BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In re:	)	Formal Complaint No. 1229
	)	
Central Transportation Co., Inc., Herman Bros., Inc., Wheeler Transport Service, Inc., Wynne Transport Service, Inc.,	)	MOTION FOR RECONSIDERATION GRANTED
	)	
	)	ORDER OF NOVEMBER 27,1990 REVOKED
Complainants,	)	
	)	EQUIPMENT LEASE REVOKED;
vs.	)	ORDER TO CEASE AND DESIST;
	)	INTERPRETATION OF
Gordon McElhose and Northland Transportation, Inc.,	)	CERTIFICATE M-7586
	)	
Defendants.	)	ENTERED: February 19, 1991

APPEARANCES

For the Complainants:

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For the Defendants:

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BY THE COMMISSION:

OPINION AND FINDINGS

By a 4-1 vote on November 27, 1990, the Commission entered an Order in the above-captioned matter. The Defendants filed a timely motion for reconsideration/rehearing. Oral arguments by the parties were presented to the Commission January 15, 1991. We grant the motion and, upon reconsideration, we: (1) revoke the Order entered on November 27, 1990; (2) make the following findings of fact; and (3) enter the following Order.

By Formal Complaint filed with the Commission on May 15, 1990 (FC-1229), Central Transportation Co., Inc. ("Central"), Herman Bros., Inc. ("Herman Bros."), Wheeler Transport Service, Inc. ("Wheeler Transport") and Wynne Transport Service, Inc. ("Wynne Transport") (referred to collectively as the "Complainants") seek revocation of Defendant Gordon McElhose's ("McElhose") authority based on the entry of Defendants McElhose and Northland Transportation ("Northland") into an Equipment Lease Agreement which Complainants allege is (1) an illegal lease of McElhose's authority to Northland. Complainants further allege: (2) but-for the illegal leasing arrangement between McElhose and Northland, McElhose's authority to transport certain

commodities, i.e., anhydrous ammonia, liquid fertilizer, liquid propane gas and bulk cement, is dormant; and (3) the operations conducted under McElhose's authority through the McElhose-Northland leasing arrangement are beyond the scope of authority granted to McElhose in Certificate No. M-7586.

Defendants deny any impropriety in their entry into, and operations conducted under, the McElhose-Northland leasing arrangement. Defendants further deny McElhose's authority is dormant or that transportation operations conducted pursuant to the McElhose-Northland leasing arrangement are beyond the territorial scope of McElhose's authority.

A hearing on Formal Complaint No. 1229 was held September 12, 1990 in Lincoln, Nebraska with appearances as shown. Documentary and testimonial evidence, which is described in detail below, was adduced at the hearing.

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A. COMPLAINANTS' EVIDENCE

Complainants introduced the evidence of seven witnesses.

1. Gordon McElhose: (McElhose) testified he is in the trucking and construction business and operates from his home in Verdigre, Nebraska. McElhose owns four power units (tractors), one of which is used solely at his gravel pit near his home; the other three units are utilized to transport

traffic in intrastate commerce. McElhose also owns four trailers consisting of a gasoline transport, a grain trailer, and two stock trailers. However, the three tractors which McElhose has committed to transportation operations do not haul traffic under McElhose's authority. Rather, the three tractors are leased to Complainant Central pursuant to an equipment lease still in effect on the date of the hearing.

McElhose holds common carrier authority issued in approximately 1945 by the Commission in Certificate No. M-7586 as follows:

Commodities generally, including those requiring the use of a gravel dump. Irregular routes from within a radius of 20-miles from Plainview, to and from Norfolk and Omaha, and occasionally to and from points within a radius of 325-miles from Plainview.

(emphasis in original).

McElhose stated he has used Certificate No. M-7586 continuously since approximately 1945. Gravel, dry fertilizer, grain, and livestock are the principal commodities McElhose hauls pursuant to his authority. McElhose has continuously transported the exempt commodities of grain and livestock throughout the state. McElhose has also continuously transported dry fertilizer between all points in Nebraska. McElhose testified he previously received opinions from two staff members of the Commission that his certificate granted him the authority to operate on an unrestricted basis within a 325-mile radius of Plainview, Nebraska. However, McElhose stated his understanding of the term "occasionally" as used in his certificate of authority did not mean daily service.

McElhose is a party to Tariff 4 which was established by the Commission and covers commodities in general. However, upon further questioning, McElhose stated he participates in Tariff Nos. 20, 6C and 15. He became a member of these Tariffs approximately three months prior to the hearing. McElhose testified he was previously a member of these Tariffs, but there was an undetermined period of time when he was not a member before rejoining approximately three months before the hearing was held.

In August of 1989, McElhose entered into an equipment leasing arrangement with Northland whereby Northland leased transportation equipment from independent owner-operators and then subleased that equipment to McElhose. McElhose and Northland renewed their leasing arrangement in a master Equipment Lease Agreement dated February 23, 1990, effective for a one year term from March 1, 1990 through March 1, 1991.

The equipment subject to the leasing arrangement is depicted in an Addendum to the Agreement (Exhibit 3).

Prior to entering into the leasing arrangement with Northland, McElhose consulted with Commission Director of Transportation Wayne Rowe and Commission Staff Attorney Hal Hasselbalch. According to McElhose, approximately two weeks before entering into the leasing arrangement he sought and received an opinion from Hasselbalch that such arrangement with Northland was valid.

Prior to August of 1989, McElhose did not have the necessary transportation equipment to haul anhydrous ammonia, liquid fertilizer, or bulk cement. Between at least 1980 and August of 1989, McElhose did not haul any anhydrous ammonia, liquid fertilizer, or bulk cement under his own authority.

Following the commencement of the McElhose-Northland equipment leasing arrangement, traffic in anhydrous ammonia, liquid fertilizer, and bulk cement began moving under McElhose's authority on a call and demand basis in the leased equipment.

