

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) APPLICATION NO. B-1683
Of CUSA ES, LLC, d/b/a Express) SUPPLEMENT 1
Shuttle, Bismarck, North Dakota,)
seeking to extend the authority)
in Nebraska intrastate commerce)
as a contract carrier in the) DENIED
transportation of railroad)
train crews by van in open)
class service between points)
in the state of Nebraska)
over irregular routes.) ENTERED: MARCH 11, 2008

APPEARANCES

For the Applicant:

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For the Protestant:

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BY THE COMMISSION:

By application filed September 16, 2006, CUSA ES, LLC, dba Express Shuttle (hereinafter referred to as "Applicant") of Bismarck, North Dakota, seeks to extend its authority to authorize it to transport railroad train crews in open class by van between points in the state of Nebraska over irregular routes. Notice of the application was published in The Daily Record, Omaha, Nebraska on September 27, 2006. A timely protest to the application was filed by Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express on October 16, 2006.

The Applicant filed a Petition for Declaratory Ruling with the Commission dated September 15, 2006, docketed as B-1683, which sought an order from the Commission declaring the transportation of railroad train crews to be interstate in nature, and therefore beyond the jurisdiction of the Commission. The Applicant filed a Motion to Stay Proceedings in this matter until the Commission

ruled on its Petition for Declaratory Ruling. The Stay of the proceedings in this docket was granted by the Commission on November 14, 2006. The initial Petition for Declaratory Ruling was withdrawn and a subsequent Petition for Declaratory Ruling, docketed as DR-0001, was filed by the Applicant on February 12, 2007. The Commission held a hearing in DR-0001, and subsequently issued a ruling on September 25, 2007, finding that the transportation of railroad train crews between two points within the State of Nebraska was intrastate passenger transportation subject to the Commission's jurisdiction. The Commission then entered an order lifting the stay in this matter on November 6, 2007, and set this matter for oral hearing. The Commission entered a Planning Conference Order on November 19, 2007, establishing various progression deadlines and setting the hearing for December 17, 2007.

A hearing on the application was held December 17, 2007, in the Commission Hearing Room with appearances as shown above.

EVIDENCE

In support of its application, Applicant produced eight witnesses: Francis Le Neve IV, Gary Schumacher, Gaylord Fridley, Lawrence Gile, Terry Johnson, Steve Kessler, Randy Meek and Ray Lineweber.

Francis Le Neve IV testified as follows:

Mr. Neve is employed by CUSA LLC as Vice President of Crew Transport. CUSA LLC is the owner of the Applicant. Mr. Neve has overall responsibility for his company's crew transport business, including oversight of the applicant. Mr. Neve was previously employed by BNSF Railway Company (hereinafter referred to as "BNSF"), where in his last position he had responsibility for managing the crew transportation providers.

Applicant is Delaware limited liability company based in Bismarck, North Dakota. It currently operates in Wyoming, Montana, North Dakota, South Dakota, Iowa, Minnesota and Wisconsin. Applicant also operates on an interstate basis. Exhibit A-1 consists of copies of Applicant's interstate operating authority, which includes nationwide contract carrier authority to transport passengers. Applicant provides service to BNSF and Union Pacific in the states previously mentioned. Exhibit A-2 is a copy of Applicant's proposal to BNSF of the rates to be charged if

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Applicant obtains the authority it is here seeking. Exhibit A-3 consists of a copy of Applicant's balance sheet and year-to-date income statement as of as of September 2007. Exhibit A-3 indicates the Applicant's net worth to be \$1,596.311. There have been no material changes to the Applicant's financial position since Exhibit A-3 was completed.

Mr. Neve believes that the services Applicant provides to the railroad are inherently specialized. There are contractual requirements Applicant is obligated to meet, specifically operating vans, going off the road on to dirt roads on to railroad property, providing round-the-clock service, training drivers, performing criminal background checks on drivers and issuing ID cards. Mr. Neve believes such services are unique to the transportation of railroad train crews. In providing service at other locations for the railroad, Applicant stations equipment at locations near where service will be requested, which might be at a terminal location. At other locations, Applicant also provides both intrastate and interstate service for the railroad. If this application were granted, Applicant would provide the same services in Nebraska that it provides the railroad in other locations. Applicant carries \$75,000,000 in insurance coverage.

