

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Herman Bros., Inc., Omaha, Nebraska,	)	Formal Complaint No. 1205
	)	
Complainant,	)	COMPLAINT
	)	SUSTAINED IN PART
vs.	)	ORDER TO
	)	CEASE AND DESIST
Peake, Inc., Des Moines, Iowa,	)	
	)	
Defendant.	)	ENTERED: February 10, 1987

Appearances: For the Complainant:

James E. Ryan, Esq.  
1300 American Charter Center  
206 South 13th Street  
Lincoln, Nebraska 68508

Jack L. Shultz, Esq.  
500 The Atrium, 1200 N Street  
P.O. Box 82028  
Lincoln, Nebraska 68501

For Intervenor  
Dahlsten Truck Lines, Inc.

Marshall D. Becker, Esq.  
1400 First National Center  
Omaha, Nebraska 68102

For Intervenor  
Crete Carrier Corporation and  
Pride Lease Company

John Boehm, Esq.  
200 Mayfair Building  
625 South 14th Street  
Lincoln, Nebraska 68508

For the Defendant

Rodney Peake, Esq.  
1836 M Street  
Belleville, Kansas 66935

BY THE COMMISSION:

OPINION AND FINDINGS

By formal complaint filed August 15, 1986, Herman Bros., Inc. ("HBI") filed a complaint with this Commission against Peake, Inc. ("Peake") alleging that the defendant had engaged in "for hire" transportation of cement in Nebraska intrastate commerce without holding a certificate or permit to provide such service. Specifically, the complaint alleged defendant had supplied equipment and drivers to Jensen Construction (I. F. Jensen according to the contract sub-

FORMAL COMPLAINT NO. 1205

PAGE TWO

mitted in evidence, hereinafter referred to as "Jensen"), under a written lease for purposes of transporting on a "for hire" basis, cement to various I-80 road projects in Nebraska. Complainant alleged the movements occurred under the guise of private carriage and resulted in diversion of revenues from HBI. Complainant prays the Commission enter an order directing defendant to cease and desist from the single source leasing arrangement which it alleges constitutes unauthorized "for hire" transportation service.

The defendant's answer alleged that the Commission lacks jurisdiction over the subject of this matter and over the defendant because of defective service.

Notice of the filing of the complaint was served on defendant's counsel. The record does not reflect that a copy of the complaint was timely served on the defendant, although the complainant requested that service of the formal complaint be made in the manner prescribed in Rule 11.02 of the Rules of Commission Procedure. Defendant did not receive immediate service on the complainant but did receive actual service at a later date. By the time hearing was held defendant waived proper service, and, therefore, waives any argument concerning improper service. The record shows defendant is a certificated motor carrier, hence the Commission has jurisdiction over it in the context of this complaint.

The Commission mailed its hearing notice in this matter on October 24, 1986. petitions for intervention were subsequently filed jointly by Crete Carrier Corporation and Pride Lease Company. A petition for intervention was also filed by Dahlsten Truck Lines, Inc. Both petitions for intervention have been granted.

The matter was heard before the Commission on October 29, 1986 in Lincoln, Nebraska, with appearances as shown. Complainant offered in evidence the following: A copy of the certificate of public convenience and necessity issued to Peake, Inc. as Exhibit No. 2. A copy of the first set of interrogatories submitted by complainant as Exhibit No. 3. The first request for production of documents by complainant as Exhibit No. 4. The answers to the interrogatories and the respondent's pleading to the request for production of documents held by defendant as Exhibit No. 5.

Complainant produced one witness, Earl Wood, who testified: He is president of HBI a corporation doing business in Nebraska. He is also a stockholder of the corporation. He has been associated with HBI for 15 years. He has served as president for the last three or three and a half years. HBI holds authority in Certificate M-10371, a copy of which is Exhibit No. 6. The certificate authorizes HBI to transport cement in bulk between all points in Nebraska. Exhibit No. 7 is an equipment list of the equipment operated by complainant. Equipment shown on pages 3, 4, and 5 identified as pneumatic is used in transportation of cement. HBI has terminals at Louisville, Superior, and Omaha. Cement is hauled under Official Cement Tariff No. 15 on item 185-B. HBI has solicited Jensen through Boyd Wood in the Ashgrove cement manufacturing plant in Louisville. Solicitation took place three or four months prior to the start of Jensen's work on Interstate 80 near Odessa. HBI did not get the traffic. The equipment HBI uses is leased from Lease Co., and Cross, sister companies. The cement in question was manufactured at Louisville, then shipped by rail to a point near Interstate 80 in Nebraska.

