

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Midwest) APPLICATION NO. B-1724
Transport, LLC, Lincoln,)
seeking authority as a common)
carrier in the transportation) DENIED
of passengers and their)
baggage in open class service)
state of Nebraska over) ENTERED: JANUARY 12, 2010
irregular routes.)

APPEARANCES:

For the Applicant:

Robert W. Chapin
421 South 9th Street
Lincoln, NE 68508

For the Commission:

Mark J. Breiner
Nebraska Public
Service Commission
Suite 300, 1200 N Street
P.O. Box 94927
Lincoln, NE 68509

For the Protestants:

For Protestants Servant Cab and Midwest Special Services:

Jack Shultz
121 South 13th Street #800
Lincoln, NE 68501

BY THE COMMISSION:

By application filed June 2, 2008, Midwest Transport, LLC, seeks authority as a contract carrier in open class services in the transportation of passengers and their baggage over irregular routes in the state of Nebraska, including the transportation of clients for the Department of Health and Human Services. Notice of the application was published in the **Daily Record**, Omaha, Nebraska, on August 25, 2008. Timely protests to the application were filed by R & F Hobbies, Inc. d/b/a Prince of the Road, Happy Cab d/b/a Happy Cab Co., Yellow Cab, Checker Cab Company, DonMark, Inc. d/b/a Cornhusker Cab Company, Transport Plus, High Plains Cab Services, Servant Cab Company LLC d/b/a Yellow Cab Company and Capital Cab Company, and Midwest Special Services. A restrictive amendment was filed by the applicant, and the protests of R & F Hobbies, High Plains Cab Service, Happy Cab Company, Yellow Cab Company and Cornhusker Cab Company were

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. B-1724

PAGE 2

subsequently withdrawn. Notice of the hearing was sent to all interested parties on October 27, 2009. A hearing on the application was held on December 2, 2009.

APPLICANT'S EVIDENCE

Mohamed Alsayid testified first for the applicant. He is the president of Midwest Transport, LLC. Midwest Transport was formed to provide medical transportation to the public with a contract with the Department of Health and Human Services ("HHS"). He was informed by HHS that he would need to be a certificated carrier with the Commission to perform transportation for them.

The applicant intends to offer transportation services to medical appointments, doctor's offices, and non-emergency hospitals. He states that he has up to ten minivans, three of which are wheelchair equipped, that would be able to be used in the service. His plan is to offer transportation services in Lancaster County on a 24/7 basis.

Mr. Alsayid detailed his educational and employment background. He said that he is an accountant and worked in the field for ten years for the Nebraska Department of Roads. He also worked for the Lincoln Action Program for two years, where he provided transportation for high school students.

On questioning by Commissioner Schram, Mr. Alsayid indicated that he would have a dispatcher and dispatch system that would be available at all times. He would also have whatever level of insurance that would be required by the Commission.

On examination by Commissioner Landis, Mr. Alsayid stated that he intended to hire additional employees upon receipt of a permit to operate and that they would undergo training and background checks. The check would include criminal record check and possibly a credit check, driver record and physical examination.

On examination by Commissioner Boyle, Mr. Alsayid stated that he would not insure all ten vans as he would not be certain at any given time how many of the vans would

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. B-1724

PAGE 3

be needed. He also did not place a number of how many employees he would hire at the beginning, but that the amount of business that was generated would indicate how many employees he may need.

On further examination by Commissioner Landis, Mr. Alsayid stated that his service may not be better than that of the taxicab company in Lincoln, but that he would be able to provide an additional service that would be more convenient to the public and another option that the public could pursue for its transportation needs. He further stated that he anticipated that the calls for transportation would be made on a prearranged basis.

On further examination by Commissioner Schram, Mr. Alsayid said that that he could operate on the basis of one trip every hour for each van, or 240 trips per day. He believed that there would be enough demand to sustain that quota.

On cross-examination by Mr. Shultz, Mr. Alsayid stated that he did not know the exact terms of the contract that he would have with HHS. The terms of the contract are unknown, including the reimbursement rate that he would receive from HHS.

Mr. Alsayid stated that he had been purchasing the ten vans over a period of time. The vans range in age from 2000 to 2002, with mileage of between 100,000 and 180,000 and are owned free and clear.

On further cross-examination by Mr. Shultz, Mr. Alsayid did not have a current plan on how many trips that his company would need to perform in order to be profitable. Mr. Alsayid said that he would make the contact with HHS and then plan how many trips that he could do and the number of employees that the company would need to hire. He further stated that he would not provide the service if there was not enough business to be profitable.

Mr. Alsayid stated upon a question by Mr. Shultz that he did have an idea of how much it would cost to insure the vehicles and that he believed that he could afford to make such payments. He also stated that he intended to hire individuals who were qualified, physically able to carry or

APPLICATION NO. B-1724

PAGE 4

lift with good driving records. The number of drivers that would be employed would depend upon the amount of business that he received from HHS. He initially would use his home as an office, but would rent office space in the future. Mr. Alsayid would initially be a driver, and a person would be hired to be a dispatcher.

Mr. Alsayid said that he would not be providing any special services, but that his attention to safety and timeliness would be important in his service.

PROTESTANTS EVIDENCE

Mr. Lannie Roblee was called by the protestant Midwest Special Services ("Special"). He is the owner and manager of Special. Midwest Special Services is a statewide provider of transportation services, including HHS transportation in Lancaster County. They provide service on a 24/7 basis. All drivers for Special are employees who undergo a background check, physical examinations, drug testing, and training.

Special employs 65 employees statewide, including 20 employees in Lancaster County. HHS transportation accounts for up to 90 percent of the business of Special. Mr. Roblee stated that the business that Mr. Alsayid appears to be referring to is business that he would be performing at the present time and would not be new transportation clientele.

