

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of of A-1) Application No. B-1594
Ambassador Limousine, Inc., dba)
A-1 Special Services, Lincoln,)
seeking authority as a common)
carrier of passengers in open)
class service between all points)
in Nebraska over irregular) MOTION FOR RECONSIDERATION
routes in sedans, buses, vans,) AND/OR REHEARING DENIED
and station wagons.)
RESTRICTION: The transportation)
of railroad train crews and)
their baggage is not authorized.) Entered: April 1, 2003

APPEARANCES:

For the Applicant:

Elaine Waggoner
825 M Street
Suite 209
Lincoln, Nebraska 68508

For the Protestants:

Yellow Cab and Limo, Midwest
Special Services, and Servant
Cab, Inc.:
Jack Shultz
P.O. Box 82028
Lincoln, Nebraska 68501

R & F Hobbies, Inc., dba
Prince of the Road:
John Boehm
811 S. 13th Street
Lincoln, Nebraska 68508

For the Commission Staff:

Shana Knutson
300 The Atrium
1200 N Street
Lincoln, Nebraska

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

On this 1st day of April 2003, the Commission considered the Motions for Rehearing and/or Reconsideration filed in the

matter of R&F Hobbies d/b/a Prince of the Road and Midwest Special Services, Inc.

Oral arguments were heard on February 19, 2003. Mr. John Boehm, Mr. Jack Shultz and Ms. Elaine Waggoner entered appearances on behalf of their clients referenced above.

Mr. Boehm and Mr. Shultz argued that the Commission's November 26, 2002 order in B-1594 Granting as Modified should be reversed on several grounds. With respect to the case summary, Mr. Boehm argued there were misstatements in the order summary when compared to the record. Upon review of the transcript, the Commission finds that there were no misstatements of fact which would have resulted in a different decision by the Commission. The Commission, therefore, declines to reverse its order on those grounds. Second, Mr. Boehm stated that the Commission's order in Application No. B-1594 was inconsistent with its treatment of the applicant in Application No. B-1441, Supplement 2. The Commission does not believe that the order entered in B-1441, Supplement 2, on November 26, 2002, is inconsistent with the order entered in this proceeding on the same date. Rather, the Commission finds that the orders properly reflect the weight given to the evidence in each case and the Commission's conclusions drawn from the testimony adduced. Mr. Boehm and Mr. Shultz argued that the Commission should reverse its decision based on lack of fitness alleging the applicant's unwillingness to conform to Commission rules. The Commission finds no reason upon which to reverse its earlier decision, which found the applicant fit. The Commission concludes its November 26, 2002 order was not discriminatory, arbitrary or capricious and the order entered thereon should be affirmed.

After being fully advised in the premises, the Commission is of the opinion and finds:

1. The Motions for Rehearing and/or Reconsideration should be denied.
2. The Commission's order of November 26, 2002, in Application B-1441, Supplement 2, should be affirmed.

O R D E R

IT IS, THEREFORE, ORDERED, by the Nebraska Public Service Commission that the Motions for Rehearing and/or Reconsideration filed in Application B-1594, be, and they are hereby, denied; and the order of November 26, 2002, entered in Application B-1594, be, and it is hereby affirmed.

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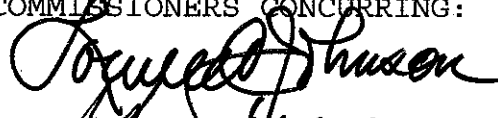

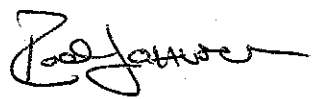
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MADE AND ENTERED at Lincoln, Nebraska, this 1st day of April 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Frank E. Landis

COMMISSIONERS DISSENTING:

//s//Anne C. Boyle


Vice Chair

ATTEST:


Executive Director

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Commissioners Frank E. Landis and Gerald L. Vap concurring:

We write separately to highlight some of the reasons why we found the applicant (hereinafter A-1) fit and why we rejected the protestants' arguments to the contrary.

Much of the confusion began with the Commission's order entered in the Application of Running Horse in Docket No. B-1498. Through our ruling in that order, the Commission opened the door to unintended consequences by permitting limousine carriers to expand their operations beyond what was historically considered to be traditional limousine service. After A-1 became a limousine carrier, it approached the Commission staff about providing HHS transportation and was told that it could do so. The staff was obviously relying on our Running Horse decision when it gave the advice that such transportation services were within the applicant's authority. In reliance on this advice, A-1 made substantial investments in equipment and personnel.

Subsequently, the Commission clarified its definitions through Rule and Regulation No. 148. In that proceeding, the Commission redefined "limousine service" and created a new classification called "open class". The Commission also set an enforcement date after which time no limousine provider could operate as an HHS transporter. The applicant appealed the Commission's new policy order and its enforcement deadline to the Nebraska Supreme Court. The appeal led to an automatic stay of enforcement.

