

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application)	Application No. B-1144
of Brown's Crew Car of Wyoming,)	Supplement No. 3
Inc., doing business as Armadillo)	
Express, Cheyenne, Wyoming, who)	
seeks to extend the authority as)	DENIED
a common carrier in Nebraska)	
Intrastate Commerce granted in)	
Certificate B-1144 and supple-)	
ments thereto in the transporta-)	
tion of passengers and their)	
baggage between points in Nebraska))	
over irregular routes.)	ENTERED: October 4, 1990

APPEARANCES OF COUNSEL: For the Applicant:
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For the Protestant:
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OPINIONS AND FINDINGS

By application filed March 9, 1990, Armadillo seeks authority to extend its authority FROM: that which is presently restricted to railroad train crews, TO: passengers and their baggage, between all points in Nebraska over irregular routes (with a limited restriction against service (a) to, from or between points in Washington, Dodge, Saunders, Douglas, Sarpy and Cass Counties, Nebraska performed using taxicabs, luxury limousines, or vehicles having a rated capacity of less than ten (10) passengers; and (b) to, from or between points in Richardson County, Nebraska). Notice of the application was published in the Daily Record, Omaha, Nebraska, pursuant to the rules of the Commission. The only protestant appearing to give evidence before the Commission was Inn "X" Press. All other protestants withdrew their protests after reaching agreement with Armadillo. Hearing on the application was held June 11, 1990 at Lincoln, Nebraska, with appearances as shown. The only issue which remains before the Commission as a result of the protest of Inn "X" Press is whether or not Armadillo has met its burden of proof and thus should be granted authority that would enable it to transport Union Pacific train crews between Fremont, Nebraska and Omaha, Nebraska, and between Omaha and Fremont.

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I. Applicant's evidence.

Applicant produced two witnesses in support of its application: Joe C. Brown and Frederick C. Meek.

Joe C. Brown testified:

His direct testimony is set forth in Exhibit 1 and was supplemented by additional direct testimony on the record. He is president of Armadillo, having held that position since the company was incorporated in 1980. Mr. Brown has general responsibility for the overall operations of the company and is familiar with all phases of its business. Armadillo is a common carrier of passengers by motor vehicle.

At present, Armadillo conducts operations in Nebraska intrastate commerce pursuant to a Certificate of Public Convenience and Necessity issued to the company by the Commission as the result of Application No. B-1144 and supplements thereto. In addition to the certificate granted under B-1144, with supplements, Armadillo holds operating authority from the Interstate Commerce Commission covering operations conducted by the company in interstate commerce, and from various state regulatory agencies covering intrastate operations in the various other states in which intrastate transportation is performed by Armadillo. At present, Armadillo has a total of 19 company-owned vehicles stationed in Nebraska, including eight vehicles stationed in Lincoln, 8 vehicles stationed in North Platte, and 3 vehicles stationed in Gering. These vehicles are used to service several railroad customers in the State of Nebraska, including Union Pacific Railroad, Burlington Northern Railroad, Chicago Northwestern Railroad, and Amtrak.

This application was filed by Armadillo for two principal reasons. First, the company sought to extend its existing Nebraska intrastate authority covering the transportation of railroad train crews to eliminate an existing restriction against service for Union Pacific railroad employees and their baggage between Omaha and Fremont. Secondly, Armadillo sought to obtain authority to transport passengers and their baggage without regard to whether the passengers being transported were railroad employees. Whether or not the Commission grants Armadillo the authority sought will not affect Armadillo's other services to other railroads. Armadillo will continue to haul for UP, Burlington, Amtrak and CN&W; the company does not rely on revenue from the Omaha to Fremont route for its existence. Nor would Armadillo lose any revenue that Armadillo is already producing. Armadillo's business with UPRR and Armadillo's revenues have continued to increase considerably without having the authority from Omaha to Fremont.

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There is no testimony by Mr. Brown indicating that there is a need for additional transportation service in the area covered by Inn "X" Press. Joe Brown has testified that he wants Armadillo to be in a position to satisfy the demands of Union Pacific when those demands cannot be met by existing carriers. However, he has indicated in his testimony that he has had no communications with representatives of the Union Pacific that there would be a probable increase in business in the immediate future. Mr. Brown has stated that under normal operating conditions the need for additional or "backup" services is not there. Moreover, Mr. Brown is not aware of any immediate needs by the UPRR whereby there is going to be a severe increase of crew transportation demand in the Omaha to Fremont area.

