

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition ) APPLICATION NO. DR-0001  
for Declaratory Ruling of CUSA )  
ES, LLC, dba Express Shuttle, )  
seeking a determination that the )  
permit requirements of NEB. REV. )  
STAT., Section 75-309 do not )  
apply to single-state ) ORDER DENYING MOTION TO  
transportation performed under ) DEFER  
contract of railroad train crews )  
within the State of Nebraska if )  
the train crews are traveling as )  
part of a continuous interstate )  
movement. ) ENTERED: JULY 10, 2007

APPEARANCES:

For the Petitioner CUSA ES, LLC: For the Protestant Brown's  
Crew Car of Wyoming, Inc.,  
dba Armadillo Express:

Jack L. Shultz Brad Kistler  
PO Box 82028 PO Box 85778  
Lincoln, Nebraska 68501-2028 Lincoln, Nebraska 68501

For the Protestant United Jeremy Kahn  
Transportation Union: 1730 Rhode Island Ave. N.W.  
Suite 810  
Washington, DC 20036

Ray Lineweber  
1307 H Street  
Lincoln, Nebraska 68508 For the Commentor BNSF  
Railway Company

David Coburn  
1330 Connecticut Avenue  
Washington, DC 20036

BY THE COMMISSION

Background

CUSA ES, LLC, dba Express Shuttle (hereafter "CUSA") filed a Petition for Declaratory Ruling on September 15, 2006, seeking a determination that certain single state contract

transportation of railroad train crews is interstate in nature and therefore not subject to the Commission's jurisdiction. Simultaneously, on February 12, 2007, CUSA filed a Request to Dismiss its initial Petition and filed the Petition which is the subject of this proceeding docketed as DR-0001. In its second Petition, CUSA sought a determination that the permit requirements of NEB. REV. STAT., Section 75-309 do not apply to single-state transportation performed under contract of railroad train crews within the State of Nebraska if the train crews are traveling as part of a continuous interstate movement.

Notice of the CUSA Petition for Declaratory Ruling was published in the Daily Record on March 12, 2007. Protests and requests for oral hearing were filed by Brown's Crew Car of Wyoming, Inc., dba Armadillo Express ("Armadillo") on April 4, 2007, and by the United Transportation Union on April 10, 2007. Comments were filed in support of the declaratory relief sought by Petition on behalf of BNSF Railway Company on April 11, 2007. BNSF responded to that motion on May 2, 2007.

After CUSA's request for declaratory ruling before this Commission was filed on February 12, 2007, Armadillo, joined by two other commonly controlled entities, filed a Petition for Declaratory Order before the Federal Motor Carrier Safety Administration ("FMCSA") on February 20, 2007. In that FMCSA Petition, Armadillo argued that transportation of the sort at issue in the CUSA Petition takes place in interstate commerce, concurring with the legal views expressed in the CUSA Petition. On April 4, 2007, Armadillo filed with this Commission a Motion to Defer Action on the CUSA Petition pending action by the FMCSA. The Armadillo Motion seeks deferral of an indefinite duration as there is presently no proceeding at FMCSA. CUSA filed a Reply opposing the Motion to Defer on April 29, 2007. BNSF Railway Company incorporated a response in opposition to the Armadillo Motion to Defer in its April 11 statement in support of the CUSA Petition. The issue of the Armadillo Motion to Defer action of the CUSA Petition came before the Commission for oral argument on May 23, 2007.

#### Motion to Defer

The Petition by CUSA before this Commission and the Petition by Armadillo before the FMCSA both seek the same relief, which is to have single state motor carrier transportation performed by contract of railroad train crews which are traveling as part of a continuous interstate movement, determined to be interstate commerce and therefore not subject to state regulation. The CUSA Petition specifically seeks a determination that the permit requirements of NEB. REV. STAT.,

Section 75-309 do not apply to single-state transportation performed under contract of railroad train crews within the State of Nebraska, if the train crews are traveling as part of a continuous interstate movement. Essentially, the Armadillo Petition filed with FMCSA seeking a similar determination on a nationwide basis.

The subject matter of the oral argument heard by the Commission on May 23, 2007, was limited to the Armadillo Motion to Defer. The issue before this Commission is whether to rule on the CUSA Petition or whether to defer to the FMCSA where the Armadillo Petition for Declaratory Order is pending (although filed after the CUSA Petition). At the oral argument, both parties indicated there were aware of no activity undertaken by the FMCSA to either accept, docket, or advance the Armadillo Petition. Accordingly, Armadillo is not asking this Commission to defer to another agency where a proceeding is pending. No proceeding is pending at FMCSA. Armadillo is asking for indefinite deferral only by virtue of the fact that it has filed a petition with FMCSA, which has not been pending for about four months at FMCSA with no action being taken by that agency.