FORMAL COMPLAINT NO. 1205

PAGE THREE

Intervenors Crete Carrier Corporation and Pride Lease Company produced one witness, Duane W. Acklie, who testified: He is employed by L.R.C. and subsidiaries. Crete is a subsidiary of L.R.C. engaged in for hire motor transportation under authority from the Interstate Commerce Commission and the Nebraska Public Service Commission. Exhibit No. 8 shows the authority held by Crete. Pride is engaged in leasing equipment to common carriers and private carriers. It leases equipment to Crete. Pride is also a subsidiary of L.R.C. Exhibit No. 9 is a list of equipment operated by Crete as of September 30, 1986. Exhibit No. 10 is a list of equipment operated and owned by Pride as of September 30, 1986. He graduated from law school in 1955. He spent two years in the military service. From 1957 to 1971 he practiced law primarily in the motor carrier field. In 1971 he became president and chief executive officer of L.R.C. and Crete. In October 1984, Nash Finch took over Hinky Dinky Stores. Nash Finch has its own fleet. Pride has leased to Nash Finch four tractors and six trailers and the labor of the drivers which is broken out and charged to Nash Finch at a cost of the labor plus 20 percent. The drivers are on Pride's payroll. The tractors are leased on a weekly charge at a set dollar amount per week. Fuel and maintenance is provided at 31 cents per mile to cover fuel and maintenance. Trailers are leased for a set amount per week with different rates for refrigerated or dry trailers. Maintenance charges are three cents per mile based on odometer miles on the dry freight vans, and four cents per mile on the refrigerated vans. An additional charge of one dollar per hour to cover fuel on the refrigerated trailers is charged. Pride pays sales tax on the amount received from Nash Finch. The vehicles and the drivers are dispatched by Nash Finch. Nash Finch treats the leased trailers as they do their own equipment. Nash Finch sets the hours of the drivers. Pride performs an audit of the logs and the safety records and provides safety training. The equipment is exclusively dedicated to the use of Nash Finch. Cargo loss is the responsibility of Nash Finch. Liability insurance on the operation is carried by Nash Finch. Safety compliance as far as equipment loading and so forth is the responsibility of Nash Finch. The operation, number of hours operated, making sure drivers are qualified and driver physical examination are the responsibility of Pride. Pride does not exercise any control over the shipments. Crete has the authority to provide the service required by Nash Finch, but it was not practical to undertake the transportation because there is no tariff covering that type of grocery distribution. Nash Finch wanted to direct the drivers and bear the responsibility for the drivers. It wanted to provide the liability insurance and take responsibility for the cargo. Pride vehicles are rotated with Nash Finch vehicles. Nash Finch is pleased with the operation. Nash Finch will not discharge any of its present drivers, but as it grows and adds grocery warehouses, it intends to utilize single source leasing. Legal counsel researched the legalities of the operation before and after it commenced. Commission representatives were invited to come to the terminal, examine the lease and examine the operation which was characterized as a single source leasing, rather than for hire operation. Based upon a search of the statutes and Nebraska case law, and where that is silent, ICC cases, single source leasing is lawful in Nebraska. To be lawful one must do the things Pride is doing and pay sales taxes. He is familiar with ICC single source leasing guidelines. Single source leasing allows someone like Nash Finch to operate its equipment and allows it to do it on a speedy basis. When Nash Finch took over Hinky Dinky distribution it found it had three days to do it. It could not buy motor vehicle equipment. It could not get everything in place within three days. There is a public benefit to allow lawful single source leasing. Pride intervened in this matter because it wants to continue to do what it has done since October 1984. It has investment in equipment and trained drivers. It wants to continue to lease to Nash Finch. It would be an adverse financial



FORMAL COMPLAIN NO. 1205

PAGE FOUR

effect if Pride had to discontinue what it believes to be lawful single source leasing. The reason Crete intervened is that it wants to demonstrate that it already holds the authority. Crete wants to show that the single source leasing is not a subterfuge. Even if there was a tariff in place and approved by the Commission, it would be very difficult to structure a tariff because the operation is simply a lease of motor vehicle equipment and lease of drivers. The lessee controls the drivers. They report to Nash Finch's place of business and not to that of Pride or Crete. The original term in the lease was six months. It has remained in effect.

Intervenor Dahlsten Truck Line produced one witness, Vayle Hayes, who testified: He is vice president of Dahlsten which holds authority from the Commission. Dahlsten is concerned that if single source leasing is approved, how is it approved? He hopes that if single source leasing is approved, it is approved under terms which require at least a minimum of 30 days; that the shipper have exclusive control of the equipment for the 30 days; that the control be exclusive so that the unit cannot haul for one shipper one day and another the next; and the shipper have the legal responsibility for the lease equipment including the liability insurance.