Mr. Roblee stated that Special would be able to increase its fleet and driver pool as demand requires. He detailed a time period in Lancaster County in which a certificated carrier ceased to do business in Lancaster County for HHS. Special was able to add additional drivers and vehicles such that HHS needs were met with their additions to their fleet and increased participation by Servant Cabs.

Mr. Roblee said that Special has made a significant investment in equipment and personnel, has the capacity and desire to handle more passengers, and that there is currently competition for HHS traffic in Lancaster County. It is his opinion that public convenience and necessity

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. B-1724

PAGE 5

does not require that an additional carrier certificate be issued.

Kirby Young testified next. He is the managing member of the protestant Servant Cab ("Servant"). Servant has authority from the Commission to operate as a taxicab company primarily in Lancaster County, Nebraska. The service area for Servant is largely the same as that sought by the applicant.

Servant has their employees undergo physical examination, testing at the city level and a national background check. They also receive training in the performance of job duties by Servant.

Mr. Young testified that HHS has not requested any specialized services from his company. He further stated that he did not believe that the applicant had proposed any service that would be considered as specialized. HHS did have some specific requests for service in certain situations, such as vans or female drivers for certain of their clientele, but other than that, there were no special requests made. HHS currently comprises 65 to 70 percent of Servant's business, with 98 percent occurring on Lancaster County.

Mr. Young described the same situation with HHS and the loss of a carrier as Mr. Roblee did in his testimony. Servant was able to add additional vans to accommodate the additional service requested and meet the sudden loss of a carrier in Lancaster County.

Mr. Young testified that Servant stands prepared to expand its fleet as necessary, that it is desirous of additional traffic, and that the proposed service would likely be taken from the existing traffic of Servant as opposed to new traffic that is not currently being served. Servant has current excess capacity at times, and the loss of this traffic would be damaging to its business. Based upon his experience, Mr. Young said that the public convenience and necessity would not require the permitting of an additional carrier.

Vicki Harding of Transport Plus testified next. She is the owner of the protestant Transport Plus. They have a

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. B-1724

PAGE 6

total of 12 vans in service, 9 of which are handicapped accessible. Transport Plus already provides some of this type of service currently. Ms. Harding said that she did not see that the proposed operation would provide any service that is not already being offered by current providers. The granting of an additional permit would injure the operation of those companies already providing service, according to Ms. Harding.

Transport Plus provides training for its employees. They participate in a driving course at Southeast Community College. Transport Plus has a trainer on staff that performs periodic training. They do a criminal background check as drug screening. These expenses are significant, according to Ms. Harding.

Ms. Harding said that the current providers are supplying adequate service and that granting additional providers would only serve to injure those currently providing service. Ms. Harding also raised an issue as to the adequacy of the vans that have been purchased by the applicant.

On cross-examination by Mr. Chapin, Ms. Harding did state that the company has grown over the last twelve years. Mr. Chapin stated this indicated that there is room for growth in Lancaster County. Ms. Harding agreed, but also noted that the growth in her company has been slow and steady with an average of one van per year being added. Transport Plus is also in the position of being able to continue to expand when demand requires.

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

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 therefore authorizing in whole or in part the operations covered by the

APPLICATION NO. B-1724

PAGE 7

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 request for authority 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 stated that it is properly equipped and has the financial capability to perform the proposed contract services. In his testimony, the applicant stated that it currently owns ten vans free and clear, that it was aware of insurance requirements, and did have plans regarding the retention of employees. However, the Commission is concerned that the applicant has made its apparent business plan on the basis of inadequate information. It did not have any projections regarding income or expenses, how much it would charge or how many trips it would perform under the potential contract with HHS. There is not enough information available to make a determination as to the potential financial success of the proposed operation. The Commission will not rule on the Applicant's financial fitness because the application fails on other grounds.

The second part of the two part test is whether the proposed operation, to the extent authorized by the permit

APPLICATION NO. B-1724

PAGE 8

would be consistent with the public interest. In **Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.**, 188 Neb. 584, 198 N.W.2d 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 interests:

In considering an application for a permit to operate 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. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp.**, 183 Neb. 229, 159 N.W.2d 310 (1968). Where transportation of specified commodities can be performed as well by common carriers as by contract carriers a need for contract carriers is not established. **Samardik 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 than the common carriers. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.** The adequacy of existing service to perform the normal needs of proposed contracting shipper is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shipper. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.**

In the application before us, the evidence is insufficient to establish that a specialized need of the proposed contracting shipper exists. The **Samardik** case places the burden on the Applicant to demonstrate that the service which it proposes fits the need of the "proposed contracting shippers." The contracting shipper in this matter is HHS. No witness appeared on behalf of

APPLICATION NO. B-1724

PAGE 9

HHS to testify regarding any specialized need. The applicant did not provide any showing that the service it proposes to offer is specialized to meet a need of HHS. We cannot conclude that HHS has any specialized need for the proposed service. The record is silent on any such specialized need.

There also was no showing that the applicant has proposed a service that is better equipped than that currently offered by common carriers or that makes the applicant better qualified to perform the service than said carriers. The Commission cannot find that the applicant is either better equipped or better qualified to meet any special needs of HHS.

After consideration of the evidence and being fully advised in the premises, the Commission is of the opinion and finds the proposed contract carrier operation is not designed to meet any specialized needs of HHS and the application must therefore be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1724 is hereby denied.

MADE AND ENTERED at Lincoln, Nebraska, this 12th day of January, 2010.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Frank E. Landis
Gerald L. Vap
Tim Schram

//s// Frank E. Landis
 //s// Gerald L. Vap

Chairman *Gerald L. Vap*

ATTEST:

Shirley L. Johnson
 Executive Director