Mr. Neve testified that the Applicant is prepared and able to make additional equipment available if the application is granted. He also stated that he believes that a grant of the application would be consistent with the public interest.

Gary Schumacher testified as follows:

Mr. Schumacher is employed by the Applicant. His office is located in Bismarck, North Dakota. He is and for seven years has been general manager of the Applicant, and previously was the owner of the company for 17 years. His general responsibilities include oversight of everything involved with the company.

Exhibit A-4 is a list of Applicant's vehicles used in its railroad operation, and also shows the passenger capacity of the vehicles and where the vehicles are stationed. Applicant operates approximately 450 vehicles in its train crew transportation business. All of Applicant's vehicles are dispatched out of Bismarck. Applicant averages about 700 over-the-road dispatch trips per day.

The communication progression that would ultimately lead to a

dispatch is for the railroad, either through the Internet or by phone call, will give the trip to Outsource Administrators (hereinafter referred to as "OAI") or directly to Applicant's dispatch. The order comes to Applicant's dispatch through Internet or phone call. Applicant then contacts the driver through a pager or through a cell phone or home phone, gives the driver the order, and the driver goes down into where the origin is and does the trip.

If this application were granted, Applicant would initially make 25 to 30 vehicles available for train crew transportation in Nebraska intrastate commerce. Those vehicles would be stationed at Alliance, Nebraska, Ravenna, Grand Island, and McCook, and possibly Crawford. Is it possible that Applicant might be stationing vehicles in Lincoln or Omaha any possibly other location in Nebraska, depending upon the railroad's requirements.

Applicant currently employs approximately 790 drivers. Applicant has procedures for hiring drivers, including checking driver-applicant's driving record, drug testing, and a DOT physical. Driver training includes the Operation Lifesaver course, a defensive driving course, a winter driving course, a railroading as a way of life course, and a black ice driving training course. Applicant's safety program includes the described driver training, and also includes post-accident training, and monthly and quarterly safety meetings with drivers. Applicant's drivers do daily vehicle inspections, and the company also does detailed monthly inspections with the results turned in to BNSF. Applicant has a Satisfactory DOT safety rating.

Applicant is currently authorized to perform some intrastate service in Nebraska. Applicant presently provides interstate service transporting train crews into Nebraska from Wyoming, South Dakota, and Iowa. If this application were granted, there would be a need to hire additional drivers. Mr. Schumacher is confident that Applicant could hire the required number of additional drivers. Exhibit A-5 indicates the geographical scope of Applicant's current Nebraska intrastate authority. Applicant has performed service under that authority in Nebraska intrastate commerce. Applicant has also received requests through OAI and BNSF to provide intrastate service beyond the scope of its Nebraska authority. Such service has been requested at different times from September 2006 until October 2007.

Applicant has transported train crews in Nebraska intrastate

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commerce on between 70 and 90 occasions from September, 2006 through October, 2007. Those included trips beyond the scope of Applicant's Nebraska intrastate authority. Trips beyond the scope of Applicant's Nebraska intrastate authority were made from Alliance to Crawford and Hemingford in January 2007. After having made those trips, Applicant was contacted by a representative of the Commission indicating that there was a complaint about the company doing trips out of Alliance that were outside of the scope of its authority. After checking with its corporate office in Dallas, Applicant decided to notify the Commission that it would refrain from doing any trips that were outside of its authority. Exhibit A-8 is a memo that Mr. Schumacher sent out to all parties involved in Nebraska crew hauling for the purpose of restricting and clarifying Applicant's operations in Nebraska. After sending out the Exhibit A-8 memo, Applicant continued to make Nebraska intrastate trips beyond the scope of its authority in February and May 2007. Exhibit A-9 identifies such trips made in February 2007, which involved trips between Alliance and Crawford. Exhibit A-10 identifies such trips made in May 2007, which involved trips between Alliance and Hemingford and between Alliance and Letan.

Applicant charged 74 cents per mile plus a fuel surcharge for the intrastate service it has recently provided in Nebraska. Exhibit A-11 sets forth Applicant's rates currently on file with the Commission. The rates that Applicant has on file with the Commission are not the rates that Applicant charged for its Nebraska intrastate service during 2007.