McElhose's payment obligation to Northland for the leased equipment is computed on the basis of ninety five percent of the revenue generated per month by operations conducted in the leased equipment. McElhose retains the remaining five percent of such revenue. McElhose's only responsibility under the McElhose-Northland leasing arrangement is to write a check every month or periodically to Northland. Virtually every other function performed pursuant to the McElhose-Northland leasing arrangement is performed by Robert Morris ("Morris") of Northland.

McElhose testified that Morris performs the following functions with respect to transportation operations conducted with the leased equipment:

a) Dispatch of the leased equipment on a daily basis;

b) Record-keeping for operations conducted in the leased equipment on a daily basis;

c) Dealing with drivers of the leased equipment on a daily basis;

d) Entry into leases with owner-operators to move traffic under McElhose's authority;

e) Termination of leases with owner-operators;

f) Maintenance of medical certificates of the drivers of

the leased equipment;

g) Maintenance of the logs for the leased equipment;

h) Payment of the drivers of the leased equipment;

i) Preparation of the bills of lading;

j) Contacts from drivers of the leased equipment in cases where break downs or delays in delivery occur;

k) Housing of the leased equipment at Northland's facilities in Laurel, Nebraska;

l) Preparation of billings for the shippers using blank shipping documents provided by McElhose.

McElhose stated he hired Morris approximately eighteen months before the date of the hearing; this was the same time the McElhose-Northland leasing arrangement was initiated. McElhose does not have a staff which is adequate to keep records and perform other bookkeeping tasks associated with operations conducted in either the equipment owned by McElhose or the equipment subject to the McElhose-Northland lease. Although McElhose stated Morris is one of his employees, Morris is also an officer of Northland and the only bookkeeping he performs for McElhose is associated with operations conducted with the leased equipment. McElhose further stated he pays Morris a salary of two hundred dollars per month but he has filed no documentation with the Internal Revenue Service ("IRS") regarding Morris' employment in either 1989 or 1990. McElhose has no knowledge as to the amount of time Morris spends on a monthly basis as an employee of McElhose. McElhose could not provide an estimate concerning the amount of time Morris takes to conduct daily equipment dispatches, record keeping, driver contacts, etc., and other functions associated with the operations under the McElhose-Northland lease.

McElhose stated his understanding that the McElhose-Northland lease provides for exclusive control of the leased equipment by McElhose. However, McElhose admitted the equipment leased to him is also used to transport both interstate and intrastate traffic for Northland. McElhose further admitted he only controls his own equipment.

McElhose also testified the McElhose-Northland lease provides that Northland is responsible for the operational expenses of the leased equipment and admitted he does not pay the expenses of the leased drivers. McElhose stated he personally inspected the trailers subject to the McElhose-Northland lease, but neither he nor his wife

inspected the tractors and he does not know who conducted such inspection, although he stated his belief such an inspection was done.

McElhose maintains five million dollars in liability coverage for insurance purposes. However, McElhose did not begin carrying this level of coverage until some time after the McElhose-Northland leasing arrangement went into effect. At the inception of the leasing arrangement, McElhose was an additional insured on Northland's insurance and McElhose remains an additional insured to date. McElhose also carries insurance coverage for cargo. However, the McElhose-Northland lease holds McElhose harmless and provides for indemnification of McElhose by Northland in the event of a loss.

Finally, McElhose stated the revenues generated from his intrastate transportation operations in 1989 were lower than those generated in 1988. He estimated 1990 revenues will be somewhat higher, but not significantly higher, than those generated in 1989 even though he is now operating twenty three units as compared to the three units he operated in 1989 because his livestock and grain hauling is down from that year.

2. Robert Morris: ("Morris") testified his business address is 120 2nd Street, Laurel, Nebraska. Morris is Northland's vice president and, although stating that he works for both Northland and McElhose, admitted he works out of one location, namely Northland's office.

In regard to his responsibilities connected to the operations conducted in the leased equipment, Morris stated he performs the following services:

a) Dispatching of the leased equipment;

b) Hiring and disciplining of the owner-operators who drive the leased equipment;

c) Record-keeping for operations conducted with the leased equipment;

d) Handling all of the details specified in the billings associated with operations conducted in the leased equipment;

e) Maintenance of the records for the drivers of the leased equipment;

f) Handling payroll and settlements with the drivers of the leased equipment;

g) Preparation of all freight bills, from blank bills provided by McElhose, for all shipments performed with the leased equipment;

h) Inspection of the leased equipment at the commencement of the lease and annually thereafter; and

i) Maintenance of inspection records for the leased equipment.

Morris estimated he devotes approximately five hours per week to the performance of the above-described functions for the McElhose operation. Morris described his salary from McElhose as a "stipend" and confirmed his monthly salary from McElhose is in the amount of two hundred dollars. However, Morris stated he was not compensated for his services to McElhose until January, 1990 when the monthly stipend went into effect. Morris also stated that he has a contract agreement with McElhose whereby McElhose will prepare an IRS Form 1099 at the end of 1990 and Morris will report his monthly stipends on his income statement as other income and not as wages.

Morris considers his employment with Northland to be a full-time endeavor. In his capacity as vice president of Northland, Morris manages the business, attempts to find additional business, prepares all billings, dispatches equipment for transportation under Northland's authority, and "just everything involved in the trucking business."

Morris confirmed McElhose's testimony that Northland uses the leased equipment to haul commodities under Northland's intrastate and interstate authority during the term of the lease. Morris also confirmed McElhose is not responsible for the operational costs of the leased equipment such as fuel, maintenance, repair, etc., and that the owner-operators of the leased equipment pay much of these costs themselves. Morris further confirmed that ninety five percent of the revenues generated by operations conducted in the leased equipment is paid to Northland.

Northland is a holder of common carrier authority issued by the Commission in Certificate No. M-13196 which provides:

Fly Ash from points in Hall and Lincoln Counties to points in Nebraska over irregular routes. SUPP. 1: Dry fertilizer between points in Nebraska over irregular routes.

(emphasis in original).

