

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the League of) APPLICATION NO. BR-332
Human Dignity, Petitioner, vs.)
R & F Hobbies, Inc., dba Prince of)
The Road, Midlands Services Link,)
A-1 Transportation, LLC, dba A-1)
Special Services, Hope) ORDER
Transportation, Inc., Prime)
Consultants, Inc., dba Goodwill)
Medical Transportation,)
Respondents.) ENTERED: JANUARY 19, 2011

APPEARANCES:

For the Petitioner:

Randall Goyette, Esq.
1248 Wells Fargo Center
Suite 500
Lincoln, NE 68508

For the Respondent R & F
Hobbies:

John Boehm, Esq.
811 South 13th Street
Lincoln, Nebraska 68509

For Commission Staff:

Mark Breiner, Esq.
300 The Atrium
1200 N Street
Lincoln, NE 68508

BY THE COMMISSION:

On December 21, 2007, the League of Human Dignity, Lincoln, Nebraska, filed a petition against the respondents pursuant to Neb. Rev. Stat. § 75-119 (2009) alleging that the respondents were charging discriminatory or unjust rates, and requesting that the Commission enter an order rescinding any such charges.

Notice of the application was published in *The Daily Record*, Omaha, Nebraska on February 18, 2008, pursuant to the Commission's rules. Hearing on the application was held on October 16, 2008, in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska with appearances as shown. Notice of the hearing in this matter was sent to all parties of record on September 10, 2008.

APPLICATION NO. BR-332

PAGE 2

EVIDENCE

Richard Skerbitz was called by the Applicant. Mr. Skerbitz is an employee of the League of Human Dignity [the "League"]. He is the Systems Change Coordinator for the League. He stated that the League provides services in 56 Nebraska counties and 8 Iowa counties, and employs sixty people. The League works with individuals who have various handicaps, including physical and mental handicaps.

Mr. Skerbitz testified that he began to look at rates that were being charged in the Medicare Waiver Program run by the Nebraska Department of Health and Human Services ["HHS"]. He began by looking at one company in Lincoln and discovered that a differential rate was charged by this company under the contract for the Program. After this discovery, Mr. Skerbitz examined rates charged by other companies and discovered that there were other companies that charged a differential rate.

Mr. Skerbitz described a differential rate as a rate structure that has one charge for ambulatory passengers and a different, higher rate, for non-ambulatory or wheelchair bound passengers. In essentially every circumstance, the rate charged for wheelchair bound passengers was greater than that charged ambulatory passengers.

Mr. Skerbitz was asked by counsel for the League about the impact of these differential rates. Mr. Skerbitz cited that there are at least two different types of impacts. One type of impact is that these rates give the persons subject to the increased rates a sense that they are not equal and that they are being treated unequally.

The second was an economic impact. The persons affected were going to pay more for transportation than someone else. In the case of HHS, while an individual was not being charged for the service, most such affected individuals had a cap on the services that they were being provided. The increased cost of the differential rate would have an impact on the amount of services that these individuals would receive. Mr. Skerbitz was not able, on direct inquiry from counsel for the Applicant, to state whether he knew of any specific instances of negative

APPLICATION NO. BR-332

PAGE 3

impacts of the differential rates as charged by some carriers.

Mr. Skerbitz brought several settlements of cases in other jurisdictions that involved transportation issues. The settlements involved several different companies around the country and involved many different issues, including challenges as to hours of service and the availability of service as well as fares. In some of the settlements, differential fares were listed as an issue and there was agreement between the parties that differential rates should not be charged. Mr. Skerbitz was not able to provide any settled cases in which a court had addressed these issues.

Mr. Sean Schroll was called next by the Applicant. Mr. Schroll is the Director of Marketing for R & F Hobbies, Inc., d/b/a Prince of the Road ["Prince"]. Prince has approximately 100 vehicles in service, of which between four and ten are wheelchair accessible. Prince does provide transportation to the general public, but most of their transportation is provided to HHS.

After some discussion regarding the rate process before the Commission, Mr. Schroll noted that rates pursuant to contract with HHS are separately negotiated. The rates negotiated with HHS are not subject to Public Service Commission regulation except for the condition that the rates as contracted are lower than the approved rates on file.

A provider agreement between Prince and HHS effective July 1, 2008, showed that Prince was permitted and paid an extra \$11.98 per one way trip charge for wheelchair transportation. It was noted that HHS is the payor in these situations, and that individuals are not charged and do not pay for this transportation. It was also noted that if an individual was able to transfer themselves from their wheelchair into the vehicle unassisted, there was no charge for wheelchair service.

On cross-examination by Mr. Boehm, Mr. Schroll admitted that Prince stopped charging for non-HHS wheelchair transportation. These trips account for less than five percent of the transportation provided by Prince,

APPLICATION NO. BR-332

PAGE 4

according to Mr. Schroll. Prince continued to charge HHS as the charge was done pursuant to contract.