If this application is granted, it is Applicant's intent to enter into contracts with BNSF and Union Pacific Railroad (hereinafter referred to as "UPRR") to provide contract carrier service in Nebraska. If this application is granted, Applicant would comply with the Commission's rules and regulations regarding service territory and tariff filings, with its insurance requirements, and with any other regulations the Commission.

Applicant currently has authority to serve the Alliance yard. Although Applicant has on occasion provided service at Alliance, it has brought in drivers and has not hired anyone in the Alliance area. Applicant has not done any kind of a study as to what the available work force at Alliance might be, and is not aware of any special work force available to Applicant at Alliance that would not be available to Brown's.

Gaylord Fridley testified as follows:

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Mr. Fridley is employed by the Applicant as Operations Manager. His office is located in Bismarck, North Dakota. Mr. Fridley participates as Applicant's representative in daily calls with representatives of OAI, BNSF and Browns. Those calls are scheduled at 10:00 central time, Monday through Saturday. The purpose of those calls is to provide BNSF information regarding how many drivers the crew transporters have on the road, how many are available, and when drivers are coming off rest. Those calls have resulted in Applicant receiving requests for Nebraska intrastate crew transportation. Applicant has also received other requests for Nebraska intrastate transportation that were not the result of the daily calls.

Lawrence Gile testified as follows:

Mr. Gile is employed by BNSF as Manager of Strategic Sourcing. In that capacity, he oversees the service aspects of BNSF's crew transportation requirements.

BNSF has 2,000 miles of track located in Nebraska. It is conceivable that BNSF might have need for a pickup or a delivery of a train crew at virtually any point on that rail system. BNSF has three operating divisions in Nebraska. Those are the Colorado Division, the Powder River Division, and the Nebraska Division. BNSF's major routes in Nebraska are from out of Creston, Iowa, coming through Lincoln, going on to Ravenna, and then on up to Alliance and on to the Gillette, Wyoming area. That is BNSF's high coal tonnage route coming out of the Powder River Basin. BNSF also has a southern route from Iowa coming through Lincoln, on to McCook, and further on to Denver, Colorado. The company's major north-south route is from Sioux City, Iowa, down through Fremont into Lincoln.

Train crews typically consist of two crew members, with three crew members for local service, and yard service could involve either two or three crew members. In some cases, BNSF can go up to as many as five crew members depending on requirements for a particular job. There are occasions where more than one crew might be transported in the crew transporter's vehicles at the same time.

The train crews are subject to federal hours of service limitations. A train crew can be in service for a maximum of 12 hours, and then must cease operating the train. When that occurs,

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BNSF requires transportation of the crew from the train to some other location, and also could require transportation of a replacement crew to the train. Transportation could be required between a train and a hotel, between a train and a rail terminal, and occasionally from one train to another.

For about the last year, BNSF had approximately 27,000 completed crew transport trip requests involving Nebraska, of which approximately 19,000 were in intrastate commerce. BNSF also requires crew transportation in its rail yard. BNSF could require crew transportation at any point along its rail lines in Nebraska.

BNSF needs flexibility to have its crews transported by the same vehicle in both interstate and intrastate commerce because it doesn't know exactly where a train will stop. BNSF's traffic is on the increase, and that equates to some increased crew transportation need.

BNSF's Nebraska intrastate crew transportation is currently provided by Brown's. Applicant has also provided limited service in Nebraska. Brown's has at times struggled to provide service in areas of driver availability, particularly during peak demand. Crew transport needs cannot easily be predicted well in advance. In addition to using for-hire crew transporters, BNSF has railroad clerks that operate crew vans at certain locations. During times of dire necessity, BNSF employees other than the clerks will also be used to transport train crews.

Exhibit A-12 comprises 24 pages of e-mail correspondence about transportation issues that BNSF has had. Generally the e-mails are concerned with instances of Brown's being short of drivers, mostly at Alliance or Ravenna. The e-mails included in Exhibit A-12 are not the only circumstances where there were service issues. BNSF generally tries to give its crew transporters as much advance notice of service needs as it can. At a minimum, BNSF tries to give 45 minutes lead time plus the drive time. Circumstances such as derailments and weather conditions can lead to less advance notice being given. Where crews cannot be transported in a timely manner, tracks are blocked, backing up trains and causing major problems for BNSF's network.