Morris acknowledged Paragraph 2 of the lease contains a representation that the leased equipment is owned by

Northland. However, Morris conceded that none of the power equipment subject to the Northland-McElhose lease is owned by Northland as all such equipment is either owned by owner-operators or Ruan Rentals and leased to Northland.

Contrary to the testimony of McElhose, Morris testified Northland does not pay worker's compensation premiums on the drivers of the leased equipment since the drivers provide their own coverage. Morris testified he incorrectly stated that he paid worker's compensation insurance on the drivers of the leased vehicles in his response to Interrogatory No. 13.

Morris conceded Northland has no authority, absent its lease arrangement with McElhose, to conduct intrastate transportation of cement, anhydrous ammonia, liquid fertilizer, and liquid propane gas. Morris also stated his understanding of the term "occasionally" contained in McElhose's certificate of authority means "as the need arises."

Morris acknowledged the McElhose-Northland lease prohibits Northland from exercising control over the leased equipment during the life of the lease. However, Morris admitted the leased equipment operates under both Northland and McElhose authority at all times. Morris further admitted it is essentially impossible to determine when he is acting as an employee of McElhose and when he is acting as an employee of Northland with respect to the exercise of control over the leased equipment.

On cross-examination, Morris testified: Northland has in the past leased equipment to Complainants Central, Herman Bros. and Wynne Transport. Morris believes the leasing arrangement with those three Complainants was basically the same as the McElhose-Northland leasing arrangement, at least with respect to the custody and control issue. Morris further testified that no one from the Commission ever informed him of any impropriety in the manner in which transportation operations were performed pursuant to the McElhose-Northland lease.

On redirect examination, Morris testified: The lessees in previous leases with Northland retained seven percent to fifteen percent of the revenues generated by operations conducted pursuant to such leases. McElhose retains five percent of the revenues generated pursuant to the McElhose-Northland leasing arrangement.

3. Hal Hasselbalch: ("Hasselbalch") The Commission Staff Attorney testified he "probably" rendered an opinion as to the interpretation of McElhose's certificate of authority in approximately August of 1989, but he did not render a written interpretation.

On cross-examination, Hasselbalch testified: He discussed the scope of McElhose's authority with Commission Inspector Janulewicz, Commission Director of Transportation Wayne Rowe, and Morris. Hasselbalch stated he did not tell them (Northland and McElhose) they could not operate under McElhose's authority in accordance with the second clause of McElhose's certificate of authority.

On redirect examination, Hasselbalch testified as follows: In orally expressing his opinion concerning the interpretation of McElhose's authority, Hasselbalch told Morris that McElhose and Northland could operate essentially on an unrestricted basis pursuant to the second clause in McElhose's authority containing the term "occasionally." Hasselbalch rendered this verbal opinion to Morris, even though it is Hasselbalch's position that certificates of authority containing the term "occasionally" have never been well defined by the Commission or the courts, "but it must mean something." Hasselbalch also stated his opinion that the Commission was not contemplating virtual daily service when it issued the authority to McElhose in approximately 1945.

4. Don Swerczek: ("Swerczek") testified he is employed by Wynne Transport of Omaha, Nebraska, where he has held the positions of vice president and general manager for approximately twenty seven years. Wynne Transport has previously transported commodities for some of the companies currently using McElhose-Northland. Wynne Transport operates equipment suitable for the transportation of all such commodities. Swerczek's purpose in appearing at the hearing was to dispute the McElhose-Northland leasing arrangement and the interpretation of McElhose's authority.

On cross-examination, Swerczek testified as follows: Northland leased equipment to Wynne Transport in the past and, during the period of that lease, Northland handled traffic for itself under either its Interstate Commerce Commission ("ICC") or its intrastate authority. Swerczek also stated that, during the terms of prior leases with Northland, it was not unusual for the shipper to call Northland, rather than calling Wynne Transport.

5. Phil Wheeler: ("Wheeler") testified he is employed by Wheeler Transport and has held the position of vice president for the past twelve years. Wheeler identified Exhibit No. 9 as an accurate portrayal of Wheeler Transport's intrastate authority and stated that such authority permits Wheeler Transport to engage in transportation of a number of the same commodities transported by the Defendants pursuant to the McElhose-Northland leasing arrangement. He further indicated Wheeler Transport owns or leases equipment suitable

for the transportation of all commodities currently hauled by McElhose-Northland. Wheeler Transport currently holds itself out to transport such commodities. Wheeler Transport has previously served several of the shippers identified in the abstract of traffic conducted pursuant to the McElhose-Northland leasing arrangement. Wheeler's purpose in appearing at the hearing was to protest the McElhose-Northland interpretation of McElhose's authority and the McElhose-Northland lease arrangement.

6. Steve Abler: ("Abler") testified that he is employed by Central and, although he only recently entered the management level, he was the comptroller and office manager of Central for the previous ten years. Abler identified Exhibit No. 10 as an accurate depiction of Central's intrastate authority which permits Central to transport all of the commodities, except cement, currently hauled pursuant to the McElhose-Northland leasing arrangement by the Defendants. Central currently owns or leases equipment suitable for the transportation of all the commodities presently transported by McElhose-Northland, except cement. Central has served some of the shippers, customers, and consignees listed on the abstract of traffic conducted pursuant to the McElhose-Northland leasing arrangement. Abler appeared at the hearing to protest, on behalf of Central, the McElhose-Northland interpretation of McElhose's authority and the manner in which McElhose's authority is being used pursuant to the McElhose-Northland leasing arrangement.

On cross-examination, Abler testified as follows: Northland leased equipment to Central several years ago. During the period of that lease, Northland utilized the same equipment to haul Northland's own product interstate and intrastate. Abler further testified that it would not be unusual for a shipper to contact a leased carrier directly to obtain transportation service from Central.

