

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF INTER CITIES) APPLICATION NO. M-13498
COURIER SYSTEMS, INC., OMAHA,)
NEBRASKA, WHO SEEKS TO EXTEND) SUPPLEMENT 1
THE AUTHORITY OF A COMMON)
CARRIER IN NEBRASKA INTRASTATE)
COMMERCE GRANTED IN)
CERTIFICATE M-13498 IN THE) DENIED
TRANSPORTATION OF GENERAL)
COMMODITIES BY SMALL VEHICLES)
AND STRAIGHT TRUCKS ON)
IRREGULAR AND REGULAR ROUTES)
BETWEEN POINTS IN NEBRASKA.)
RESTRICTION: THE USE OF)
SPECIAL EQUIPMENT IS NOT) ENTERED: MARCH 9, 1994
AUTHORIZED.)

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BY THE COMMISSION:

OPINION AND FINDINGS

By application filed on June 25, 1993 Inter Cities Courier Systems, Inc., Omaha, Nebraska, (Inter Cities) seeks authority to transport general commodities by small vehicles and straight trucks on irregular and regular routes between points in Nebraska. Notice of the application was published in the Daily Record of Omaha, Nebraska, on June 28, 1993, pursuant to the rules of the Commission. Protests to the application were timely filed by American Courier Corp (ACC), A.S.A.P. Express, Inc. (ASAP), Dudley, Inc. (Dudley), Nebraska Bulk Transports, Inc. (Bulk), Pony Express Courier Corp (Pony Express) and Quick Freight, Inc. (Quick). A hearing on the application was held on October 14, 1993 in Omaha with appearances as shown and was continued to December 8, 1993, for a final day of hearing in Lincoln.

APPLICANT'S EVIDENCE

In support of its application, applicant produced six witnesses.

Larry Davis testified: He is president and, with his wife, co-owner of Inter Cities. He has been involved in the transportation business for 14 years.

Applicant performed interstate services exempt local services and intrastate services in accordance with current authority. The interstate work currently being performed by Inter Cities consists of service to approximately 48 courier companies throughout the continental United States, which accounts for approximately 15% of the applicant's gross revenues. Inter Cities provides expedited local services on an exempt basis for approximately 50% of its gross revenues. Inter Cities also provides non-exempt regulated services in accordance with its authority for approximately 35% of its gross revenues. Inter Cities has authority to transport general commodities in expedited service within a 100-mile radius of Omaha with no more than one shipment in one vehicle at any time and on a regular route from Omaha to Lincoln. All of its authority is restricted to transportation of shipments which are picked up and delivered on the same day. The expedited nature of applicant's service requires 24-hour dispatch service. Although the requested authority would effectively delete the restrictions, the company does not, nor does it plan to, perform overnight work. With respect to intrastate shipments, his customers regularly asked him to perform services for which he does not have authority. Confusion arises when he is unable to take a shipment to its final destination after it is stored in his warehouse. Inter Cities charges shippers at the

tariff rate; however, for some shipments within the city of Omaha, Inter Cities charges shippers an inflated rate. During his first day of testimony he acknowledged that Inter Cities regularly delivered more than one shipment in the same vehicle at the same time. It was his understanding that the restriction on his present authority that would prohibit such traffic had been previously deleted. Exhibit 5 shows the equipment applicant operates, the great majority of which is leased. Exhibits 16 and 17 show net equity on August 31, 1993, of just over \$76,000 of which over \$66,000 arises from an insider transaction related to the operating location. In addition to its main facility and warehouse location at 614 North 15th Street, Omaha, the applicant also maintains a facility at 5622 N Street in Lincoln. The Lincoln address is the location for Peels Beauty Supply. He has an agreement with Peels Beauty Supply. Inter Cities does not license any motor vehicles within the city of Lincoln; has no dispatch operator located in Lincoln; has no office staff located in Lincoln; has no equipment facilities located in Lincoln; and has no dedicated telephone in Lincoln. Applicant has an 800 listing in the local yellow pages in the Lincoln phone book; however, there is no listing in the white pages of the phone book. No material change in applicant's operation has taken place from the date of the first hearing in October of 1993 until the continuation of the hearing in early December, 1993. Exhibit 19 shows a proposed contract with National Paper Company, Inc. The proposed agreement provides for a drop charge which is not permitted by the controlling tariff. Inter Cities does not travel over a fixed route on a predetermined and regularly published schedule.