Mr. Brown's testimony confirmed that in 1984 when Armadillo applied for statewide authority for the transportation of railroad crews in the State of Nebraska that Armadillo voluntarily restricted its application (between Omaha and Fremont) in order to encourage Inn "X" Press to withdraw its protest. The protest was withdrawn and Armadillo's application went through unopposed.

Frederick C. Meek testified:

His direct testimony is set forth in Exhibit 2 and was supplemented by additional direct testimony on the record.

Mr. Meek is the Director of Internal Services for the Union Pacific Railroad Company ("UPRR") and has responsibility for crew support functions including crew transportation throughout the UPRR system. He has been with the UPRR and its affiliates for 27 years. He has been in his present position since January 1988. He has been responsible for various crew car service matters since 1983. By regulation and contract the UPRR crews can only be in an operating and on-duty status for a limited period of time. Accordingly, it is necessary for UPRR to replace trains crews several times per train as its trains move through its system. Service unit operating stations were established for crew supervision. UPRR operates in 23 states.

Union Pacific Railroad awards crew transportation contracts through a bidding process using fairly standard crew contracts. UPRR evaluates the qualifications and experience of the bidders and is not concerned about the carrier's operating authority when negotiating for service. It operates in many states and jurisdictions with varying degrees of regulation. In some cases, if a carrier does not have the authority, UPRR will work with it to get it, as in this application. Presently there is an agreement between Inn "X" Press and UPRR for a period of two years and the intrastate authority is all service in and about Council Bluffs and Omaha including road haul trips in both directions, which would be

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towards Falls City and North Platte. There is presently no bid pending with respect to the Omaha to Fremont route and there are no immediate or long-term plans to bid the area. UPRR is assisting Armadillo in its application because it is looking for a "legal backup" or an "alternative" in those situations where UPRR would have to turn to someone else besides Inn "X" Press for service. Mr. Meek has stated that UPRR would back any qualified carrier in order for the railroad to have this backup capability.

Union Pacific Railroad is in no way thinking of reducing the service presently performed by Inn "X" Press. UPRR wants to continue to use Inn "X" Press for its operations in and around Council Bluffs and Omaha. The Fremont operation is very dependent upon what Inn "X" Press is doing in and out of the Leisure Inn Motel at Omaha and Mr. Meek is satisfied with Inn "X" Press's service to UPRR in this regard. The present number of Omaha to Fremont transportation runs is higher daily than the average but Mr. Meek has confidence that if called upon Inn "X" Press has the resources and brain power and management capability to put its operation back in working force quickly. Inn "X" Press has a good understanding of how the Omaha to Fremont corridor of railroad operates. It has a good rapport with the train and the engine men. They have the ability to manage the situation for UPRR. UPRR is in no way thinking of reducing the service presently performed by Inn "X" Press for its operations in and around Council Bluffs and Omaha. It would be silly for UPRR at this point to try to reduce that service and UPRR has no intentions of doing so.

II. Protestant's evidence.

Protestant, Inn "X" Press, produced two witnesses in support of its protest: James Malolepszy and Cindy Robertson. Additionally, Ray L. Lineweber testified on behalf of the protestant via an affidavit.

James Malolepszy testified:

His direct testimony is set forth in Exhibit 12 and was supplemented by additional direct testimony on the record.

He is the general manager and vice president of Inn "X" Press and general manager of Leisure Inn Motel ("Motel"). Inn "X" Press holds intrastate authority in B-1276 to transport Union Pacific train crews between points in Nebraska on and east of U.S. Highway 83 and is restricted against any operation in Richardson County. Inn "X" Press has always been in business (and before it became a separate corporation it did business under its related party corporation, Leisure Inn Motel) solely for the purpose of serving UPRR. From 1980 through 1989, Inn "X" Press has expanded from a mere two vans up to twenty-six vans and has added extensive

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equipment, all dedicated solely to providing service to UPRR. On January 1, 1990, UPRR terminated the services of Inn "X" Press and started using Armadillo. Had the termination continued, Inn "X" Press would have suffered severe and permanent adverse financial effects and would have been permanently driven out of business, saddled with expenses and its employees terminated. As a result of defective service, Brown's Limousine Service was terminated by UPRR in May, 1990. On May 5, 1990 Mr. Meek met with Mr. Malolepszy and negotiated a new two year contract to begin May 9, 1990 for Inn "X" Press to haul UPRR trains crews in and about the Council Bluffs and Omaha to Fremont areas. Once the new contract was negotiated Inn "X" Press was up and running by May 9. Inn "X" Press was not paid any start-up costs by UPRR. UPRR is the sole customer of Inn "X" Press and without the revenue generated by the contract between UPRR and Inn "X" Press, the firm would not be in business.

