

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In re Abbott Transportation,)	Application No. FC-1300
)	
Complainant,)	
vs.)	COMPLAINT SUSTAINED
)	
Easy Car Rental Co., Inc., dba)	
Budget Car & Truck Rental Co.,)	
)	
Defendant.)	Entered: January 7, 2003

APPEARANCES:

For the Complainant:

Bradford E. Kistler
P.O. Box 85778
Lincoln, NE 68501

For the Defendant:

Jack L. Shultz
P.O. Box 82028
Lincoln, NE 68501

For the Commission Staff:

Shanicee Knutson
300 The Atrium Building
1200 N Street
Lincoln, NE 68508

BY THE COMMISSION:

This cause came to be heard by the Commission upon a Formal Complaint by Abbott Transportation, Inc., of Omaha, Nebraska (Abbott or Complainant) against Easy Car Rental Co., Inc., dba Budget Car & Truck Rental Co., of Omaha, Nebraska (Budget or Defendant) filed on July 22, 2002. The Complaint contained one allegation of an ongoing violation of Neb. Rev. Stat. § 75-309. Specifically, the Complainant alleged that commencing on or about April 1, 2002 and continuing to the date of the filing of the Complaint, Defendant has been conducting operations on a daily basis as a common carrier or contract carrier of passengers in Nebraska intrastate commerce without a certificate of public convenience and necessity or permit issued by the Commission. On July 30, 2002, the Answer was filed denying the allegations contained in the Complaint with respect to Neb. Rev. Stat. § 75-309. The Answer contained an affirmative defense that Defendant has not provided any service on a "for hire" basis and therefore the Commission has no jurisdiction over the

Formal Complaint. A hearing on the Complaint was held in the Commission Hearing Room on September 11, 2002 with appearances entered as identified above.

In support of its Complaint, Abbott offered Exhibits 1 through 5 which were received into the record. Exhibits 1 through 4 were excerpts from the record from the hearing held on Budget's application for contract carrier authority in Application No. B-1585. Exhibit 5 contained a collection of Exhibits received into the record in Application No. B-1585, namely Exhibits 1 through 4, Exhibit 7, Exhibit 9, Exhibits 14 through 15 and Exhibit 17. The Defendant stipulated to the fact that Exhibits 1 through 5 were actually copies of the exhibits offered and the transcript prepared in conjunction with the proceeding in Application No. B-1585. The Complainant rested its case upon the admission of Exhibits 1 through 5.

The Defendant offered one exhibit which was marked as Exhibit 6 and identified as the definition of "for hire" as printed in the 6th Edition of the Black's Law Dictionary. Exhibit 6 was received into evidence.

The Defendant called two witnesses. The first witness, Mr. Michael Gottwals testified that Budget has not at any time received any fare, charge or rate for providing passenger transportation services to the Sleep Inn. Prior to the time that Budget provided that service, Budget also received referrals for parking from the Sleep Inn hotel.

Upon cross-examination, Mr. Gottwals stated that Budget was not the exclusive recipient of parking customers from the Sleep Inn. He has seen other parking vendors providing that service for Sleep Inn. The original contract with Sleep Inn covered only airport parking and not for shuttle service. Sleep Inn then asked Budget whether it would be interested in providing a shuttle service as well. Budget continues to be a parking vendor for Sleep Inn today. Budget receives a daily rental fee for the cars parked in Budget's lot. Mr. Gottwals read for the Commission a sentence from Exhibit 7 provided in Application B-1585 which read, "An exclusive arrangement to promote Budget Airport Parking including both Park and Ride and Valet service. Hotel management agrees to vigilantly monitor employee performance to insure the exclusivity of this relationship." In the hearing in Application B-1585, Mr. Gottwals was asked whether Sleep Inn has been providing that service for Budget. To that question, Mr. Gottwals had answered "yes".

Upon re-direct examination, Mr. Gottwals stated that Sleep Inn has provided referrals to Budget, but there has not been exclusivity in doing so. He testified that in his understanding it was clear that Budget did not have an exclusive relationship. According to Mr. Gottwals, no exclusive relationship existed at the time of the hearing on the complaint.

Mr. Len Friedenbach testified next on behalf of the Defendant. He testified that Sleep Inn does not dictate to its customers what parking facilities they use. They use the parking facilities of Budget, Abbott, Steward Airport Parking and Park and Go. He testified that Sleep Inn recommends the parking services of Budget. However, he also noted that Budget's rates have increased and that customers are likely to choose the cheapest parking facilities. Sleep Inn has promotional materials from any other parking lots available. Prior to the time of Budget's application, Sleep Inn made referrals to Budget. If Budget's application was denied, Sleep Inn would continue to refer people to Budget's parking facilities.