7. Brian Wood: ("Wood") testified he has been employed by Herman Bros. for approximately seventeen years and has held the position of vice president for approximately one and one-half years. Wood identified Exhibit No. 8 as an accurate depiction of Herman Bros. intrastate authority which authorizes Herman Bros. to transport all of the commodities listed on the abstract of the traffic moved pursuant to the McElhose-Northland leasing arrangement. Herman Bros. currently transports those commodities and, in the past, transported such commodities for some of the shippers and consignees listed on the McElhose-Northland traffic abstract. When an owner-operator is leased to Herman Bros., shippers do not contact the owner-operators directly since all calls for transportation service go through Herman Bros.' dispatch. Wood's purpose in appearing at the hearing was to

protest the McElhose-Northland interpretation of McElhose's authority and to protest the lease.

On cross-examination, Wood testified it is possible other carriers which lease equipment to Herman Bros. handle their own intrastate or interstate traffic occasionally with the leased equipment.

B. DEFENDANT'S EVIDENCE.

Defendants did not present any affirmative evidence at the hearing.

C. ISSUES, LEGAL AUTHORITY, AND ANALYSIS.

1. Issues Raised by the Complainants: The Complainants raise three primary issues to be resolved by the Commission-

a) Whether McElhose's authority to carry anhydrous ammonia, bulk cement, liquid fertilizer and liquid petroleum gas traffic intrastate was dormant prior to the inception of the McElhose-Northland leasing arrangement?;

b) Whether McElhose's intrastate authority contained in Certificate No. M-7586 authorizes McElhose to provide unrestricted transportation service to all points within a 325-mile radius from Plainview, Nebraska pursuant to use of the term "occasionally" in the certificate?; and

c) Whether the McElhose-Northland leasing arrangement constitutes an illegal lease of McElhose's authority to Northland?

2. Dormancy: The Complainants' allegation that the McElhose authority is dormant, or at least partially dormant, is easily disposed of upon review of the applicable case law. To make a finding of dormancy in this proceeding is to misapply the law. Therefore, we do not address the dormancy issue except to point out that dormancy is not an issue to be determined pursuant to a complaint proceeding, absent a pending transfer application.

As the Nebraska Supreme Court noted in Herman Bros., Inc. v. Spector Industries, Inc., 209 Neb. 513, 308 N.W.2d 720 (1981), the concept of dormancy was developed by the Interstate Commerce Commission to aid "in determining whether a motor carrier should be allowed to *purchase* the operating rights of another carrier." citing Wright Trucking, Inc. v. United States, 403 F. Supp. 119 (D. Mass. 1975). In Wright, the District Court explained: "Dormancy is a concept the [Interstate Commerce] Commission developed in the

course of its statutory oversight of the *transfer* of operating rights." Id. at 120 and quoted by the Nebraska Supreme Court in Spector at 520. Spector also relies on C & H Transportation Co. -Purchase (Portion)- Ferguson Trucking Co., 93 M.C.C. 741 (1964), which contains the proposition that " [a] *purchaser* of dormant rights is seen as aggressively seeking to expand the *vendor's* relinquished business".

The Spector decision involved an application for the transfer of authority, as did Dahlsten v. Harris, 191, Neb. 714, 217 N.W.2d 813 (1974). Another Nebraska case analyzing this issue is Ace Gas, Inc. v. Peake, Inc., 184 Neb. 448, 168 N.W.2d 373 (1969), which also concerned a transfer of operating authority. Dormancy is only properly raised when the issue at hand is a transfer of the operating authority. The Nebraska cases cited above all involve an application for a transfer of authority pursuant to §75-318 R.R.S. 1943, as amended which pertains to the sale, transfer, lease, or consolidation of operating authorities .

A review of all of the Interstate Commerce decisions cited by the District Court in the Wright Trucking decision shows that every one of them involved an application for the transfer of an operating authority from a vendor to a vendee. The Nebraska Public Service Commission's own statutes only use the term "dormant" in §75-318. The issue of dormancy is only properly raised when the issue before the Commission is an application for the transfer of an operating authority. We therefore do not make any findings or conclusions concerning this allegation.

(emphasis supplied throughtout)

3. Scope of McElhose's Authority: The Commission's grant of authority in Certificate No. M-7586 permits McElhose to transport intrastate traffic over (emphasis supplied) "[i]rregular routes from within a radius of 20-miles from Plainview, to and from Norfolk and Omaha, and occasionally to and from points within a radius of 325-miles from Plainview." McElhose takes the position he is authorized by the terms of Certificate No. M-7586 to operate on an unrestricted basis within a three hundred and twenty five mile radius of Plainview, Nebraska. However, McElhose also testified he interpreted the term "occasionally" within his certificate to mean something less than authority to provide daily service within the three hundred and twenty five mile radius. Morris' interpretation of the term "occasionally" in the certificate derives from a definition he found in Webster's Encyclopedia Dictionary of the English Language. Morris' interpretation of the term "occasionally" authorizes

McElhose to transport intrastate traffic within a three hundred and twenty five mile radius of Plainview "as the need arises" (T87:9-14). Morris indicated he relied on this definition to provide service pursuant to the McElhose-Northland leasing arrangement on a daily basis if "the need arises."

Further, any doubt about whether Morris interprets McElhose's authority as providing for unrestricted daily service within a three hundred and twenty five mile radius of Plainview is eliminated by a review of Exhibit 2 which is an abstract of the traffic moved pursuant to the leasing arrangement between the two Defendants. The abstract of the traffic moved in April, 1990 graphically demonstrates that McElhose-Northland have and will provide virtual daily, unrestricted transportation services within a three hundred and twenty five mile radius of Plainview whenever they deem the need to have arisen. Traffic moved under the leasing arrangement on twenty-nine of the thirty days in April, 1990 (E2). Significantly, during those twenty-nine days, over one hundred and seventy loads were transported from and to points located throughout Nebraska including Lousiville, Hoag, Nebraska City, Plattsmouth, Auburn, Creighton, Osmond, Falls City, Crofton, Hastings, Wilcox, Optic, Orleans, LaPlatte, Crofton, Doniphan, and Dawson (E2).