If an increase in traffic should occur Inn "X" Press has extra vehicles and employees-drivers available to handle the additional flow. Inn "X" Press has never turned down a run for the Union Pacific Railroad Company and has always been able to handle the business notwithstanding the level of traffic.

Cindy S. Robertson testified:

She is the operation manager of Inn "X" Press and has been in that position since 1984. Seventy to seventy-five percent of the work and revenue of Inn "X" Press is derived from the Omaha to Fremont and Fremont to Omaha runs. She was informed on Saturday, May 7, that Inn "X" Press and UPRR had negotiated a new contract and that the transportation service would be in full force and effect at 12:01 a.m. on May 9. In just two days she reinstated 95% of Inn "X" Press' operations, had the vehicles painted, hired drivers, and obtained materials, equipment and staff. The financial condition of Inn "X" Press was such that all of these activities were able to be accomplished in two days. Ms. Robertson indicated that the last few weeks of operation were very busy and a good example of just how heavy the demand for vans in Eastern Nebraska can get. Inn "X" Press has never turned down a request for transportation from UPRR no matter how heavy this demand for increased service became.

Ray L. Lineweber testified via his affidavit as follows:

He is employed by the United Transportation Union ("UTU") as the Nebraska State Legislative Director. He is familiar with the safety record of Inn "X" Press through the UTU members throughout the State of Nebraska. In his opinion, the service and safety that is afforded the UTU members through the service of Inn "X" Press has been excellent.

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III. Legal authority and legal reasoning.

Section 75-311 R.R.S. Neb., 1943, as amended, provides:

A certificate shall be issued to any qualified applicant therefor, . . . if . . . the applicant is fit, willing and able properly to perform the service proposed . . . and that the proposed service, to the extent to be authorized by the certificate, . . . is or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.

Neb. Rev. Stat. §75-311 (1989) (emphasis added). The applicant has the burden of proving that the proposed service (here between Omaha and Fremont) is or will be required by the present or future public convenience and necessity. In re Application of Renzenberger, Inc. v. Brown's Crew Car of Wyoming, Inc., 225 Neb. 30, 402 N.W.2d 294 (1987).

In Renzenberger the applicant was a Kansas corporation which asserted that Nebraska authority was necessary because it was unable to provide complete service for its customer, Missouri Pacific (now Union Pacific). The protestant (Armadillo) contended that other common carriers in the area were adequately and satisfactorily serving the demand for motor carriers and that the new certificate would have a negative effect on the protestant's business. In denying the applicant its certificate the Nebraska Supreme Court found that:

{w}hether there is a public convenience and necessity for issuance of a commission certificate depends on answers to three questions: "'{W}hether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by {the} applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.'" Black Hill Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 429, 118 N.W.2d 498, 500 (1962). "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is {a} complete negation of a public need and demand for added service by another carrier." In re Application of Canada, 154 Neb. 256, 261, 47 N.W.2d 507, 510 (1951); Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N.W.2d 386 (1954).

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In re Application of Amsberry, Inc., 220 Neb. at 357-58, 370 N.W.2d at 112 (1985).

Here the evidence does not indicate a public demand or need. The testimony of Mr. Meek and Mr. Brown show that there is no evidence of a probable increase in the transportation business between Omaha and Fremont in the immediate future. Additionally, the testimony of Ms. Robertson indicates that the last few weeks is a good example of just how heavy the demand for vans in Eastern Nebraska can get. With its current fleet of vehicles and driver-employees Inn "X" Press has the capacity to meet all present needs of UPRR. Even during peak periods, Inn "X" Press has handled and met all demands for service from UPRR. Additionally, Mr. Meek has stated that he has no intention of reducing or taking away service from Inn "X" Press and that it would be silly for him to do so considering UPRR's relationship with Inn "X" Press and the Leisure Inn Motel. Mr. Meeks has stated that Inn "X" Press has the resources, brain power, and management capability to meet current needs. Additionally, all of the intrastate service provided by Inn "X" Press would be subject to diversion upon approval of Armadillo's application. Since Inn "X" Press meets all current needs of Union Pacific in its area of authority, and a grant of authority to Armadillo could displace the Inn "X" Press operation, then there is no need to grant Armadillo a certificate to provide this duplicate service.