Upon cross-examination, Mr. Friedenbach stated the agreement provided that Sleep Inn would exclusively recommend Budget to those of its guests who inquired as to where they might park. Prior to the arrangement with Budget, Sleep Inn would give its guests a list of places to park. After entering into the arrangement with Budget, Mr. Friedenbach testified, Sleep Inn recommends Budget exclusively.

Closing statements were given by each party. Mr. Kistler argued that the issue is that Budget is providing service on a for-compensation basis. Although they are not receiving money directly, the service provided by Budget should be deemed to be "for-hire". He argued Budget is the recipient of exclusive referrals from the Sleep Inn for parking services. To support his argument, Mr. Kistler stated that the Federal Highway Administration (FHWA) considers the phrase "for compensation" to be synonymous with "for-hire."

Mr. Shultz argued that the definition of "for-hire" according to Black's Law Dictionary requires that a fee be charged.¹ This fee is absent from the present case. Mr. Shultz further warned the Commission about heading down a path where the recommendation to use someone else's service has a price tag value. This, he argued, would be a slippery slope for the Commission to navigate. Every applicant that supports and

¹ BLACK'S LAW DICTIONARY 651 (6th ed. 1990).

application is giving something of value in anticipation that the applicant will receive a benefit.

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

Upon consideration of the evidence and arguments presented, we are of the opinion and find that the arrangement between Budget and the Sleep Inn hotel for exclusive recommendations of Budget's parking services in this case constitute compensation; and, therefore the services Budget provided would qualify as "for-hire" under Neb. Rev. Stat. § 75-302 (Reissue 1996). We conclude that a certificate of public convenience and necessity or contract carrier permit should have been required under Neb. Rev. Stat. § 75-309 (Reissue 1996). In reaching this conclusion, we find Budget is the recipient of a benefit which is tied into their original agreement to provide transportation services to the Sleep Inn. The evidence indicated that Budget and Sleep Inn entered into a contract for transportation services for a set monthly fee. In return for the transportation services under the contract, Budget was to receive not only the set monthly fee but also other agreed upon consideration including exclusive recommendation of Budget's parking services. Mr. Gottwals testified that upon learning that he could not provide for-hire transportation services without first obtaining a certificate of public convenience and necessity or contract carrier permit from the Commission, he continued to provide the transportation services for the Sleep Inn hotel although no direct monthly fee was collected. However, according to the testimony given, the parties continued to operate under other portions of the contract including the exclusive recommendation provision. Although Sleep Inn guests may use alternative parking services, the testimony indicates that, when parking services are requested, Sleep Inn provides customers with Budget's name. The testimony indicates that employees may mention other alternatives only when asked about other parking services. We find that this exclusive recommendation provides a palpable benefit for Budget in the form of increased parking business and should be therefore be considered compensation. Even though no evidence indicated that Budget was making a profit from the additional parking referrals, we have previously found telecommunications services priced at cost without profit qualify as "for-hire" services.²

² See Application No. C-1481/PI-18, In the matter of the Commission on its own motion, to conduct an investigation to determine whether the Nebraska Public Power District is operating as a common carrier offering intrastate telecommunications services and is thereby subject to Commission

Similarly, in this particular case, even though there was no specific value calculated as a result of the exclusive recommendations received by Budget, we find Budget was providing the transportation service on a "for-hire" basis.

We further find the guidance provided in the Federal Highway Safety rules persuasive.³ "For-hire" services are not strictly limited to services where a monetary fee is exchanged. Other bargained for compensation, in many cases can be just as valuable to the recipient as a monetary fee. The consideration for these purposes, we believe to be whether a bargained for benefit was exchanged for the services provided. We find that the fact that the value exchanged through this contract is not a direct monetary fee is irrelevant. Budget is the recipient of exclusive recommendations for its parking services and Sleep Inn, in return, is the recipient of a transportation service. We find that the Complaint should be sustained.

We note that the Complainant prayed for a cease and desist order from the Commission. This request has now been mooted by the Commission's grant of contract carrier authority to Budget. We may have been inclined to assess a monetary penalty, however, no such relief was requested and no evidence of financial loss was demonstrated by the Complainant.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Complaint filed in the above-captioned cause be and it is hereby sustained.

MADE AND ENTERED at Lincoln, Nebraska, this 7th day of January 2003.

jurisdiction, Interim Order Determining NPPD Is Providing Telecommunication Services, entered May 28, 1997.

³ See Regulatory Guidance, 62 Fed. Reg. 16370, 16407 (April 4, 1997)(Response to Question 10 asking whether the FHWA defines for-hire transportation of passengers the same as the former ICC did. The FHWA guidance stated that a "for-hire motor carrier as defined in part 390 means a person engaged in the transportation of goods or passengers for compensation." The FHWA has further determined that "any business entity that assesses a fee, monetary or otherwise, directly or indirectly for the transportation of passengers is operating as a for-hire carrier").

COMMISSIONERS CONCURRING: NEBRASKA PUBLIC SERVICE COMMISSION

Chair

ATTEST:

Executive Director