The defendant called one witness, Hal Hasselbalch, who testified: He wrote the letters shown in Exhibit 13. The question of liability insurance was not addressed in either letter. It would make a difference whether the private entity transporting the goods carries the liability insurance.

Interrogatories propounded by complainant shown in Exhibit No. 3 show: Defendant contracted, and provided equipment and drivers for transportation in intrastate commerce for I.F. Jensen of Sioux City, Iowa. Cement was transported from a rail siding at Sutherland, Nebraska to Sutherland and from a rail siding at Odessa, Nebraska to Odessa. Defendant owned the equipment, licensed it, and hired the drivers which were employed pursuant to the contract. Defendant supplied or terminated the drivers under the contract at the request of Jensen. The drivers were paid on the basis of a percent of revenue per ton. Federal and state withholding taxes were deducted from the drivers wages by defendant, and defendant made employment contributions on the drivers. The drivers were covered by workmen's compensation insurance carried by defendant from payments received from Jensen. Defendant carried liability insurance coverage for the movements conducted under the leases. Defendant has no authority to transport cement in Nebraska intrastate commerce.

The rental agreement attached to Exhibit 5 in paragraph 10 states: "Renter agrees to bear the risk of loss, damage, theft, or destruction of any and all property transported by it in said rented motor vehicles." Section 11 states: "Notwithstanding the preceding, Renter agrees to indemnify and obtain and keep in force, as its own expense during the rental term, and any renewals thereof, public liability insurance covering bodily injury, death, and property damage arising from use of the rented units. The monetary limits of such insurance shall be at least \$300,000.00 per person; \$500,000.00 per accident in the case of liability for bodily injuries or deaths; and \$500,000.00 per claim; \$100,000.00 per accident."

FORMAL COMPLAINT NO. FC-1205

PAGE FIVE

§75-309 R.R.S. 1943 states:

It shall be unlawful for any common or contract carrier by motor vehicle subject to the provisions of articles 1 and 2 of this chapter and §75-301 to 75-322.01 to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity, or a permit to such contract carrier, issued by the commission authorizing such operations.

The complaint alleges in paragraph 7 that "Defendant has willfully failed to comply with the provisions of the Nebraska Motor Carrier Act and the Rules and Regulations of the Commission in that Defendant has willfully \*\*\* (b) Relied on the sham lease arrangement to circumvent the certification requirements of Neb. Rev. Stat. §75-309 and §75-311;". That was the only allegation of the complaint against the defendant that the complainant proved. The evidence shows that the defendant did in fact lease its equipment to a noncarrier for the purpose of hauling cement which the defendant was not authorized to carry under its authority. It is evident that the lease is a sham from the standpoint that the defendant furnished the insurance for the operation and charged rates according to the distance product was carried. It is clear that the contract between the defendant and Jensen was not a legitimate single source leasing arrangement. The statutes of this state do not preclude single source leasing; however, a legitimate single source leasing contract must provide that the lessee of the equipment have complete control over the equipment and drivers; the operation must be insured by the lessee not the lessor; the compensation arrangement must compensate the owner of the equipment for lessee use of the equipment whether the equipment is operated or not, whether it is used loaded or unloaded.

It is clear from the evidence that the complainant's request for an order to cease and desist should be granted, and this order will serve to place defendant on notice that its certificate of public convenience and necessity granted by this Commission will be in jeopardy in the event that the defendant undertakes similar operations in the future.

#### O R D E R

IT IS THEREFORE, ORDERED by the Nebraska Public Service Commission that Formal Complaint No. 1205 be, and it is hereby, SUSTAINED IN PART.

IT IS FURTHER ORDERED that the operations conducted by defendant Peake, Inc., under its lease of equipment to I.F. Jensen be, and they are hereby, held to have been in violation of §75-309 R.R.S. 1943 as amended.

IT IS FURTHER ORDERED that Peake, Inc., cease and desist, now and in the future, from any further operations under terms of leases used in its operations with I.F. Jensen.

FORMAL COMPLAINT NO. FC-1205

PAGE SIX

IT IS FURTHER ORDERED that Peake, Inc., follow and apprise itself of the Commission's rules for single source leasing being conducted under Rule and Regulation Docket 85.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February 1987.

NEBRASKA PUBLIC SERVICE COMMISSION

*Eric Rasmussen*

Chairman

ATTEST:

*Donald Adams*  
Executive Secretary

COMMISSIONERS CONCURRING:

*Duane D. Gay*

//s//James F. Munnelly  
//s//Eric Rasmussen  
//s//Harold D. Simpson  
//s//Daniel G. Urwiller