Mr. Schroll also stated that the Provider Agreements are essentially given to companies such as Prince with very little negotiation with HHS. It was also noted that they charge and receive payment from HHS and not any individual clients of HHS.

Mr. Schroll detailed some of the extra costs that companies such as Prince incur due to the provision of wheelchair available transportation. The van costs more as the special equipment and renovation requires additional work that is not required for regular transportation. There are also additional insurance costs involved and the related difficulty in finding a company that will provide such insurance. There are additional increases in workers compensation insurance and the cost of the additional time that is involved in the loading and unloading of the passenger. It is these higher costs that caused companies such as Prince to institute the additional charges for wheelchair transportation.

Mr. Schroll stated that Prince stopped charging the differential rate to the general public as they believed that to charge the rate would be a violation of ADA guidelines. He further stated that they continued to charge HHS the higher rate as they believed that the greater charge, when not made to a disabled individual, was not in violation of the ADA. He also stated that Prince would be at a competitive disadvantage by providing wheelchair transportation if they are compelled to change their rates to incorporate the additional costs into their overall rate structure as compared to a company that did not provide this service and therefore did not incur these additional costs.

Marcia Alber testified next. Ms. Alber has been with HHS for around fourteen years, and has worked in the transportation program for HHS for most of that time. She testified that the aged and disabled programs that constitute much of the HHS program have a cap on the amount of money that is available to provide services for its clientele. The budgeted amount includes an amount for transportation. The additional charge for wheelchair

APPLICATION NO. BR-332

PAGE 5

transportation could cause an overall decrease in the total services received as this additional cost would be applied against a capped amount of funding for said individual.

OPINION AND FINDINGS

The issue brought before the Commission is the additional charges that some transportation companies in the state of Nebraska may impose for the transportation of non-ambulatory persons or persons utilizing wheelchairs. It appears that there are two different types of transportation involved: transportation of the general public and state wards that are provided transportation through HHS. A preliminary matter that the Commission will address is whether the Petitioner is an interested person able to file a petition under Neb. Rev. Stat. § 75-119 (2009).

R & F Hobbies contends that the League is not an "interested person" entitled to petition the Commission to challenge the rates at issue as unjust or discriminatory under § 75-119. R & F Hobbies asserts that the term "interested person" means one who has legal standing or a "litigable interest" in the proceeding, meaning someone directly harmed or subject to actual injury due to the challenged action.

"Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary." *PSC Credit Services, Inc. v. Rich*, 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997). The word "interested" is commonly understood to mean "having an interest in something; concerned." <http://dictionary.reference.com/browse/interested> (accessed January 10, 2011). The term "person" includes not only individuals, but also other entities, including "associations." Neb. Rev. Stat. § 49-801(16) (2004). The League is a non-profit organization that provides aid and services to disabled persons in Nebraska. The League's services include educational training, physical barriers removal programs, and advocacy for issues related to disabilities. The League also has an Extended Hours Service Program that provides transportation for individuals with disabilities during hours where public transportation generally does not operate. Applying the

APPLICATION NO. BR-332

PAGE 6

plain and ordinary meaning of the phrase "interested person", the League is an interested person within the meaning of § 75-119. Nothing in the language of the statute indicates that the Legislature intended to adopt the technical interpretation of "interested person" urged by R & F Hobbies which would include only persons meeting the legal criteria for standing to bring an action in court.

Moreover, even if the legal requirements for standing applied, as an association which represents and advocates for the interests of persons with disabilities, including persons provided transportation services by common carriers regulated by the Commission, the League meets the requirements of associational or organizational standing to bring this action in a representative capacity on behalf of its members, which include disabled individuals utilizing transportation services provided by regulated entities. See *Nebraska Seedsmen Ass'n v. Department of Agriculture and Inspection*, 162 Neb. 781, 77 N.W.2d 464 (1956) (Association may bring action on behalf of its members); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (Association may bring suit on behalf of its members if members would have standing to sue, the interests it seeks to protect are germane to the organization's purpose, and claims do not require the participation in the action of the individual members.). Further, the League asserts it is among the organizations that the carriers provide transportation services to by arrangement with DHHS, thus giving it standing to bring this action in its own right.

In the petition, the League cites Neb. Rev. Stat. § 75-126(1)(a)(2009), which provides that no common carrier shall "[c]harge, demand, collect or receive from any person a greater or lesser compensation for any services rendered than it charges, demands, collects or receives from any other person for doing a like or contemporaneous service unless required under section 86-465. . . ."

The League also cites the Americans with Disabilities Act ["ADA"]. The ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose

APPLICATION NO. BR-332

PAGE 7

operations affect commerce." 49 U.S.C. § 12184(a). The Federal regulations implementing the ADA provide that "[n]o entity shall discriminate against an individual with a disability in connection with the provision of transportation service". 49 C.F.R. § 37.5(a). The regulations further provide that "[a]n entity shall not impose special charges . . . on individuals with disabilities, including individuals who use wheelchairs, for providing services necessary to accommodate them." 49 C.F.R. § 37.5(d).