Jarold L. Kohll testified: He is vice-president of Kohll's Health Services (Kohll's). His duties consist of running the institutional side of the company, providing consulting services to nursing homes, on behalf of Kohll's, as well as servicing nursing homes. The ability to permit delivery outside 100 miles would be an advantage to Kohll's because there is a lack of sophistication to health services in the rural settings. For the calendar year 1993 to date Kohll's Health received six requests for service outside 100 miles. Kohll's has been solicited by protestants and has never had any problems with any protestant. There is no specific reason for Kohll's to not utilize any of the protestants other than personal preference.

Bill Oltean testified: He is the controller for National Paper, in Omaha. National Paper is an industrial towel, tissue, and janitorial supply distributor headquartered in Omaha. Currently, Inter Cities is servicing National Paper's account for deliveries of 10-15 stops within 100 miles, including Crete, Lincoln, Beatrice and Seward. National Paper is pleased and satisfied with the service and flexibility of Inter Cities, including picking up a full day's worth of stops at its warehouse. In addition to its accounts within 100 miles, National Paper also has accounts outside of 100 miles of Omaha. Those accounts would be served by applicant if the Commission grants its application.

Quick has never denied service to National Paper. He expressed no specific service problem with any protestant. Recently, National Paper received bids for some of its traffic from Inter Cities and Quick. National Paper awarded the bid to Inter Cities.

Dorothy Povondra testified: She is the traffic and receiving manager for Nebraska Furniture Mart. She is responsible for shipping and transporting furniture to various customers throughout a 48-state territory. Nebraska Furniture Mart needs a specialized service--service whereby the delivery includes taking the furniture into its customer's house and placing the furniture in a certain room for the customer. Nebraska Furniture Mart has been happy with the service that Inter Cities has provided, although the relationship between Inter Cities and Nebraska Furniture Mart began only three weeks prior to the hearing. No protestant served or wanted to serve Nebraska Furniture Mart.

Kim Schamp testified: She is an administrative assistant with Early Childhood Training Center which is affiliated with the Educational Service Unit #3. Part of her duties include coordinating the shipment of materials or educational notebooks to various locations throughout Nebraska. The educational notebooks and/or materials are usually prepared at least 30 days in advance. She could usually give a courier system approximately 30 days advance notice of a delivery. She works under a budget. If different couriers provide equal service, then she is going to utilize the service of the courier that charges the lower rate. She did not know the rates charged by different couriers. To the best of her knowledge, her employer had never contacted Dudley, Quick or any other protestant to provide services. She has no reason to believe that any one of the protestants could not provide the service currently provided by Inter Cities. Her testimony about Inter Cities is based on information and personal knowledge she has obtained from a single project in which Inter Cities is involved.

PROTESTANTS' EVIDENCE

In opposition to the application, protestants produced five witnesses.

Jack Johnson testified: He is branch manager for Pony Express. He has been employed by Pony Express for approximately nine years. His duties include responsibility for the day to day operations of the company, in addition to the financial well-being of the company. Pony Express has authority to move general commodities in courier service, subject to certain exceptions and restrictions, between points in Nebraska. To the best of his knowledge, Pony Express has never received any complaints or dissatisfaction with the service provided to Kohll's, a supporting shipper. Mr. Kohll's testimony did not include description of any service needs that Pony Express can not provide. The same can be said with respect to the needs of National Paper. Pony Express would like to have the opportunity to participate in the traffic of

Kohll's, National Paper, and the Nebraska Department of Education. Pony Express has people on call 24 hours per day with a live dispatcher, and the couriers currently in place provide the market with the necessary service. The additional authority being requested by the applicant is not needed.

