telephone book, nor did defendant call on customers to request business.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Three

In March or April of 1983, defendant was approached by Ron and Jay Hardy concerning the possible sale of his authority to them, but decided not to sell because his father became upset when he tried to discuss it with him. Later, during May or early June, Ron Hardy called back and inquired as to whether defendant would be interested "in going in business with him and leasing some of his equipment and work my authority in." Mr. Huls agreed to think about it and subsequently on June 17, 1983 while in Omaha he contacted the Hardys. On that day, Mr. Huls executed an equipment lease with Direct Delivery and Distribution (DDD covering a 1973 Chevrolet truck and a 1976 GMC tractor, with a lease providing for 95% of the revenue generated under lease to be paid to DDD and 5% to be paid to the defendant. Defendant paid \$110.00 in cash to DDD which was used the following Monday to purchase PSC plates and a copy of Tariff 4-A, and the same day operations were started by the company.

On or about that same day Mr. Huls received a payment from Ron Hardy of \$1,200.00 cash which defendant characterized as being "good faith money" and put up "when your starting business with somebody" defendants own contribution to the business was his authority. Also on June 17, 1983 a decision was made to open a checking account, and the account was opened by Jay Hardy. Mr. Huls testified that he told Jay to open the account in the name of Huls Transfer but he "went along" with including DDD on the account because Jay thought it might be a good idea. Mr. Huls did not know the amount of the initial deposit, and did not himself become a signatory on the account until sometime in September.

Shortly after operations commenced, certain advertising was prepared which held out service essentially as follows:

CALL 592-0181
Huls Transfer

Pick Up A.M. Delivered P.M.
Pick Up P.M. Delivered A.M.

Omaha
Lincoln
Waverly
Greenwood

Bellevue
Ashland
Papillion
Gretna
Council Bluffs

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Four

Ask About Our Special Rates To
(10,000 Lbs. Minimum)

Grand Island
Norfolk
Columbus
Hastings
Nebraska City
Auburn
Seward
Aurora

South Sioux City
Kearney
Beatrice
Fremont
Falls City
Crete
York
Blair

Local Cartage In the
Omaha, Council Bluffs Area

Defendant indicated that he discussed the preparation of advertising with Jay Hardy, and that he told Jay to offer "a.m. pick-up, p.m. delivery" service. Defendant is continuing to advertise availability of such service.

Mr. Huls indicated that he is aware of the frequency with which service is being provided under his authority between Omaha and Lincoln. After inspecting the driver's logs he acknowledged that daily, five-day a week service was being provided between points. The vast majority of traffic transported by defendant's company between Omaha and Lincoln consisted of LTL freight.

Mr. Huls presented financial statements reflecting operations for the portion of the month of June as well as July and August. The financial statement reflected a loss for this period of \$2,649.43 and he further testified that an additional \$1,100.00 plus was lost by the operation in September. Defendant deposited \$1,200.00 he received from Ron Hardy into the business on June 17, 1983, and testified further that he has invested another \$150.00 in the business although he was unable to document this from the bank deposit slips brought with him to the hearing. Except a \$40.00 cargo surety bond, the financial statement presented by Mr. Huls reflected no insurance expense. He stated that notwithstanding the existence of a lease provision to the contrary DDD is providing its own cargo and public liability insurance.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Five

Jack Mahoney testified: He is employed by the Commission as an inspector for the Motor Transportation Department. In August 1983, he made an inspection of the facility in Omaha from which the operations of Huls Transfer were conducted. He submitted a report to the Commission indicating, that he was told by Ronald E. Hardy on or about June 17, 1983 that Mr. Hardy paid Mr. Huls \$1,200.00 in cash for his authority from the Commission, that Mr. Hardy purchased PSC plates for equipment leased to Huls Transfer, and that Mr. Hardy started operating Huls authority on June 20, 1983.

Roger Huls was recalled as a witness for the defense and testified that he had acquired his authority from his father in 1975. He understood the meaning of dormancy but that in recent years he had not done much hauling intrastate because he could make more money hauling exempt interstate.