Thereafter, A-1 applied for open class authority, but the Commission dismissed the application because the language contained in the application did not conform to the authority the applicant was truly seeking. Because of the ongoing changes and confusion with the Commission's procedures, the applicant waited for further changes to Rule and Regulation No. 148. A-1 then reapplied as an open class provider seeking HHS authority.

With respect to the specific arguments relating to the rate violation, A-1 did not renegotiate its contract with HHS because it was unclear as to whether it would have authority to operate. When we considered this alleged rate violation, we did not believe that the nature of this violation rose to the level sufficient to find A-1 unfit to continue its operations. The record was further unclear as to whether the driver who testified about A-1's hiring practices was over 70 at the time

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of his employment with A-1. In any event that argument was not persuasive enough to convince us that A-1 was unfit. Nor were any of the other arguments made by the protestants related to fitness persuasive.

For these reasons, and because A-1 met its burden relating to need and necessity, we would affirm the Commission's November 26, 2002 order.



Frank E. Landis



Gerald L. Vap

Commissioner Anne C. Boyle dissenting:

I write separately to dissent because I believe that we should overturn our decision to grant the application. I would overturn the majority's decision based on the applicant's lack of fitness which became evident to me at the oral argument. The first hurdle for any applicant seeking authority under Neb. Rev. Stat. § 75-311 is to demonstrate that it is fit, willing and able to comply with any and all of the Commission's rules, regulations and orders. The Commission should have denied A-1's application for failure to overcome this first hurdle. I would further note that a denial of this application does not put A-1 out of business as they already hold authority as a limousine carrier. A denial of this application, in reality, would restrict A-1 from providing transportation services to the Nebraska Department of Health and Human Services (HHS).

Understandably, this particular case is unique in that the applicant's ability as a limousine carrier to provide service to health and human services clients was not officially authorized by this Commission. However, the Commission staff had informally spoken with A-1 and informed them that Commission rules did not expressly prohibit it from transporting health and human service clients. Then, through the rule and regulation process the Commission clarified its definitions of "limousine service" and "taxicab service" and then created a new category of transportation service which is referred to as "open class" in Rule and Regulation No. 148. Notwithstanding the argument of A-1 that they have been treated unfairly, nothing about the Commission's actions following was particularly unfair as the Commission has, on past occasions found that notwithstanding reliance on opinions of Commission staff members, the Commission can will interpret and enforce its rules and regulations independently.¹ Applicant appealed the Commission's order setting its initial policy guidelines and proposing further rulemaking in Rule and Regulation No. 148. The effect of that appeal stayed any possible enforcement against the applicant by the

¹ See e.g., FC-1300, *In re Abbott Transportation, v. Easy Car Rental Co., Inc., dba Budget Car & Truck Rental Co.*, Complaint Sustained (Entered: January 7, 2003) (where Budget Car & Truck Rental Co. (Budget) was forced to provide transportation free of charge for seven months until its application was either granted or denied and where the Commission sustained a complaint against Budget for receiving compensation, despite its reliance on advice given by the Commission staff).

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Commission. Knowing the effect of the stay, the applicant continued to operate during that time as a transportation provider for HHS. A-1 filed this application for authority after filing its appeal but prior to the Supreme Court's mandate. The Nebraska Supreme Court upheld the Commission's authority to clarify its definitions of limousine service and open class service and to enforce its interim policy ruling that limousine providers like the applicant could not provide health and human services transportation. Yet, the applicant continued to operate as an HHS provider despite this ruling. The applicant, therefore, was providing services prior to and throughout the duration of the application process. Finally, this Applicant has been in business for many years, has appeared before the Commission, made inquiries to the Commission and is well aware of Commission procedure and rules. Therefore, Applicant knew the pending court action did not waive the requirement to file a new tariff.

At the hearing, evidence was presented by the protestant, Prince of the Road, that Applicant had not amended its filed rates to conform with the rates charged to HHS despite the Commission's finding that such disregard was unlawful and being ordered to pay an administrative penalty to the Commission for the violation. Applicant, having knowledge that this was in violation of statute and the Commission's findings, decided not to amend its rates until the current application was resolved because it believed its authority was "in limbo". To me, this demonstrated bad faith and a pattern and practice of knowing disregard of the rules and regulations and orders of the Commission. Even further, evidence presented by the protestant demonstrated that the applicant hired a driver over the age of 71 without having a medical history performed and without requesting the Commission's permission as required in Neb. Admin. Code Title 291, Ch. 3, Section 10.01E3. Based on this evidence alone, I believe that the Commission should have denied this applicant's request for authority finding that it was unfit to hold a certificate.



Anne C. Boyle