BNSF requires that its crew transporters operate vans, it requires interstate and intrastate transportation, and 24/7 availability of both vans and dispatch. BNSF further requires that the transporter's vans be dedicated to its use so as to know exactly what type of resources the transporters have available.

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Mr. Gile is familiar with the service that Applicant provides in surrounding states. Generally, it has been good service, although it has had issues with Applicant which they have talked about and addressed. Applicant having restricted authority in Nebraska poses a problem from the railroad's point of view when it has spikes in demand in certain areas. BNSF wants to have transporters available to meet its needs on those occasions or to support its other transporters.

BNSF has not yet determined whether it will replace Brown's service with Applicant in the Powder River Division if this application is granted. BNSF's main focus is to have competition and to have a second provider available in the Powder River Division that can meet its needs. BNSF is looking for the availability of a backup secondary transporter in Nebraska.

Exhibit P-5 is a copy of Renzenberger's Nebraska intrastate operating authority. Renzenberger's authority authorizes it to serve BNSF between all points within a 300 mile radius of Alliance. With that authority, Renzenberger would have been able to meet whatever needs BNSF had for backup service in the Powder River Division during the course of the year preceding the hearing. BNSF uses Renzenberger in other locations and considers the company to be a competent carrier. There is no reason why BNSF would not call Renzenberger for backup service in the future within the 300 mile radius of Alliance territory it is authorized to serve.

Terry Johnson testified as follows:

Mr. Johnson is employed by OAI as Traffic Transportation Services. OAI is the contract administrator for BNSF rail crew transportation.

The demand for crew transportation in Nebraska intrastate commerce is on the increase. There is an increased demand for both intrastate and interstate transportation involving Nebraska.

Mr. Johnson is familiar with the rail crew transportation service providers offering intrastate service in Nebraska. Those are Brown's, Renzenberger and Applicant, as well as multiple small cab companies. Mr. Johnson has had contact with Commission representatives regarding carrier availability since 1998. Mr. Johnson is familiar with rail crew transportation provided by the Applicant in surrounding states, which he characterize as very satisfactory.

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Transportation is required by BNSF for from 80 to 100 road trips per day, but with yard vans included it requires service for upwards of 700 trips on a daily basis. Service might be required at any point along the BNSF rail line. There have been occasions where OAI has had difficulty with Brown's in setting up transportation. Exhibit A-15 comprises 36 pages of e-mail correspondence about transportation issues that OAI has had. Exhibit A-15 is somewhat duplicative of Exhibit A-12, and like Exhibit A-12, the e-mails generally are concerned with instances of Brown's being short of drivers at Alliance or Ravenna. Driver staffing has played a role in the difficulty. Exhibit A-13 is an overview of weekly calls that OAI has with Brown's. Exhibit A-14 is a monthly summary over a six month period containing the information from the documents that are a part of A-13. OAI's minimum expectation is 90% on-time for all trips performed.

If this application is granted, OAI would attempt to negotiate a contract with Applicant so that it could provide service to the railroad. OAI has struggled with excess capacity, and believes having another carrier with statewide authority will open up options on what it can do when requested by BNSF to help deal with a short-term challenge of getting trains and crews moving in locations within Nebraska.

The service issues with Brown's have gotten better over time with a lot of time and effort put in by BNSF, OAI and Brown's. Brown's service is getting satisfactory.

Stephen Kessler testified as follows:

Mr. Kessler is employed by UPRR as Director of Planning and Support in the Crew Management Department. He is responsible for all of crew management and support services for UPRR crews in the field, including crew lodging and transportation.

UPRR has a little over 1,000 route miles of main line track in Nebraska. UPRR crew sizes are similar to those of BNSF. UPRR's main yard is in North Platte, Nebraska. Approximately 140 trains run through North Platte on a daily basis. East from North Platte, UPRR has a line that runs from Gibbon and down to Marysville, Kansas, and another line that goes across through Omaha and also through the Missouri Valley, Iowa area. West from North Platte, UPRR's line goes up to South Morrill and then into Powder River, and also over into Cheyenne, Wyoming.