Monte O'Hara testified: He is president of Dudley. He is familiar with the company's day to day operations. Dudley has common carrier authority for commodities generally over irregular routes from Lincoln to and from all parts of the state. His company offers daily runs and expedited movements between Omaha and Lincoln. Dudley has a live dispatcher between 6:30 a.m. to 6:30 p.m. daily. During off-hours, or when a live dispatcher is not present, the telephone calls are either forwarded to his residence or forwarded to a live answering service. If the calls are forwarded to the answering service, it will contact him directly. He did not hear any testimony from the supporting shippers that indicated a need for "off hour" or night calls.

Tracy Reeves testified: He is president and, with his wife, co-owner of Quick. The bulk of his testimony is contained in Exhibit 6, a prepared statement. Quick's authority is shown in Schedule A attached to Exhibit 6. Quick holds all the authority required by the four supporting shippers. It provides service on a statewide basis, as well as local-exempt service around Omaha. Its operations are conducted out of its headquarters at 1427 South 20th Street, Omaha. Its equipment is shown in Schedule B attached to Exhibit 6. All of this equipment, plus the appropriate trailers for the referenced tractors, are able to satisfy the majority of the equipment needs required by the four supporting shippers. Quick solicits the business of National Paper and Kohll's. Quick also provides local exempt traffic within the Omaha commercial zone for National Paper. Recently, Quick bid on additional National Paper business and Kohll's business. In both instances, Quick was advised by the respective shipper that the bid was awarded to the applicant because applicant submitted a lower bid. Quick provides such quality service that it is not uncommon for customers to start out with one or two shipments, only to be so satisfied with the service that the customer wants to establish an extended relationship. Quick has not opposed every application by all carriers that were seeking freight that Quick had the authority to carry.

Brian Shanks testified: He is vice president for ACC. He is actively involved with the day-to-day operations of the company, particularly with the company's accounts payable and accounts receivable. ACC has authority to carry checks and other commercial papers, data processing materials, and other documents and records relating thereto, between Lincoln, Grand Island, North Platte, Norfolk, Scottsbluff, on the one hand, and on the other all points in Nebraska over irregular routes under continuing contracts with NBC Computer Services Corporation. ACC is a specialized contract carrier for NBC Computer Systems, both in Nebraska and Colorado. He did not hear any testimony from witnesses that would

have an impact on its service to NBC Computer Services.

Nolan Mullins testified: He represents ASAP. ASAP has authority to carry commodities generally within designated locations and with significant use limitations. ASAP's equipment is shown in Exhibit 10. Its route structure is shown in Exhibit 12.

Bulk offered its authority which provides, among other things, common carrier authority for commodities generally between points within a 50-mile radius of Waverly and between points between said radial area on the one hand and on the other hand all points in Nebraska over irregular routes.

LEGAL AUTHORITY AND LEGAL REASONING

Neb. Rev. Stat. § 75-311, in pertinent part provides: A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of section 75-301 to 75-322.04 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future public convenience and necessity. Otherwise such application shall be denied.

Applicant's burden as to fitness, willingness and ability is well established in In re Application of Overland Armored Exp., 229 Neb. 524, 528 and 428 N.W.2d 166, _____ (1988) wherein the Nebraska Supreme Court held:

The burden of proof rests on the applicant for a certificate of public convenience and necessity to show that the applicant meets all the requirements of the statute. In re Application of Greyhound Lines, Inc., 209 Neb. 430, 308 N.W.2d 336 (1981).

Whereas the evidence in this proceeding shows that applicant has experience in transportation of various commodities in interstate and intrastate commerce as a motor carrier and possesses equipment that can perform such service, the Commission cannot ignore other significant facts and evidence relating to the threshold burden of fitness, willingness and ability. Specifically, the Commission cannot ignore the fact that on more than one occasion, both in the past as well as at the time of the initial hearing and the continued hearing, applicant's management has conducted operations beyond the scope of its authority.