He explained that the split on the lease agreement had been increased to 80%-20% split, also he had obtained his own checking account and office space. Defendant testified that if it should be found that he is presently conducting a regularly scheduled service between Omaha and Lincoln, notwithstanding such finding he might continue the operation anyway.

DISCUSSION:

As set forth above, complainants alleged violation of the Nebraska Motor Carrier Act and the Commissions rules and regulations in four separate respects. Initially, insofar as dormancy is concerned, the record is clear that during the 12 month period immediately proceeding June 1, 1983, defendant transported only one shipment under his authority, that being a truckload of fertilizer. During the same period, he neither advertised his business in a telephone directory nor did he call on customers to request business. Giving this virtually non-existent level of activity, the Commission would be justified in finding defendant's authority to have become dormant as alleged. While the defendant's certificate maybe dormant, the record does not support a finding that such dormancy has resulted from the willfull actions of the defendant. We accordingly find that the allegation of the complaint with respect to dormancy has not been sustained.

On June 17, 1983, defendant entered into an arrangement with Ron Hardy and DDD with respect to the conduct of motor carrier operations under the defendant's authority. Complainant alleged that the arrangement entered into represented a lease of the defendant's authority not sanctioned by this Commission. Defendant, of course, maintains he merely leased the equipment from DDD for use in his own operation. Considering the evidence as a whole, we find that the complaint must be sustained on this point.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX va. Huls Transfer (cont)
Page Six

First we note that the origin for this arrangement came from Ron Hardy rather than the defendant. Defendant was first approached by Ron and Jay Hardy and when defendant declined to sell because of his fathers objections he was thereafter approached by telephone by Ron Hardy with an offer to lease defendants sum equipment and go into business with him, an arrangement defendant described as a partnership. Ron Hardy was the moving party and was very interested in commencing a new motor carrier service within the territory served by the defendant's certificate. In fact he was willing to pay and did in fact pay \$1,200.00 in cash to the defendant to enable such operations to be instituted.

We now consider the nature of the arrangement entered into on June 17, 1983. On that day, a standard commission equipment lease form was entered into between the defendant and DDD, with revenues derived thereunder to be split 5% to the defendant and 95% to DDD. At the same time, Ron Hardy made a \$1,200.00 cash payment to the defendant. The defendant's own testimony made it clear that he understood and expected that he would have a guaranteed profit. Risk of loss was not intended to be born by the defendant. It is clear from the evidence that the actual nature of the arrangement entered into however described was actually a lease of the defendant's authority in exchange for 5 percent of the revenue to be generated under that authority.

The defendant had no control over the finances of the business at least from June 17, 1983 through August 31, 1983, the defendant could not even sign a check from that account until sometime in September.

The financial statements presented by the defendant were prepared by Jay Hardy during the week prior to the hearing. The entries on the financial statements were not backed up by cancelled checks brought by the defendant to the hearing under subpoena, nor was the defendant able to satisfactorily explain certain expense entries. In addition to defendant's lack of control and knowledge of the financial affairs of the subject operation during the period in question, other contradictory testimony offered by the defendant indicates general uncertainty as to the manner in which operations were being conducted, and further indicate general lack of control by defendant over those operations.

Along the same lines, we note defendant's testimony concerning the performance of local cartage service in the Omaha-Council Bluffs area. Defendant initially responded that he did not hold out such service, then testified when asked about his advertisement which specifically indicates that such service is available changed his earlier statement that to his knowledge Huls Transfer was not performing local cartage as advertised. He stated that the advertisement gets people to call for service even if the defendant cannot furnish the service.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Seven

Based upon the examples of the defendant's uncertainty as to the actual operation being conducted under his authority and otherwise in the name of Huls Transfer, coupled with the defendant's lack of financial control of subject operations and the fact that the arrangement originally contemplated between the defendant and Ron Hardy was clearly that of an authority lease, the Commission is convinced that the subject operations were in fact those of Ron Hardy and DDD rather than of the defendant.