There are occasions where UPRR will have multiple crews transported in the same vehicle. UPRR's employees are subject to the Federal hours of service limitations and are limited to 12 hours in operation of the train. As crews on trains run out of hours, they need to be picked up from the trains and new crews brought on.

UPRR traffic patterns require movement between trains and hotels, between trains and terminals, and from train to train. UPRR also requires in-yard transportation. UPRR can require train crew transportation at any point along its rail lines. Crew transportation is a daily event. UPRR will require crew transportation between points in Nebraska hundreds of times annually. UPRR's traffic is generally on the increase, which could potentially impact UPRR's demand for train crew transportation.

UPRR currently uses Brown's and Renzenberger for intrastate crew transportation in Nebraska. UPRR has not experienced any problems to speak of with the service of those carriers. There have been occasions where Brown's or Renzenberger was unable to meet UPRR's needs. There have also been occasions where railroad personnel were required to transport UPRR crews, but UPRR tries to avoid that.

UPRR is primarily supporting this application because Mr. Kessler believes a single vendor cannot meet UPRR's needs. From Mr. Kessler's perspective, the more qualified crew transporters UPRR has available, the better off the company is. Consequences when crews do not move on time are lost revenue and decreased velocity. It can also have ramifications to the whole system.

Service required by UPRR is something other than ordinary passenger transportation. UPRR requires van transportation, equipment usually dedicated to UPRR's exclusive use, a carrier able to provide either intrastate or interstate service upon request, and 24/7 dispatch service. It would not be easy for UPRR to make use of a carrier whose certificate is restricted.

Whether UPRR would negotiate a contract with or make use of the Applicant's service remains to be seen.

There is a certain level of equipment that is needed at a given location for routine train crew hauling operations. When a spike in demand occasioned by a derailment or other cause occurs,

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the issue is not how many carriers are available to provide needed equipment, but rather how much equipment is needed.

Randy Meek testified as follows:

Mr. Meek has been employed by BNSF as a locomotive engineer since 1977. Since 1995 he has also been a Nebraska state legislative board chairman for the Brotherhood of Locomotive Engineers Trainmen. Mr. Meek has personally been transported by Brown's nearly every day for the last 20 some years. Members of his union are also transported by Brown's.

For the last six years, Mr. Meek has been transported by Brown's between Lincoln and Ravenna and points in between. Mr. Meek has personally experienced problems with Brown's and with delays in being transported. When Mr. Meek runs out of hours of service and the carrier is not available when that happens, he sits on the train and is paid for his time.

Mr. Meek does not know how the railroad's crew carrier dispatch process works or, as between BNSF and Brown's, who is responsible for the delay in getting him off of a train. He just knows that the van didn't show up when he thought it should. It is Mr. Meek's opinion that another carrier would increase the pool of drivers available. There are only a few people willing to work as a van driver, as the job entails odd hours and bad hours. Mr. Meek believes that if there is competition, drivers will jump from one company to the other.

Safety and efficiency are Mr. Meek's primary concerns. His principal reason for testifying is that he believes there should be competitive service.

Ray Lineweber testified as follows:

Since 1982, Mr. Lineweber has been the Nebraska State Legislative Director for the United Transportation Union. His responsibilities entail the oversight of safety. Members of his union are currently transported by vans of the existing carriers. Mr. Lineweber believes a grant of this application would be of benefit to his union members and would be consistent with the public interest.

In protest to the application, Brown's produced two witnesses: Scott Boyes and Bobby Motz.

Scott Boyes testified as follows:

Mr. Doyes is employed with RailCrew Xpress, LLC ("RailCrew") as the Chief Executive Officer. Brown's is a wholly owned subsidiary of RailCrew, and Mr. Boyes is also President of Brown's.

Brown's is involved in the transportation of rail crews in states from eastern California all the way through to Iowa, including Minnesota, Iowa, Nebraska, Idaho, Nevada, and one location in California. Brown's serves both BNSF and UPRR, and conducts operations in Nebraska.