Specifically, the evidence of record shows that a key portion of applicant's authority limits it to transport only from one origin to one destination for one customer on one vehicle. This prohibits and precludes the mixing of multiple shipments for multiple customers and multiple points on one piece of equipment. To circumvent this restriction, the applicant has been moving multiple shipments from Omaha to a facility in Lincoln. At the Lincoln facility, it then distributes the shipments out to multiple consignees and multiple destinations, it contends, under the statutory local exemption. That local exemption is set forth in Neb. Rev. Stat. § 75-303(4) which states that the Motor Carrier Act shall not apply to:

"The operation of any motor carrier owned in any city or village of this state engaged in the transportation of property within such city or village or within a radius of five miles beyond the corporate limits thereof;"

With a corporate motor carrier such as the applicant, the Commission has consistently held that such a motor carrier can only be based in one city or village in the state. The applicant by its own testimony holds out that it is Omaha based where it derives a substantial portion of its revenue from exempt operations within Omaha. Therefore, it cannot at the same time hold that it is owned in Lincoln and thus can conduct exempt operations there as well. To do so is in violation of the statute.

Applicant has been conducting under the same rationale a peddle delivery run wherein it originates multiple shipments going to multiple consignees from the shipper's Omaha facility. Applicant has contended that the authority which presently limits it to single shipments for single shippers and single consignees on a single vehicle, was removed previously by the Commission but had not been properly documented. In that regard, the Commission takes notice of its own records and observes that neither the applicant, nor any other party, sought to eliminate such language and that any modifications, deletions, or amendments to the applicant's authority were properly documented, and representations of the applicant to the contrary are incorrect. If the applicant were relying on such changes or amendments, it, and it alone, had the burden to timely contact the Commission and seek to clarify this matter, which it has never done. It is significant to observe that this matter was brought up at the time of the initial hearing on this matter and that applicant took no steps in the intervening period between the time evidence was first adduced on this issue and the continued hearing to communicate with the Commission concerning this matter. Such inactivity did not show any concern on behalf of the applicant to address and clarify this matter.

The Commission is further concerned that, although the applicant may contend it will operate in compliance with the Commission's rules if it is granted the authority sought, its operating witness has not expressed any concern or regrets

concerning the past alleged, illegal operations, nor was there any demonstrated or expressed assumption of responsibility for the illegal actions which had taken place. Rather, applicant's witness stated that the Commission had just conducted and completed an investigation of its operations and had advised it that it was in compliance. Such statement is unsubstantiated in the record and is inconsistent with the Commission's own records of which it takes notice.

Given its repeated violation of the Motor Carrier Act, the Commission would be remiss and unrealistic in finding applicant fit at this time.

In some cases, the Commission has been confronted with circumstances wherein the simple performing of unlawful services did not necessarily render an applicant unfit where the record showed and the Commission found there was no willful or intentional violation. However, in this record the Commission finds that the applicant's course of conduct clearly shows that it had notice and knowledge that it did not hold the authority to serve the shippers intrastate on multiple shipment traffic directly from origin to destination. Applicant rather elected to interpose an artificial stop-intransit/distribution system to evade the one-vehicle/one-shipment restriction in its authority. Applicant's participation in such an illegal operation was willful, and establishes that the applicant is unfit to hold the authority sought.

In view of the Commission's findings on the fitness issue, it need not go further in the consideration of this application. Given the applicant's attitude toward the compliance with the Motor Carrier Act, any consideration of the issues of public convenience and necessity is unwarranted.

From the evidence adduced, and being fully informed in the premises, the Commission is of the opinion and finds that:

1. Applicant is not fit, willing, and able properly to perform the proposed service and to conform to the provisions of Neb. Rev. Stat. § § 75-301 to 75-322.04, as amended, and the requirements, rules and regulations of the Commission thereunder.
2. The application should be denied.

ORDER

IT IS THEREFORE ORDERED BY the Nebraska Public Service Commission that the application of Inter Cities Courier Systems, Inc., Omaha, Nebraska, in Application No. M-13498 Supplement 1 be, and it is hereby, DENIED.

APPLICATION NO. M-13498, SUPPLEMENT 1

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MADE AND ENTERED this 9th day of March, 1994, at Lincoln, Nebraska.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Daniel G. Brewster
Duane D. Gay
Frank E. Landis, Jr.
James F. Munnely

Chairman

//s//Rod Johnson
//s//Frank E. Landis, Jr.
//s//James F. Munnely

ATTEST:

Debra R. King
Executive Director