The applicant cites several settlement agreements. In these agreements the parties to the settlement agreed that a differential fare would be discriminatory and would be in violation of the ADA. The Commission notes that these settlements do illustrate that there are many entities that voluntarily recognize that differential rate structures would be a violation of the ADA and should not be in place. While these settlements are of interest as to the discussions of the ADA and their applicability to the circumstances of each particular case, they do not provide any binding orders on the Commission nor do they have the precedential value of settled case law.

The ADA promotes a policy that the ability to enjoy public transportation is to be equal as to the physical status of individuals and not be subject to increased costs due to any physical disabilities. While there may be some additional costs related to the provision of some types of wheelchair transportation, it appears that the ADA policy is that these costs are to be considered in the overall costs of transportation and not paid for directly by the individuals who are disabled. They are to be factored into the overall cost of the operation and therefore spread out over all users of the service.

The record shows and notice of the files of rates on file with the Commission show that there are several companies, including the only company to appear at the hearing, Prince of the Road, that provide transportation to the public, including wheelchair transportation, that do not have or do not charge a differential rate for such wheelchair transportation. While many of the companies do not provide wheelchair transportation, there are some that do provide wheelchair transportation and that also do not

APPLICATION NO. BR-332

PAGE 8

have a differential charge. These companies have been able to develop a fare program that provides for transportation for all members of the public without the necessity of an additional charge for a wheelchair bound passenger.

Public policy would dictate that the rate differentials should not be in effect. While there do not appear to be any controlling court cases that would dictate that these rates are illegal, the language of the ADA itself as well as the line of reasoning in the settlements would indicate that public policy requires that the differential rates not be approved by this Commission. There are numerous companies that do not charge a differential rate, and the brief for Prince stated that it believes that charging an individual a higher rate based upon a disability is illegal under the ADA.

The Commission finds that differential rates as charged to the general public should be discontinued and that all authority holders that currently have such rates should amend these rates to eliminate the differential charges that are in place.

A separate issue is the status of HHS and differential charges. The record shows that HHS has been contracting with companies such as Prince for many years with terms that pay differential charges. There has been no showing that HHS has been informed by any governing body or court that they are not permitted to make such differential payments. The record indicates that the payment of differential charges by HHS is in the normal course of their business.

Further buttressing this point, as the brief for Prince points out, HHS has specific legal authority to charge a differential rate. In Neb. Rev. Stat. § 75-303.02(2)(2009), HHS has a mandated maximum rate for transportation of three times the rate of reimbursement. Under the statute, however, this maximum reimbursement rate shall not apply when the carrier transports a disabled person as defined by the Federal Americans with Disabilities Act of 1990 in a vehicle that is compliant with the regulations provided for the transportation of such disabled person.

APPLICATION NO. BR-332

PAGE 9

A second state statute shows that a governmental body such as HHS does have a different status from the general public. Neb. Rev. Stat. § 75-126 requires that a certificated carrier shall charge the rate that is filed with or prescribed by the Commission with certain exceptions, the first one of which (§ 75-126 (2)(a)) is a governmental subdivision, including the State of Nebraska.

However, § 75-126 (2) further states that a certificated carrier may charge a governmental entity at a "free or at reduced rates." The Commission finds that current and future rate structures must be in compliance with this statutory section.

The League also alleges that the rates in question are in violation of Neb. Rev. Stat. § 20-127 (Cum. Supp. 2010). The pertinent part of this section states that a disabled person (among others) "is entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers . . . to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons." § 20-127(2). The Nebraska Supreme Court found in *Loewenstein v. Amateur Softball Association*, 227 Neb. 454, 418 N.W. 2d 231 (1988) that this statute is to be strictly construed. The statute does make specific reference to "where the public is invited". The Department of Health and Human Services does not provide transportation for the general public, but only for individuals that are being served by the Department. As the general public is not served through HHS, this statute is not applicable to HHS transportation. The Commission therefore finds that there is no discrimination due to violation of § 20-127.

The Commission finds that the differential rates should be eliminated from the published rates of certificated carriers. All certificated carriers who are charging a differential rate will have until February 18, 2011, to apply to the Commission for a rate change to be in compliance with this order and applicable statutory sections. The normal rate application fee will be waived for these companies in order for them to come into compliance.

ORDER

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. BR-332

PAGE 10

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission, that differential rates are ordered to be eliminated from the published rates of certificated carriers to the extent that such rates are in violation of §75-126 and other applicable statutes.

IT IS FURTHERED ORDERED that all certificated carriers who currently have such differential rates shall apply to the Commission by February 18, 2011, for a rate change to bring said rate structures into compliance with this Order and state statute. The normal rate application fee will be waived for certificated carriers to enter into compliance with this Order.

MADE AND ENTERED at Lincoln, Nebraska, this 19th day of January, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s// Frank E. Landis
//s// Tim Schram

ATTEST:


Chairman
Executive Director