Exhibit P-1 is a copy of Brown's authority from the Commission. Brown's is authorized to serve both BNSF and UPRR transporting their employees in Nebraska intrastate commerce on a statewide basis, and Brown's holds itself out to provide all of that service. Brown's also holds federal authority to transport train crew passengers on a nationwide basis in interstate commerce. Brown's has excess capacity at times in Nebraska and could use additional business in the state.

Exhibit P-2 is a list of vehicles that Brown's has operated within the state of Nebraska. Exhibit P-2 lists approximately 150 total vehicles, including five vehicles stationed in Missouri Valley, Iowa but used primarily in Nebraska. Brown's has added vehicles in Nebraska after Exhibit P-2 was created. Brown's and the other two crew transport companies operated by RailCrew collectively operate approximately 1,000 vehicles.

Brown's operates vehicles providing road van service, radius van service and yard service in Nebraska. Road vans operate predominately in long haul service. Radius vans operate typically within a 50 to 60 miles radius of a van hub. Yard vans operate within rail yards or within a small radius of the yards. Brown's vehicles are predominantly assigned to specific railroads, as reflected in the last column of Exhibit P-2. If warranted by the demands for service, Brown's is willing to add to its fleet as required.

RailCrew has invested heavily over the last couple of years in upgrading the quality of the fleet of the three crew transport companies it operates. The average age of its fleet now is about 29 months. RailCrew/Brown's vehicles are regularly inspected and maintained. RailCrew/Brown's is trying to maintain a fleet of

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newer vehicles, and is moving towards a policy of replacing vehicles after 24 to 30 months in service, depending on location and use.

RailCrew/Brown's has established a full safety department and carries on an active safety program. Fleet maintenance is one part of RailCrew/Brown's safety program. The company has a specialized safety team that rotates throughout the territory completing unannounced vehicle inspections. RailCrew/Brown's has established and published safety rules, and has produced safety videos. Drivers attend regular safety programs. RailCrew/Brown's has a team of safety managers who are former law enforcement officers circulating throughout the areas it serves inspecting vehicles, conducting training classes, and monitoring driver behavior. RailCrew/Brown's has also spent a lot of time training its area and regional managers in safety protocol. We have taken them into conferences. RailCrew/Brown's has engaged an outside party year to put together a whole safety program which will enable the company's location managers to professionally conduct their monthly safety meetings with a pre-scripted program with visual aids, and so forth just to make it much more professional than it was. The company publishes newsletters with safety articles, and includes safety reminders that go out with the drivers' pay checks. Safety is a constant focus for RailCrew/Brown's, it never ceases.

Exhibit A-17 is an internal report generated to track Brown's on-time performance for BNSF in Nebraska from September 1 through November 30, 2007. Exhibit A-17 indicates on-time performance of 86%. When pickups within 10 minutes of the requested time are included, it increases to about 88-1/2%. Under the current structure, to achieve 90% on-time performance would require so much excess capacity as to put the crew transporter out of business. Other structures are being experimented with that would allow on-time performance to dramatically increase. In early November Brown's implemented a new business model with UPRR involving very close communication and cooperation between UPRR and Brown's. Using the new model, Brown's performance at North Platte is currently 96% to 97% on-time. Brown's plans to implement this new model at other locations with UPRR.

In early 2007, Brown's replaced the paper dispatch system it had been using with an on-line, computerized system which manages not only dispatch but also driver hours-of-service, van utilization, aspects of van maintenance, and payroll. It is the WebTMS system. The system is linked to UPRR and sends dispatch and on-time trip information back and forth with the railroad.

Dispatchers must be trained to use the WebTMS system, and after training it takes six to eight weeks for Brown's employees to be fully conversant with the system.

Brown's derives about \$8,000,000 in revenue from operations in Nebraska on an annual basis. The loss of any significant part of that revenue would have an impact on Brown's business. Brown's has about 300 employees in Nebraska including supervisory, dispatch and driver personnel who rely on the company for their livelihood.

Mr. Boyes is not aware of any other train crew transporters in the state of Nebraska that hold statewide intrastate authority. Mr. Boyes considers the services which Brown's provides to BNSF and UPRR to be specialized. Brown's constantly strives to hire drivers. The company advertises on the radio and in newspapers, and runs frequent job fairs.