In support of its Motion to Defer, Armadillo advances essentially two arguments. First, Armadillo argues that the "primary jurisdiction doctrine" supports its request to defer. Second, Armadillo argues that sound policy supports its position that a ruling should be entered on a nationwide basis by FMCSA.

a. Primary Jurisdiction

In support of its "primary jurisdiction" argument, Armadillo relies on a series of cases appealed from decision of the Interstate Commerce Commission. WE note the Interstate Commerce Commission ceased to exist on January 1, 1996. We believe Armadillo's analysis on "primary jurisdiction" cases is misplaced. Our understanding of primary jurisdiction stems from circumstances where a court is asked to seek the views of an expert agency to help it assess regulatory issues presented to it. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). Primary jurisdiction plays a role when a court defers to an agency because of its expertise, its "special competence" within its statutorily-defined subject area. This case comes to the Commission not from a court seeking our assessment, but by a petitioner seeking a determination as to whether permit requirements of NEB. REV. STAT., Section 75-309 have application to the railroad train crew transportation at issue. This Commission certainly has the expertise to determine the scope of its jurisdiction and to determine whether the transportation at issue is beyond its jurisdiction and the

permit requirements of NEB. REV. STAT., Section 75-309. The cases cited by Armadillo (Texas v. United States, 866 F.2d 1546 (5<sup>th</sup> Cir. 1989); Central Freight Lines v. ICC, 899 F.2d 413 (5<sup>th</sup> Cir. 1990); and Merchants Fast Motor Lines, Inc., v. ICC 5 F.3d 911 (5<sup>th</sup> Cir. 1993)) all involved parties who went to the Interstate Commerce Commission first, obtained a ruling, and then one of the parties proceeded to appeal the agency's determination on the merits before the court. The element of primary jurisdiction addressed in these decisions relates only to the context of determining that the ICC did, in fact, have jurisdiction to determine whether the truck commerce at issue was interstate commerce or not. The cases cited by Armadillo do not offer support for the proposition that this Commission should forego the opportunity to opine on the scope of jurisdiction over the transportation and the Nebraska statute which is at issue, particularly where no proceeding is pending at another agency.

As mentioned, the ICC no longer exists as a federal agency. The primary jurisdiction cases referenced by Armadillo all involve the Interstate Commerce Commission. This Commission is aware that the Interstate Commerce Commission had statutory oversight over virtually all modes of surface transportation and was particularly active in hearing cases regarding motor carrier operating authority. Here, no precedent has been cited to us establishing that FMCSA has primary jurisdiction over the issues raised here or that it is likely to choose to address those issues in response to the Armadillo petition. As pointed out during the oral argument, Armadillo could point to no portion of the FMCSA rules or regulations which entitle it to petition FMCSA and seek the relief sought in this proceeding. Neither party was able to identify any activity by the FMCSA which would give any indication of its intent, willingness or ability to grant the relief requested. In fact, Armadillo has cited to us a matter decided by FMCSA's predecessor, the Federal Highway Administration, indicating that declaratory orders will only be issued "in extraordinary circumstances." See 63 Fed. Reg. 31827 (June 10, 1998).

This Commission has on prior occasions dealt with the issue of whether certain transportation was interstate or intrastate in nature. Silvey Refrigerated Carriers Inc. vs. Bee Line Motor Freight, 226 Neb. 668, 414 N.W.2d 248 (1987) (transporting freight across state line to home terminal in normal course of operation was interstate in nature); Dilts Trucking v. Peake, 197 Neb. 459, 249 N.W.2d 732 (1977) (Whether color of right established for intrastate operations under previously issued ICC certificate). We recognize our jurisdiction goes only to intrastate transportation. The FMCSA was created by the Motor

Carrier Safety Improvement Act (MCSIA) on January 1, 2000. Section 4 of the MCSIA states the purpose of the Act was to improve administration of federal motor carrier safety programs within the Department of Transportation (Public Law 106-159, December 9, 1999). On its website, FMCSA states its "primary mission is to reduce crashes, injuries and fatalities involving large trucks and buses." ([www.fmcsa.gov](http://www.fmcsa.gov); "About FMCSA." This Commission is aware that FMCSA is the federal agency that registers motor carriers under 49 U.S.C., Section 13902. The registration process before FMCSA is very different, and much simpler, than the certification and permitting practice before this Commission. FMCSA essentially uses a safety and insurance fitness standard while this Commission employs a fitness and a "consistent with the public interest: standard for contract carrier applications. We are not aware, and neither party brought to our attention, any circumstance akin to the issue before us where FMCSA has previously rendered any advance or ruling on the question of whether a carrier is engaged in interstate versus intrastate operations for registration purposes.

b. Sound Policy

Armadillo also argued that it would be sound policy for the Federal agency to rule on the nature of the transportation at issue in order to achieve uniformity. To the extent that some state regulatory agencies regulate the contract transportation of railroad train crews while others do not, currently creates a lack of uniformity. However, this lack of uniformity has apparently been the rule for many years without any problem for motor carrier or their customers. In fact, it is clear that states do not uniformly regulate motor passenger licensing in many respects, with each state applying its own laws and rules to motor carrier transportation. This Commission cannot speak for other state commissions, but it is our duty to address issues which impact Nebraska citizens and interpret Nebraska statutes. At this point, it is unclear whether FMCSA will entertain the Armadillo Petition or when or if it might rule on that Petition. Sound policy dictates this Commission perform its obligations and not defer to a federal agency which may or may not address the issue before us. At some point in the future, should FMCSA render a decision on the pending Armadillo Petition for Declaratory Ruling, this Commission and the parties will be bound by that ruling. However, this Commission is not inclined to defer ruling on the Petition before it, particularly in the absence of any proceeding pending at FMCSA or some assurance FMCSA will address the issue at some point. Nebraska citizens should not be required to wait for action by a federal agency which may never act.

c. Safety

One issue this Commission raised during the course of the oral argument related to whether state safety regulation would be applicable if the CUSA Petition was granted and the contract van transportation was determined to take place in interstate commerce. We do not believe that a finding that the van transportation at issue takes place in interstate commerce in any meaningful way changes the scope of safety regulation of this transportation. According to the CUSA Petition, the vans used to transport rail crews are generally designed to carry between eight and 10 persons. To the extent that they are designed or used to transport more than eight persons (including the driver), these vans meet the definition of "commercial motor vehicles" subject to the Federal Motor Carrier Safety Regulations. See 49 CFR, Section 390.5. FMCSA's safety regulations accordingly apply to such vans to the extent that they are operated in interstate commerce in Nebraska. Nebraska enforces compliance by interstate carriers with such regulations. This is confirmed by Nebraska law. See Section 75-363 of the Nebraska Statutes, which provides that the Federal Motor Carrier Safety Regulations, as modified by Section 75-363, applies to all motor carriers, drivers and vehicles in the state "to which the federal regulations apply." It also bears note that under Section 4136 of a 2005 federal statute known as the Safe, Accountable, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. No. 109-59), the Federal Motor Carriers Safety Regulations were extended in their entirety to all small passenger van vehicles transporting between nine and 15 passengers, removing a prior limitation in the applicability of FMCSA's safety regulations. The scope of the Commission's safety regulation of vans operating in intrastate commerce in Nebraska is no different than the scope of the federal safety regulations that the Commission applies to interstate carriers operating in the state. This Commission's safety regulation of intrastate vans thus applies to all vehicles designed or used to transport more than eight persons for compensation. See 75-363(2)(b)(ii).

As a result of the above statutes and regulations, a finding by this Commission that the contract motor carrier transportation of rail crews is interstate in nature would result in no meaningful change in the current safety regulatory scheme. WE note that the Petitioner has asked only that the permit requirements of NEB. REV. STAT., Section 75-309 not apply and has not asked that any safety regulations applicable to railroad train crew transportation be determined inapplicable.

The Commission finds that the arguments advanced by Armadillo in its Petition to Defer are not persuasive. We do not believe that this is a circumstance where the primary jurisdiction doctrine has application. This Commission possesses the experience to address the CUSA Petition. It is appropriate for this Commission to rule on the issue before it, which is whether the permit requirements of our state statutes, specifically NEB. REV. STAT., Section 75-309 have application to the transportation of railroad train crews within Nebraska as described by the parties.

#### ORDER

It is therefore ordered by the Nebraska Public Service Commission that the Motion to Defer by Brown's Crew Car of Wyoming, Inc., dba Armadillo Express in Docket number DR-0001 is hereby denied. Further, this Commission intends to proceed promptly to a determination of the merits of the CUSA Petition and will proceed to schedule an oral argument within the next three weeks, and, subject to any supplemental filings which any party or interested person may make with the Commission by no later than 15 days following the date of the oral argument. Any replies to such filings are due 10 days following the date any supplemental submission is served.

MADE AND ENTERED at Lincoln, Nebraska, this 10<sup>th</sup> day of July, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Vice Chairman

ATTEST:

Deputy Director