Although not rising to the level of daily service, the transportation services provided by McElhose-Northland during June, 1990 (twenty eight traffic movements during sixteen days) and during July, 1990 (forty traffic movements during thirteen days) to points in Nebraska in addition to those identified in the text above (Stamford, Deweese, Petersburg, Cozad, McCook, Dickens, Fremont, Upland, and Wolbach) were substantial, providing further evidence for our conclusion that McElhose-Northland operated in disregard of the limiting term "occasionally" in the certificate of authority.

We flatly reject the interpretation of McElhose and Morris that Certificate No. M-7586 authorizes unrestricted service in a three hundred and twenty five mile radius of Plainview. To adopt such an interpretation would render superfluous the phrase "to and from Norfolk and Omaha" and the limiting term "occasionally" in the certificate; this is contrary to basic principles of construction. More importantly, the Defendants' interpretation of the certificate conflicts with prior Nebraska Supreme Court rulings and is contrary to public policy. See, e.g., Nebraska State Railway Commission v. Service Oil Co., 157 Neb. 712, 61 N.W.2d 381 (1953); In Re Application of Canada, 154 Neb. 256, 47 N.W.2d 507 (1951); and In Re Application of Meyer, 150 Neb. 455, 34 N.W.2d 904 (1948).

In Service Oil Co., a Commission order restricting operations of an intrastate common carrier was appealed. The carrier's certificate authorized transportation of commodities generally, except those requiring special equipment, by "[i]rregular routes from Ord and within a 50-mile radius thereof to and from local points, occasionally to and from Omaha, Kimball, intermediate points and points generally throughout the State of Nebraska, on a statewide basis." Id. at 713, 61 N.W.2d at 383 (emphasis supplied). The restrictions placed on the carrier's authority arose as a result of a series of hearings conducted pursuant to two Show Cause Orders issued by the Commission. The evidence at the hearing on the second Show Cause Order established that the carrier "had transported automobile parts from Omaha to consignees at Ord and Burwell almost daily from October 1 through December 28, 1951." Id. at 715, 61 N.W.2d at 384 (emphasis supplied).

The single issue before the supreme court was whether the carrier confined its operations to the services authorized in its certificate. In order to resolve this issue, the court interpreted the provisions of the carrier's certificate and rejected an interpretation nullifying the limiting term "occasionally":

> Local points as used in the certificate defined places or locations within 50 miles of Ord. The broadest and liberal interpretation of them would not include Lincoln or Omaha. They may not be considered local to the radial area. They are more than 100 airline miles "from Ord and within a 50 mile radius thereof." The subsequent language of the certificate occasionally to and from Omaha and points generally in Nebraska excludes these cities from the ones intended and described as local points. Any service that was authorized by the provision of the certificate occasionally to and from Omaha, Kimball, intermediate points, and points generally throughout the State of Nebraska on a state-wide basis was qualified by the word occasionally. . . A consideration of the entire certificate makes it certain that Ord and within a 50 mile radius thereof was established as a primary or base area and that two specified points outside of it were named all of which is characteristic of irregular route radial service. It logically follows that the service which was intended and authorized to Omaha was on an irregular route basis and limited and qualified by the word occasionally. . . "[I]f this court permitted the appellants to haul freight to and from all parts of the state, even occasionally, as they contend their certificate permitted them to do, it would rewrite their certificate so that it would contain no limitation or restriction on the business

> they could conduct under it. If the commission allowed one carrier to thus broaden its rights and territory granted in its certificate to the unlimited extent claimed in the case at bar, it would be impossible for the commission to properly regulate such carriers in our state." (citations omitted). . . The authority of appellant as a carrier was specifically limited by its certificate to irregular route operations. Whatever occasional irregular permission was given it by the certificate must necessarily mean something less than an unqualified irregular route operation.

Id. at 717-718, 61 N.W.2d at 385 (emphasis supplied), quoting In Re Application of Meyer, 150 Neb. 455, 34 N.W.2d 904 (1948) and citing In Re Application of Canada, 154 Neb. 256, 47 N.W.2d 507 (1951) and Black v. Palmer, 293 Ky. 231, 168 S.W.2d 752 (1943). The Canada court refused to render superfluous the limiting term "occasionally" in a common carrier's certificate, stating: "[t]he ambiguous provision of the certificate of September 26, 1946, 'and occasionally to and from points within the state of Nebraska at large,' obviously was not intended to authorize common carrier operations to and from all locations in the state [because] [i]f it was, the specifications of definite points of origin and destinations therein were meaningless." (emphasis supplied).

In Meyer, the sole issue was the appropriate interpretation and construction of the appellant common carrier's certificate of authority. The certificate authorized transportation of commodities generally, except those requiring special equipment, by "[i]rregular routes from Cozad, Gothenberg, Eddyville, Lexington and within a 35-mile radius of Lexington, to and from Omaha, Grand Island, Hastings and points in the vicinity of Lexington, occasionally to and from various points in all sections of the State of Nebraska." 150 Neb. at 456, 34 N.W.2d at 905 (emphasis supplied). The evidence presented at the hearing before the Commission established that the carrier interpreted his authority as covering the entire state of Nebraska. Indeed, the carrier's interpretation of its certificate sounds remarkably similar to the Defendants' interpretation of the McElhose certificate:

> [T]he carrier testified that he had hauled shipments to and from points outside the 35-mile radius of Lexington; 'but does not believe the thirty-five mile radius of Lexington' means anything; and is immaterial to the meaning of his certificate; that he reads his certificate to mean 'anywhere within the state';. . ."

Id. at 458, 34 N.W.2d at 905.

Following the hearing, the Commission issued its order interpreting the Meyer carrier's authority to require that all shipments originate or terminate within a 35-mile radius of Lexington. The carrier challenged the Commission's interpretation on appeal, contending it had the right, pursuant to its certificate, to occasionally make trips between any two points in Nebraska. Id. at 459, 34 N.W.2d at 906. The Meyer court rejected the carrier's contention, upholding the Commission's right to interpret the carrier's certificate and its determination that, if the carrier was permitted to haul freight to and from all parts of the state, even occasionally, such an interpretation would rewrite the carrier's certificate by removing any limitation or restriction on the business the carrier conducted pursuant to its certificate. This would make it "impossible for the Commission to properly regulate such carriers" in Nebraska. Id. at 460, 34 N.W.2d at 906.