We accordingly find that, as alleged in the complaint, defendant has leased his authority to another person without obtaining prior Commission approval, in violation of Section 75-318 R.R.S. 1943 as amended.

Concerning the third allegation of the complaint, that defendant has held out and permitted his lessee to hold out and perform regular route service under defendant's irregular route authority, it is clear from the evidence that this allegation of the complaint must also be sustained. The Commission's rules and regulations outline distinguishing characteristics of regular route and irregular route operations, and provide in determining the nature or character of the operations of any carrier, the pattern of operations involved shall be considered in its entirety by the Commission, together with the nature of the commodities transported, and the seasonal or other distinguishing characteristics of such commodities. See Chapter III, Article 2, Section (2) (d) of the Commission rules and regulations. Concerning the pattern of the subject operations conducted under the defendant's certificate in its entirety it is clear that the defendant is engaged through his lessee in an unauthorized regular route operation between Lincoln and Omaha, and it is further clear that this has been accomplished by design rather than by chance.

It is clear that the subject operations are being conducted in accordance with a predetermined plan, rather than strictly on a call and demand basis. Defendant's advertising flier as originally prepared clearly indicates to the shipping public that traffic moving between the points of Omaha, Lincoln, Waverly, Greenwood, Bellevue, Ashland, Pappilion and Gretna, Nebraska and Council Bluffs, Iowa, that pick up a.m.-delivered p.m., pick up p.m. delivered a.m. service is available. The clear indication is that daily service is being held out by defendant for traffic moving between these points. Irrespective of the size of shipment involved.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)

Page Eight

Further, the evidence establishes that 90% of the freight being transported by defendant between Lincoln and Omaha is LTL, and the extent to which the defendant is engaged in a movement of truckload lots or other substantial shipments between these points has been insignificant in comparison to the LTL service being provided. Evidence of the actual routes used in the operations is lacking, but it is clear that the vast preponderance of the operations being conducted are between fixed terminals in Omaha and Lincoln, that service between these points and that service involving this degree of frequency is being held out through defendant's advertising. Under the circumstances, the Commission must come to the conclusion that a scheduled, daily, regular route operation is being conducted between Omaha and Lincoln under the defendant's certificate, that the development of this operation has been willfully undertaken, and that the development and continuation of this regular route operation under the defendant's certificate is unlawful.

This final allegation of the complaint, that the defendant has held out service at lessor rates than those prescribed by the Commission has also been sustained. Defendant's advertising material made reference to "special rates" with respect to a number of specified points, subject to a 10,000 pound minimum. Because the Commission prescribes all rates for all regulated Nebraska intrastate motor carrier transportation for all carriers in its official tariffs, the individual carrier such as defendant could not provide service at special rates without violating our rules and regulations relative to tariffs and rates. Defendant's testimony indicates that this advertising was willfully proposed at his direction.

Section 75-315 R.R.S. 1943 as amended provides, in pertinent part: "permits and certificates shall be effective from the date specified therein, and shall remain in effect until terminated as provided in 75-315 to 75-317. Any such permit or certificate may, upon application of the holder thereof, at the discretion of the commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of Section 75-101-75-801, or with any lawful order, rule, or regulation of the commission proclaimed thereunder, or with any term, condition or limitation of such permit or certificate."

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Nine

As found above, defendant has permitted the unlawful lease of his certificate to another person without obtaining prior Commission approval, in violation of Section 75-318 R.R.S. 1943. Further the defendant has failed to confine his operations to those authorized under his certificate in violation of Chapter III, Article 1, Section (1) (b) (iv) of the Commissions rules and regulations, and that he engaged and has permitted his lessee to engage in a regular route operation, notwithstanding that his certificate limits the defendant to the performance of a irregular route service. Finally, defendant has held out service at rates other than rates prescribed by the Commission in each official tariffs in violation of Section 75-126 R.R.S. 1943 and Chapter III, Article 1, Section (1) (c) of the Commissions rules and regulations. The lease of authority was willfully entered into by the defendant, the development of a regular route operation under defendant's certificate was likewise undertaken willfully with defendant's permission and, if his testimony with this respect is to be credited, at his direction, and the advertising material holding out at service "special" rates was also prepared at defendant's direction. Clearly sanctions are warranted in these circumstances, and the Commission is left with the development of an appropriate remedy for the violations which have occurred.