Bobby Motz testified as follows:

Mr. Motz is General Manager of the north division of RailCrew, which is Brown's operation. He has responsibility for Brown's operation in eight states, and oversees seven area managers and 30 locations. Each location has a lead driver.

Exhibit A-13 consists of a documents Mr. Motz prepares on a weekly basis to monitor Brown's hiring process. The goals for numbers of drivers indicated in Exhibit A-13 are his goals and not the goals of BNSF, OAI or Brown's as a company. The goals are to keep Brown's area managers serving under him focused on hiring drivers on a 24/7 basis, 365 days a year. Mr. Motz has overturned every rock, placed ads in papers, listed with hiring agencies and placed radio ads in an effort to hire drivers. Mr. Motz's stated goal for hiring drivers at Alliance in November 2007 as indicated on Exhibit A-13 is 12 drivers, but the trip count in Alliance is too low to justify hiring 12 drivers. At the time of hearing, Brown's had eight road drivers at Alliance, and was averaging about 5.2 road trips a day dating back to June 2007.

Drivers are hired by Brown's area managers. Brown's conducts an extensive seven year background check of prospective drivers, checks the drivers' MVRs, and requires that the prospective drivers have DOT physicals and pass a drug test. The drivers then go through a training phase involving from 24 to 36 hours of training. If drivers are hired for a location where Brown's has radius vans, the drivers get trained for radius vans. If hired for locations

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where Browns has yard vans, radius vans and road vans, the drivers are trained to provide all three types of service. Brown's lead drivers are responsible for the training.

At Alliance, Brown's has yard drivers, radius drivers and road drivers. At Ravenna, the company only has radius drivers, but it has road drivers which service this location from Grand Island, Broken Bow and Kearney. The Alliance yard drivers are dispatched by local BNSF personnel. Radius drivers at both Alliance and Ravenna are dispatched directly by OAI. Brown's is required to have three radius vans at each of these locations and give OAI the cell phone numbers of the drivers. Brown's is able to track the radius drivers' hours of service using its WebTMS system. Road trips for Alliance and Ravenna are given to Brown's electronically, and the road drivers are then dispatched by Brown's from its Lenexa, Kansas dispatch center.

PRELIMINARY MATTER

Prior to discussing the evidence and our conclusions, a preliminary matter should be addressed. As the parties are aware, subsequent to filing this application, Applicant filed a petition with the Commission seeking to have the transportation of railroad train crews involved in this application declared to be interstate in nature, and therefore beyond the jurisdiction of this Commission. As a part of the Commission's consideration of that petition, both written and oral presentations were made by attorneys to the parties to this proceeding as well as by attorneys for BNSF, including statements of counsel regarding BNSF's purported needs for service in Nebraska and purported deficiencies in existing service. Under the circumstances, we believe it is well to recall the following admonition of the Nebraska Supreme Court in *Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc.*, 203 Neb. 356, 278 N.W.2d 762 (1979):

"Before closing the opinion, a few comments should be made about the briefs and the findings of the Commission in its various orders. Statements of counsel are not evidence. Statements of Commission members are not evidence. Matters of fact known to Commission members are not evidence and are not bases for findings of fact."

203 Neb. at 366, 278 N.W.2d at 769. Notwithstanding other proceeding that have come before the Commission, our decision on

this application is based solely on the record developed in this proceeding.

OPINION AND FINDINGS

Applications for contract carrier authority are governed by Neb. Rev. Stat. § 75-311(2), which provides:

"(2) A permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application if it appears after notice and hearing from the application or from any hearing held on the application that (a) the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules, and regulations of the commission under such sections and (b) the proposed operation, to the extent authorized by the permit, will be consistent with the public interest by providing services designed to meet the distinct needs of each individual customer or a specifically designated class of customers as defined in subdivision (6) of section 75-302. Otherwise the application shall be denied."

The Commission's consideration of an applicant's fitness is comprised of two tests. The first part of the test is whether the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules and regulations of the commission under such sections.

Applicant is an experienced train crew transporter and is properly equipped and has the financial capability to perform service transporting train crews as a contract carrier. The financial documents and testimony established the financial fitness and business acumen of the Applicant and we find that the Applicant is fit in these areas.