Similar to the carrier in Meyer, Defendants here do not believe the words "within a radius of 20-miles from Plainview, to and from Norfolk and Omaha and occasionally" in McElhose's certificate "mean[] anything, and [are] immaterial to the meaning of his certificate [and Defendants] read [ ] this certificate to mean 'anywhere within the State'." See Meyer, 150 Neb. at 458, 34 N.W.2d at 905. Moreover, just as the Commission in Service Oil Co. found that the carrier's almost daily service for an approximate three month period constituted a failure to confine its common carrier operations to the services authorized by the certificate, we find that the Defendants' almost daily intrastate transportation of commodities from April 1, 1990 through July 21, 1990 conducted pursuant to the McElhose-Northland leasing arrangement constitutes a failure to confine the common carrier operations to the services authorized in McElhose's certificate. See Service Oil Co., 157 Neb. at 717, 61 N.W.2d at 385.

Moreover, given the language of the McElhose certificate, "[i]t logically follows that the service which was intended and authorized to [and from Norfolk and] Omaha [and occasionally to and from points within 325-miles from Plainview] was on an irregular route basis and limited and qualified by the word occasionally." See Service Oil Co., 157 Neb. at 718, 61 N.W.2d at 385. The language "and occasionally to and from points within a radius of 325-miles from Plainview" in the McElhose certificate "obviously was not intended to authorize common carrier operations to and from all locations in the state [because] [i]f it was, the specifications of definite points of origin and destination therein [would be] meaningless." See Canada, 154 Neb. at 260, 47 N.W.2d at 510.

"Whatever occasional irregular permission was given [McElhose] by the certificate must necessarily mean something less than [the] unqualified irregular operation" which the Defendants unquestionably have been conducting pursuant to the McElhose-Northland leasing arrangements. See Service Oil Co., 157 Neb. at 718, 61 N.W.2d at 385.

Finally, Defendant's interpretation of McElhose's certificate is in direct conflict with the public policy of this State:

> It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages, of, and foster sound economic conditions in, such transportation and among such carrier, in the public interest.

Sec. 75-301, R.R.S. 1943, as amended (emphasis supplied).

If we were to adopt Defendant's interpretation that they are permitted "to haul freight to and from all parts of the state, even occasionally, as they contend [McElhose's] certificate permit[s] them to do, it would rewrite [McElhose's] certificate so that it would contain no limitation or restriction on the business they could conduct under it." See Service Oil Co., 157 Neb. 718, 61 N.W. 2d at 385. If we "allowed one carrier to thus broaden its rights and territory granted in its certificate to the unlimited extent claimed" by the Defendants in this case, "it would be impossible for the Commission to properly regulate such carriers in our state." See Id. See also Canada, 154 Neb. at 260, 47 N.W.2d at 510; and Meyer, 150 Neb. at 160, 34 N.W.2d at 906.

Defendants' operations have been conducted on an unrestricted, almost daily, basis contrary to the express limiting terms of McElhose's authority contained in Certificate No. M-7586. Accordingly, we conclude the Defendants' did not confine the common carrier operations, pursuant to the McElhose-Northland leasing arrangement, to the services authorized by the certificate.

4. Legality of the McElhose-Northland Leasing Arrangement: The evidence establishes the McElhose-Northland equipment lease is essentially a two-tiered leasing arrangement. The first tier involves Northland leasing equipment from owner-operators for one year terms with payments for the use of such leased equipment ranging from seventy five percent to

ninety five percent of the gross revenues. The second tier involves a subleasing arrangement, whereby Northland (the lessor) re-leases to McElhose (the lessee) the equipment Northland acquired possession and control over pursuant to the
one year leases described above. The first and second tiers were consolidated and the resultant equipment lease was subsequently filed with and approved by the Commission's Transportation Department.

Relevant terms of the "Equipment Lease Agreement" between Northland and McElhose are the following:

> 10. OPERATIONS:
>
> The possession and control of the motor vehicle equipment during the term of this lease is entirely vested in the LESSEE, in such a way as to be good against all the world, including the LESSOR. The operation of the motor vehicle equipment shall be under the exclusive control and supervision of the LESSEE, and said motor vehicle equipment will be operated by the LESSEE in the ordinary course of LESSEE's business. LESSOR shall in no way exercise any supervision over or direct the manner of the use of said motor vehicle equipment.
>
> . . . .
>
> 17. AUTHORITY:
>
> THIS LEASE SHALL NOT CONSTITUTE A LEASE OF AUTHORITY AND SHALL NOT BE CONSIDERED AS SUCH BETWEEN THE PARTIES.

(emphasis supplied)

Pursuant to Nebraska statute, a motor carrier can only lease the authority of another motor carrier upon approval by the Commission of the proposed leasing arrangement after notice and hearing. See §75-318 R.R.S. 1943, as amended. With regard to "equipment leasing," the Commission has adopted a detailed set of regulations governing motor carrier equipment leasing. The Commission's leasing regulations which are relevant to this proceeding are:

> 008.02 Leasing Equipment. Common or contract carriers may lease equipment which they do not own to augment their existing equipment other than that exchanged between motor carriers in interchange service, only under the following conditions:

. . . .

008.02A5 Provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the LESSEE for the duration of the lease;

008.02A6 Notwithstanding the provision of 008.02A5, a common or contract carrier LESSEE of equipment may subsequently lease that leased equipment to another common or contract carrier without being in violation of these rules if the subsequent lease also conforms to the provisions of 008.02;

Neb. Admin. R. & Regs. Title 291, Ch. 3, Rule 008.02 (1989).