The stated purpose of the application at hand is to provide a "back-up" service in case Inn "X" Press is unable to provide the service desired by UPRR. In regards to future needs the Nebraska Supreme Court in Renzenberger went on to state:

Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to §75-311, is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable. See, Highway Express Lines, Inc. v. Pa, P.U.C., 195 Pa. Super.92, 169 A.2d 798 (1961); Kentucky Utilities Company v. Public Service Comm'n, 390 S.W.2d 168 (Ky. 1965); and State ex re. Eldon Miller, Inc. v. Public Serv. Comm'n, 471 S.W.2d 483 (Mo. App. 1971). Any rule otherwise would bind the present with certificated service based on speculation and mere possibility of demand or need, a foundation not of fact but fantasy. In reference to a certificate based on future need, possibility is not equivalent to probability. Ordinarily, the more prospectively remote a proposed service is in relation to the application for authority, the less likely and more doubtful is need or demand for the service to be authorized.

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Renzenberger, 402 N.W.2d at 299.

Here the proposed service by Armadillo is intended as a "back-up transportation" or an "alternative" service if Inn "X" Press is unable to meet the needs of UPRR. The evidence does not indicate that there has ever been a time when this back-up service was ever needed. Indeed Inn "X" Press has never been unable to provide the service desired by UPRR even during peak periods. Additionally, should such an unusual circumstance occur which would tax the current resources of Inn "X" Press, the Inn "X" Press has demonstrated the capability to respond to this circumstance by obtaining supplementary equipment and calling up additional drivers. Union Pacific's desire to have a contingent force available as a backup does not rise to the level of a need, actual or probable. Mr. Meek's wish to have a "back-up" is founded on mere speculation.

As stated earlier, the third part of the Renzenberger court's analysis requires a determination of whether the purpose of the certificate can be served "without endangering or impairing the operations of existing carriers contrary to public interest." Id. at _____, 402 N.W.2d at 299. Here it is apparent that Inn "X" Press would be severely and adversely affected by a grant of Armadillo's application. Inn "X" Press's sole reason for existence is to provide the train crew transportation contemplated in the UPRR contract area here under consideration. It is abundantly clear that if Armadillo's application is approved that UPRR may, at anytime it desires, rely upon Armadillo to provide the subject intrastate service already provided by Inn "X" Press. This would be severely detrimental to Inn "X" Press and thus would be contrary to the public interest. As stated by the Commission in In re Application of Koch Service, Inc. v. Wheeler Transport Service, Inc., 228 Neb. 631, 423 N.W.2d 767 (1988):

The commission must weigh the effect of granting the permit on both the shipper and protesting common carriers. Here, the evidence shows that KAC will continue to receive the satisfactory service it has received from the protestants if KSI is denied a permit. KAC did not meet its burden of showing a denial of KSI's application would have an adverse effect upon KAC. . . . The record reflects that a grant of KSI's application would have an adverse financial impact on the protestants and, consequently, on the public. Protestants collectively have invested in 124 asphalt trailers, primarily to serve KAC. The commission found that {i}t is not in the public interest for a shipper to encourage common carriers to augment their fleets to the optimum for the shipper, then have that shipper swich {sic} to a contract carrier and leave the common carriers saddled with thousands and thousands of dollars worth of special equipment.

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Here, similarly, it would not be in the public interest to encourage Inn "X" Press to invest in its continued service to UPRR, or to prepare for unusual service conditions, only to have this business diverted to another common carrier. If such business were diverted to Armadillo then Inn "X" Press would essentially cease to exist as an operating entity. Since Union Pacific is satisfied with the quality of service that Inn "X" Press provides under its current authority, then this is hardly a result which would be in the best interest of Union Pacific or the public.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Application of Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express, Cheyenne, Wyoming, in Application No. B-1144, Supplement No. 3 insofar as it seeks authority to extend its authority to transport railroad train crews and their baggage between points of Omaha and Fremont and Fremont and Omaha be, and it is hereby, DENIED.

MADE AND ENTERED at Lincoln, Nebraska, this 4th day of October, 1990.

NEBRASKA PUBLIC SERVICE COMMISSION

Daniel G. Urwiller
Chairman

COMMISSIONERS CONCURRING:

Duane D. Long
//s//James F. Munnelly
//s//Daniel G. Urwiller

ATTEST:

Robert R. King
Executive Director

COMMISSIONERS DISSENTING:

//s//Frank E. Landis
//s//Eric Rasmussen

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