The second part of the first test of fitness is whether the applicant can provide the service in conformity with the statutory requirements and Commission rules and regulations.

The Commission does have some concerns regarding the evidence at hearing regarding some trips provided by the applicant that were

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outside of its current area of authority area. The evidence indicated that there was some misunderstanding as to the extent of the current authority held by the Applicant. There also appears to have been some miscommunications problems when it was determined by the applicant, with assistance from Commission staff, what the authority allowed and how future trips should be performed. The evidence shows that the trips did stop shortly after consultation with the Commission.

The Commission also has concerns regarding the contract rates that the Applicant charged the railroads for the transportation they provide. The Applicant did not appropriately file for an increase in the rates and appears to have been charging the railroad more than legally permitted. The Applicant did state that if they are granted the extension that they will come into compliance with Commission rate requirements.

The Court has held that past unlawful actions do not necessarily bar on the grounds of unfitness future grants of operating authority if the public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., 188 Neb. 584, 198 N.W. 2nd 195 (1972). The Commission declines to address the specifics of fitness in this application due to other factors considered.

The second part of the two-part test is whether the proposed operation, to the extent authorized by the permit, will be consistent with the public interest. In Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., 188 Neb. 584, 198 N.W. 2nd 195 (1972) the Court established the following criteria to be considered in determining whether a proposed contract carrier operation will be consistent with the public interest:

"In considering an application for a permit to operate as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., 183 Neb. 229, 159 N.W.2d 310. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Samardick of Grand Island-Hastings, Inc.

v. B.D.C. Corp., supra. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.

In the application before us, the proposed operation is one that requires a specialized service. The railroad's requirements for crew transportation demand a specialized service. It also appears that the Applicant has made sufficient showing that the proposed service is designed to meet needs of the railroads.

Regarding whether the transportation of specified commodities can be performed as well by common carriers as by contract carriers (see Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., supra.), an examination of the evidence shows that there was not sufficient evidence that common carriers are unable to perform the transportation of the crews as well as the contract carriers. Evidence was adduced regarding alleged performance inadequacies of the Protestant regarding on-time service and an alleged shortage of drivers at certain locations at certain times, but the Applicant did not produce evidence that its own operations offer better service in those areas than the protestant.

The Wells Court set forth a third area of consideration as to whether the proposed service is in the public interest. Where competent proof is made by the Applicant showing the proposed service to be specialized and needed, and the application is protested by common carriers showing a willingness and ability to perform it, the Applicant must then establish that it is **better equipped and qualified** (emphasis ours) to meet the special needs of the proposed contracting shippers than the protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., 188 Neb. 584, 198 N.W. 2d 195 (1972); see also In re Application of Northland Transportation, Inc., Northland Transportation v. Herman Brothers, Inc., et. al. 239 Neb. 918, 470

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N.W. 2d 764 (1992).

The evidence before the Commission is that the proposed service is specialized. The Protestant made a showing that it is willing and able to perform the service. The burden then shifts back to the Applicant to show that it is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carrier.

In this case, the Commission finds that the Applicant has failed to establish that it is better equipped and qualified to meet the special needs of the shipper than the Protestant. While there was evidence put forth that the Applicant is equipped to properly perform the service and has the requisite qualifications to perform the service, the evidence does not show that they are better equipped or better qualified than the Protestant. The Applicant did not make a showing that the equipment that the Applicant would provide is different in quality or features than that currently being used by the Protestant. They also did not set forth any evidence that they have better qualifications than that of the protestant.

Therefore, the Commission finds that the applicant is not better equipped and qualified than the protestant. The Applicant also failed to show that it provides better service than the Protestant.

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

1. The proposed contract carrier operation will not be consistent with the public interest.
2. The application should be denied.

ORDER

IT IS THEREFORE THE ORDERED by the Nebraska Public Service Commission that Application B-1683, Supplement 1 be, and it is hereby denied.

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MADE AND ENTERED at Lincoln, Nebraska, this 11th day of March, 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Gerald L. Up

Frank E. Landis

Tim Schwan

//s// Anne C. Boyle
//s// Frank E. Landis

Anne C. Boyle

Chair

ATTEST:

Michael R. Smith

Executive Director