It should be observed that the Commission's leasing rules were re-codified in 1989. The rules do not specify which party is responsible for gasoline, oil, and other operating expenses. In fact, the standard equipment lease form available from the Commission (which can be used at the option of the parties) permits either to assume the responsibility for those costs. The Northland-McElhose lease is not illegal per se because the Lessor assumes those costs nor because the drivers are responsible for their own tax obligations.

As set forth in Rule 008.02A6, authorized carrier lessees are permitted to sublease the leased equipment to other authorized carriers, only "if the subsequent lease also conforms to the provisions of 008.02." Thus, although the fact Northland subleased to McElhose equipment previously leased by Northland from owner-operators, this by itself does not establish an illegitimate arrangement. However, in the McElhose-Northland relationship, we find that intrastate transportation operations conducted pursuant to the McElhose-Northland equipment lease do violate Rule 008.02. Such leasing arrangement is therefore, in reality, an illegal lease of McElhose's authority. It is apparent, from the way the operations were conducted, that after the equipment lease was filed with the Commission, the leasing arrangement constituted an illegal lease of authority. Northland used the illegal lease arrangement to circumvent the Nebraska regulatory process.

Just as we condemn illegal leasing of operating authority at the state level, the Interstate Commerce Commission has condemned such a practice at the federal level. Like us, the ICC focuses primarily on who is in control of the leased equipment (the lessor or the lessee) to determine whether a facially valid leasing arrangement actually constitutes an illegal lease of operating authority. The overriding

importance of the "control" factor for analyzing the validity of leasing relationships is graphically demonstrated by the ICC's consistent position "that a genuine lease of equipment without dominion by the lessee over the physical operations performed therewith is a legal impossibility." Bekins Moving & Storage Co. - Pur.- Pacific Movers, 122 M.C.C. 163, 169-170 (1975) (emphasis supplied) (citations omitted). See also, American Red Ball Transit Co., Inc. - Pur.- Fallon, 90 M.C.C. 515, 520 (1962) (where purported lessee's only connection with the transportation conducted under the leasing arrangement was passive receipt of .075 percent of the revenue for shipments over the lessee's authorized territory. The ICC concluded a genuine lease under these conditions was a legal impossibility).

The ICC has issued numerous decisions in motor carrier cases over the last several decades that determined a variety of different carrier leasing relationships were subterfuges or shams constituting illegal leases of the lessee carrier's authority. In these cases, the ICC relied on a number of factors to resolve the "unlawful lessor control" issue, including:

(a) Lessor acceptance of freight;

(b) Lessor delivery of the shipments;

(c) Lessor payment of the drivers;

(d) Lessor retention of responsibility for the freight;

(e) Lessor preparation of the bills of lading and related documentation;

(f) Lessor loading and unloading of the freight carried on the leased equipment;

(g) Unavailability of leased equipment to augment the lessee's fleet;

(h) Nonpayment by lessee for the privilege of leasing the equipment;

(i) Lessee receipt of a portion of the transportation charges for carriage operations conducted with the leased equipment;

(j) Drivers of leased equipment supplied by Lessor;

(k) Drivers contact Lessor for instructions when leased equipment breaks down;

(l) Lessor performance of billing, collection, and shipment tracing functions;

(m) Lessor inspection of shipment prior to use and maintenance of inspection records;

(n) Lessor responsibility for operating expenses in connection with use of leased equipment;

(o) Lessor responsibility for obtaining and maintaining insurance of the leased equipment;

(p) "Hold harmless" provisions in the lease, relieving Lessee of indemnity responsibility or liability for operation of the equipment (indemnity provisions in motor carrier leases are valid, so long as the Lessee is in control of the equipment);

(q) Lessor receipt of calls from shippers, received in the name of the Lessor and not the Lessee;

(r) Leased equipment garaged and maintained by Lessor;

(s) Lessor's name placarded on the leased equipment;

(t) Shipping documents and invoices prepared by Lessor on blank forms supplied by Lessee; and

(u) Upon receipt of payment from shippers, Lessee remits substantial percentage of freight charges, e.g., eighty five percent, etc., to the Lessor, keeping only the small remainder.

See, e.g. England & Sons, Inc., Ext. - Milton, PA., 128 M.C.C. 142 (1977); Bekins, 122 M.C.C. at 169-170; Hatcher Pickup & Delivery Services, Inc., Ext. - N.C., 112 M.C.C. 706 (1970); Tischler, Ext. - Canned Goods, 82 M.C.C. 179 (1960); and Steel Transp. Co., Inc., Ext. - Nonferrous Metals, 81 M.C.C. 637 (1959).

Of the twenty one factors cited above, at least sixteen of these factors existed in this case. The evidence received at the hearing establishes Northland, through Morris, performed the following functions in connection with operations conducted pursuant to the McElhose-Northland leasing arrangement:

(a) Dispatch of the leased equipment on a daily basis;

(b) Record keeping for operations conducted in the leased equipment on a daily basis;

(c) Dealing with drivers of the leased equipment on a

daily basis;

(d) Termination of leases with owner-operators;

(e) Maintenance of medical certificates of the drivers of the leased equipment;

(f) Maintenance of the logs for the leased equipment;

(g) Payment of the drivers of the leased equipment;

(h) Preparation of the bills of lading;

(i) Contacts from drivers of the leased equipment in cases where break downs or delays in delivery occur;

(j) Housing of the leased equipment at Northland's operation in Laurel, Nebraska;

(k) Preparation of billings for the shippers, using blank shipping documents provided by McElhose;

(l) Inspection of the leased equipment at the commencement of the lease and annually thereafter;

(m) Maintenance of inspection records for the leased equipment;

(n) Nonpayment by McElhose for the privilege of leasing the equipment;

(o) Upon receipt of payment from shippers, McElhose remits a substantial portion of the freight revenues, ninety five percent, to Northland, retaining only the small remainder of five percent of the revenues;

(p) The lease contains a "hold harmless" provision which relieves McElhose of indemnity responsibility or liability for the operation of the equipment pursuant to his lease with Northland while Northland (the Lessor) is, in reality, in control of the equipment.