While under circumstances presented the Commission would be warranted in revoking defendant's certificate, however we are reluctant to impose such a harsh sanction if a remedy of lesser severity can be developed that will insure the cessation of the violations which have occurred. However we are not satisfied that merely ordering defendant cease and desist from further violations will be sufficient under the circumstances of this matter, both because (a) defendant has stated his intention to continue operating in the future as in the past between Omaha and Lincoln even if the Commission finds such operations to be unlawful, and (b) we are unwilling to permit the defendant to continue to benefit in the future from the operations that he has unlawfully conducted in the past.

Under the circumstances, we shall order defendant to cease and desist from leasing his certificate to another person, and we shall further order that defendant cease and desist from holding out or providing a regular route service under his certificate. Moreover, we shall also impose on the defendants certificate the conditions (a) that service thereunder is restricted against the transportation of any shipment weighing less than 20,000 pounds and (b) that service thereunder is restricted against transportation of more than two shipments in any one vehicle at any one time.

In consideration of the evidence adduced and being fully advised in the premises, the Commission is of the opinion and finds:

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)

Page Ten

1. The complaint filed by Mills Transfer and Trans-Nebraska Xpress, Inc., against Roger Huls, dba Huls Transfer should be sustained in part.
2. Defendant has leased his authority to another person without approval of the Commission in violation of Section 75-318 R.R.S. 1943.
3. Defendant has performed and permitted the leasee of his authority to perform a regular route service in violation of Chapter III, Article 1, Section (i) (b) (iv) of the Commission's rules and regulations.
4. Defendant has held out, and has permitted the lessee of his authority to hold out service at rates other than those prescribed by the Commission in each official tariffs in violation of Chapter III, Article 1, Section (i) (c) of the Commissions rules and regulations.
5. Defendant should be ordered to cease and desist the lease of his authority, the performance of a regular route service, and the holding out of service other than at rates prescribed by the Commission in its official tariffs.
6. Defendant's authority should be restricted against the transportation of shipments weighing less than 20,000 pounds and against the transportation of more than two shipments in any one vehicle at any one time.

O R D E R

IT IS, THEREFORE ORDERED by the Nebraska Public Service Commission that Formal Complaint FC-1183 of Mills Transfer Company, Inc. and Trans-Nebraska Xpress, Inc. vs. Roger L. Huls, dba Huls Transfer be, and it is hereby, sustained in part.

IT IS FURTHER ORDERED that Roger L. Huls, dba Huls Transfer be, and he is hereby, ordered to cease and desist from leasing his authority to another person in violation of Section 75-318, R.R.S. 1943, from performing a regular route service under his irregular route authority in violation of Chapter III, Article 1, Section (1) (d) (iv) of the Commissions rules and regulations, and holding out service at rates other than prescribed by the Commission in its official tariffs in violation of Chapter III, Article 1, Section (1) (c) of the Commissions rules and regulations.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Mills Transfer and TNX vs. Huls Transfer (cont)
Page Eleven

IT IS FURTHER ORDERED that the certificate issued to Roger L. Huls, dba Huls Transfer in Application No. M-12101 be, and it is hereby restricted against the transportation of shipments weighing less than 20,000 pounds, and further restricted against the transportation of more than two shipments in any one vehicle at any one time.

IT IS FURTHER ORDERED that Roger L. Huls, dba Huls Transfer be, and he is hereby ordered to file with the Commission within 30 day of the effective date of this order a sworn affidavit stating that all requirements of this order are being fulfilled.

MADE AND ENTERED in Lincoln, Nebraska this 27th day of March, 1984.

NEBRASKA PUBLIC SERVICE COMMISSION

Harold D. Simpson
Chairman

ATTEST:

Therese L. Kuback
Executive Secretary

COMMISSIONERS CONCURRING:

Duane D. Gay

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION
