

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

R&F Hobbies, Inc. d/b/a Prince of)	FORMAL COMPLAINT No. 1287
the Road,)	
)	MOTION FOR RECONSIDERATION
Complainant,)	DENIED
)	
vs.)	
)	Entered: March 20, 2001
Midwest Special Services, Inc.,)	
)	
)	
Defendant.)	

BY THE COMMISSION:

On October 24, 1999, R&F Hobbies, Inc., d/b/a Prince of the Road, ("Complainant"), filed a formal complaint with this Commission against Midwest Special Services, Inc. ("Midwest Special Services"), alleging that Midwest Special Services transported passengers for the Nebraska Department of Health and Human Services at a rate in violation of Neb. Rev. Stat. section 75-126 (1998 Cum. Supp.) and that Midwest Special Services operated vehicles without proper identification. The Formal Complaint further alleged that Midwest Special Services operated unlawfully by operating in those counties where they had no authority.

On January 23, 2001, the Commission dismissed the complaint without prejudice primarily on the grounds that the Complainant had not alleged a specific harm and that, as a result, had failed to demonstrate sufficient standing to bring the complaints. On January 30, 2001, the Complainant filed a Motion for Reconsideration. On February 20, 2001, a hearing was held on the Motion for Reconsideration. Notice of the hearing was mailed to the interested parties by first-class mail on February 15, 2001.

OPINION AND FINDINGS

In our initial finding in this procedure, we noted that the Complainant failed to allege a harm that, as a result, had failed to demonstrate standing to bring a complaint. In addressing the standing issue, we noted that the courts have found that in an adversarial proceeding, the plaintiff must,

...first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable", as opposed to merely "abstract," and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.*, at 569 citing *Whitmore v. Arkansas*, 495 U.S. at 155-56. [Citations omitted.] *State v. Baltimore*, 242 Neb. 562, 569.

In the Motion for Reconsideration filed by the Complainant, Prince of the Road argues,

Every common carrier has a distinct and legal interest in insuring that all other common carriers, particularly direct competitors, adhere to the rules and regulations of the Commission. The cost of doing so is a cost of doing business, and the failure of other competitors to do so gives that competitor an unfair advantage, which in turn creates unfair competition and thus an injury in fact which clearly provides a basis for standing... *Motion for Reconsideration*, at ¶2.

If this were the only issue raised by Complainant in his argument for reconsideration, we might consider whether to treat this allegation as an amended pleading. Our attention would then turn to the causality and redressability prongs of the standing issue. But the Complainant further argues that either standing does not apply in a Formal Complaint proceeding, or alternately, that the Complainant has met the burden of demonstrating standing.

In arguing that standing does not apply, Complainant cites Neb. Rev. Stat. § 75-131 which states,

Any person who complains of anything done or omitted to be done by any common or contract carrier may request that the commission investigate and impose sanctions on such carrier by filing a petition which briefly states

the facts constituting the complaint. *Neb. Rev. Stat.*
§75-131 (Reissue 1996). (Emphasis of Complainant.)

The distinction to be made is that the statute gives any person the right to file a petition for investigation, but it does not confer the right to file a formal complaint. A formal complaint initiates an adversarial proceeding which gives the parties the right to discovery and cross-examination. Because a formal complaint proceeding is quasi-judicial, a party filing a formal complaint must meet the requisite threshold for standing including demonstration of an injury-in-fact, causality, and redressability. A petition for investigation, however, need not be an adversarial proceeding. In those cases, no demonstration of standing is required.

Because we specifically find that standing is a necessary prerequisite to a Formal Complaint, that the Complainant chose not to allege a harm in its initial filing, and that the failure to allege a specific and redressable harm requires us to find that standing has not been demonstrated, we must find that the Motion for Reconsideration should be denied. However, our conclusions do not end there. Because there has been allegations of violations of Commission rules by the Respondent, it is necessary for us to conduct an investigation to determine the validity of those allegations and, if found to be valid, to impose appropriate sanctions.

Accordingly, this Commission will, on its own motion, and on the basis of the information provided by the Complainant, open a departmental investigation against the Respondent in a separate proceeding which we will open simultaneous with the order we enter today.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Motion for Reconsideration of the Dismissal of the Formal Complaint by R&F Hobbies, Inc., d/b/a Prince of the Road against Midwest Special Services should be, and is hereby, denied.

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MADE AND ENTERED in Lincoln, Nebraska on this 20th day of March, 2001.

COMMISSIONERS CONCURRING:

Laurel Johnson

Ann C. Boyle

Joe Johnson

//s/ Daniel G. Urwiller

NEBRASKA PUBLIC SERVICE COMMISSION

Paul Jander
Chairman

ATTEST:

Ad S. Pollack

Executive Director

COMMISSIONERS DISSENTING:

//s//Frank E. Landis

Dissent of Commissioner Frank Landis

The Commission today denies Prince of the Road's motion for reconsideration, finding that Prince of the Road does not have standing to bring a formal complaint against one of its competitors. Because I believe that Prince of the Road can, and more importantly should be able to, bring such a complaint against the Defendant, I respectfully dissent.

Neb. Rev. Stat. § 75-131 (Reissue 1996) provides, in part, the following:

Any person who complains of anything done or omitted to be done by any common or contract carrier may request that the commission investigate and impose sanctions on such carrier by filing a petition which briefly states the facts constituting the complaint. Notice of the complaint shall be served upon the respondent carrier as in civil cases in district court, and the respondent shall be required to answer or satisfy the complaint within a reasonable time fixed by the commission. (Emphasis added.)

The language of the statute is plain and clear – *any* person may file a formal complaint, regardless of any harm incurred. The second sentence of the statute creates certain procedures to be followed, notably, service of the complaint on the respondent, and an answer or satisfaction period which follows the filing of the complaint. These are the same procedures we have consistently utilized when processing any Formal Complaint (See Neb. Admin. R. & Regs., Title 291, Chapter 1, Rule 005.08). It is clear that § 75-131 confers a right to file a Formal Complaint, and an untortured interpretation of the statute makes equally clear that *any* person may file such a complaint, without distinguishing between any persons who have incurred harm and any persons who are unharmed by the respondent's alleged actions.

In addition to the above statutory construction, I believe there are equally important policy reasons for allowing Prince of the Road's Formal Complaint to proceed without alleging a specific injury. Prince of the Road is certificated as a common carrier in the state of Nebraska, as is the Defendant and others. Each common carrier must comply with this Commission's rules and regulations, which imposes equal costs and burdens on all common carriers. When one common carrier evades our rules, they also evade the associated costs, placing them in a more advantageous competitive position vis-a-vis their competitors. All other common carriers necessarily suffer harm when one competitor obtains an unfair competitive advantage over the others. I would find that the mere possession of a certificate from this Commission is a sufficient allegation of harm when the certificate holder makes allegations of the nature made by Prince of the Road.

Finally, I am concerned with the message sent by the majority's decision today. This Commission is the agency constitutionally charged with regulating carriers who serve the citizens of Nebraska. Concluding that a complainant's ability for redress is limited, especially when such redress comes in the form of protecting the public by enforcement of our rules designed for that purpose, borders on an evasion of our duties. Our role is to protect the interests of all

Nebraskans. We should act with that purpose in mind and not turn away from those complainants who allege that the public has been harmed.


Commissioner Frank Landis