At this point in our analysis, a brief observation about the Commission's liability insurance filing requirements as they pertain to equipment leasing is in order. The equipment leasing rules provide the Lessee shall "be responsible for carrying the insurance . . ." Title 291, Ch. 3, Rule 008.02A7. From the Commission's, as well as the public's point of view, the public interest is protected by a Form E insurance filing (or an equivalent Form G surety bond or satisfactory proof of self-insurance) made with the Commission.

McElhose had a Form E filing with the Commission at the time this lease was entered into. The evidence shows McElhose was transporting commodities requiring five million dollars in liability coverage. Whether or not McElhose's policy provided for five million dollars of coverage is not relevant. When an insurance company files a Form E on behalf of its insured motor carrier, by the terms of the Form E, the insurance company certifies that it has issued to the motor carrier a policy of insurance "which by attachment of the Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement, has [ ] been *amended* to provide automobile bodily injury and property damage liability insurance covering the obligations imposed upon such motor carrier by the provisions of the motor carrier law (emphasis supplied) of the State in which the Commission has jurisdiction or regulations promulgated in accordance therewith." Therefore, McElhose complied with the required amount of insurance imposed by law.

To hold otherwise is to mean the entire system of insurance filing requirements imposed in this State, which is the system of regulation in most other states, is meaningless. Instead of relying on the Form E filing, this Commission would have to require a filing of the motor carrier's insurance policy, ferret out all private agreements between the motor carrier and the lessor party pertaining to the insurance coverage, and make an individual examination of each before approving an operating authority or an equipment lease. The possibility of hidden agreements and their effect is chilling, to say the least. And this is to say nothing of the administrative burden and delay which would ensue. The filing of the Form E by McElhose satisfied the Commission's insurance filing requirements and therefore met the requirement set forth in the equipment lease rule.

Notwithstanding the insurance arrangement, the evidence leads inescapably to one conclusion: how the Defendants' used the equipment lease in reality created an illegal lease of McElhose's operating authority by Northland. Indeed, the most telling evidence, quite apart from the existence of the foregoing factors, are the bald admissions by McElhose and Morris that the leased equipment is also used to transport both interstate and intrastate traffic for Northland. This directly contradicts the "exclusive control" provision of the lease between the parties and is in violation of Title 291, Ch. 3, Rule 008.02A5.

In concluding Northland is exercising unlawful control over the leased equipment, we categorically reject Defendants' contention McElhose exercises the requisite control over the leased equipment through Morris acting as McElhose's employee. Several factors cause us to reach this conclusion:

(a) Morris is employed full time with Northland as its vice president and he performs all functions in the operation of Northland's trucking business;

(b) Morris performs the dispatching and other services for operations conducted with Northland's equipment and with the leased equipment from one location, i.e., Northland's office in Laurel, Nebraska;

(c) Morris performed all of the previously-described services in connection with operations conducted in the leased equipment without charge to McElhose during the August, 1989 to December, 1989 period of the leasing arrangement;

(d) McElhose has never filed any documentation with the IRS regarding Morris; employment in either 1989 or 1990 and McElhose has no knowledge of or even an estimate as to the amount of time he spends on a monthly basis providing service in connection with use of the leased equipment;

(e) not even Morris considers his monthly "stipend" from McElhose to constitute wages for employment;

(f) Morris conceded it is impossible to determine at what given time he is exercising control over the leased equipment on behalf of Northland as opposed to McElhose; and

(g) McElhose exercises no oversight over his purported employee, Morris; McElhose's only responsibility for the entire scope of operations with the leased equipment is to periodically write a check to Northland.

On these facts, we conclude the purported employer-employee relationship between McElhose and Morris amounts to nothing more than a sham which conceals Northland's unlawful control.

We find the evidence establishes beyond question that the lessor, Northland, has been and is exercising unlawful control over the leased equipment to the complete exclusion of McElhose. This is in violation of the express terms of the lease and of Rule 008.02A5. Accordingly, we adopt the ICC's maxim as our own to conclude the McElhose-Northland leasing arrangement is an illegal lease of McElhose's operating authority since "a genuine lease of equipment without dominion by the lessee over the physical operations performed therewith is a legal impossibility." See, Bekins, 122 M.C.C. at 169-170.

5. Conclusions:

From the evidence adduced, being fully informed in the premises, the Commission is of the opinion and finds that:

a) The operations under McElhose's authority, through the McElhose-Northland leasing arrangement, have been and are being conducted beyond the scope of authority granted to McElhose in Certificate No. M-7586;

b) The operations conducted pursuant to the equipment lease between the Defendants violates the rules of the Commission governing motor carrier leasing and subleasing of equipment and such arrangement is an illegal lease of McElhose's authority to Northland in violation of §75-318, R.R.S. 1943, as amended.

c) The Defendant McElhose should be ordered to cease and desist from conducting operations which exceed the scope of authority in Certificate No. M-7586 and to restrict his operations to conform to the findings in this Order. The equipment lease between the Defendants should be revoked and the Defendants should be ordered to cease and desist from operating pursuant to the lease.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that:

1. Defendant McElhose shall immediately cease and desist the unrestricted statewide operation which exceeds the authority contained in Certificate No. M-7586.

2. Defendant McElhose shall restrict his operations to conform to the findings in this Order.

3. Defendants shall immediately cease and desist from further operations under the equipment lease and from conduct which is in violation of the rules of the Commission and Chapter 75, articles 1 and 3 of the Nebraska statutes.

4. The equipment lease is hereby revoked effective this date.

Made and entered at Lincoln, Nebraska, this 19th day of February, 1990.

NEBRASKA PUBLIC SERVICE COMMISSION

By: Frank Landis Jr.
Chairman

COMMISSIONERS CONCURRING:

Duane D. Gay
//s//Frank E. Landis, Jr.
//s//James F. Munnelly
//s//Eric Rasmussen

ATTEST:

Executive Director