

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) APPLICATION NO. M-14205
of Tymar, LLC, d/b/a Second)
To None Moving, LaVista,)
Nebraska, seeking authority as)
Common carrier in Nebraska) DENIED
Intrastate commerce in the)
Transportation of household)
Goods between points in Cass,)
Sarpy, Douglas, and Washington)
counties and between points in)
said counties over irregular)
routes.) ENTERED: OCTOBER 14, 2009

For the Applicant:

David Skalka
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Omaha, NE 68108

For the Commission Staff:

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Lincoln, NE 68509

BY THE COMMISSION:

B A C K G R O U N D

By application filed July 7, 2006, Tymar, LLC d/b/a Second to None Moving, LaVista, Nebraska seeks to establish an authority as a common carrier of household goods in Nebraska intrastate commerce in service between points in Cass, Sarpy, Douglas, and Washington and between points in said counties over irregular routes. Notice of the application was published in The Daily Record, Omaha, Nebraska, on May 20, 2008. Timely protests to the application were filed by Two Men and a Truck, Jim's Moving and Delivery Company, Vaughn Moving, I-Go Van and Storage, vonRentzell Van and Storage, Earl vonRentzell and Chieftain Van Lines.

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A hearing on the application was held on August 5, 2009, with appearances listed above. Notice of the hearing was sent to all interested parties on July 14, 2009.

PRELIMINARY MATTERS

An issue in this case is the discovery that the applicant stated it served on the protestants and that were, in all cases but one, not answered by the protestants. The applicant has stated that the protestants failure to respond to these requests causes the admissions requests to be admitted by the protestors that failed to respond pursuant to Supreme Court Rule 6336.

The Commission hereby overrules the motion of the applicant and will allow the protestants testimony contained in the record and will give it the due weight that it deserves.

APPLICANT'S EVIDENCE

Myron Tyrone Franklin was called to testify for the applicant. Mr. Franklin is the owner-operator of the applicant. The applicant currently is licensed with the United States Department of Transportation (USDOT) as an interstate carrier of household goods, and has been so since March of 2008. In February of 2009, the applicant was audited by the USDOT and passed the audit.

Mr. Franklin testified that he had 22 years experience in the household goods moving industry with Allen Furniture as well as his own business. He was a manager and supervisor of employees at Allens.

Mr. Franklin stated that he had a business plan that he intended to follow. He has developed contacts with companies such as upholsters and wood workers that would use his service. These contacts would also produce other moves that he could perform.

He would provide extras in his proposed operation that other companies, to his experience, did not offer such as set up of electronics and extra cleaning after the move is completed. The applicant already has contacts set up with

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such companies who are impressed enough with his service that he has given in the past through Allens that they are desirous of using his proposed service.

Mr. Franklin stated he plans hire an employee if he is granted a certificate. He has examined the tariff and states he knows what he would charge under the tariff.

On questioning by Commissioner Schram, Mr. Franklin stated that he has purchased a 17 foot truck for use in the proposed operations. He said he would probably buy another truck but that this purchase would not occur right away. He also said he had most of the equipment that he would need such as pads and dollies already. He further stated that he had already purchased \$1 million in insurance.

On questioning by Commission staff, Mr. Franklin said that he had passed a federal safety audit in February of 2009.

Marijean Bechtold testified next for the applicant. She is a resident of Omaha who called Cheiftain Van Lines on July 2 to see if they could perform a move in the next few days. She was told that Chieftain would not be available to perform a move before July 10. She also stated that she called vonRentzell Moving and Storage on July 17 for another quick move but that they would not be available until the end of the month. She stated that she had called other movers, but that she was not able to arrange a quick move with anyone.

Mr. Bechtold further testified that he believed that Mr. Franklin is an upstanding individual who has a good reputation in the community. He felt that Mr. Franklin would provide a good service to the community.

Mr. Kenneth Hill testified next for the applicant. He has known Mr. Franklin for over four years. According to Mr. Hill, Mr. Franklin has an excellent reputation in the community.

Mr. Hill further testified as to a move he had experienced in May of 2009. He had hired Bryan's Team Moving to do a move for him, but on the date the move was supposed to take place they did not show. He made calls to

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the company and was told that they were on the way. He subsequently rented a U-Haul when the company finally arrived at the move site over two hours late.

Mr. Scott Vaughn testified for the protestant Vaughn's Moving. Mr. Vaughn testified that his business was down. Three years ago his business operated five trucks and had twenty employees. Today it operates three trucks and as seven employees. Overall, he testified that business was down twenty-five percent from last year. He further stated that his company performed one-third the moves in 2008 than it did three years earlier.

On cross-examination by Mr. Skalka, Mr. Vaughn stated that his company would have had a small profit in 2008. He also stated that he did not receive the discovery materials sent out by the applicant.

Earl vonRenzell testified for vonRenzell Van and Storage. He testified that his business was down in 2009. He said that this is due to the economic downturn that the country is experiencing. He said that he hoped to continue operations into 2010, when he expects the economy to begin its recovery and that the number of moves he will do should increase. Mr. vonRenzell further said that the moves of the type that his company performs and are a part of the proposed business of the applicant require special skills and training.

On questioning by Commissioner Landis, Mr. vonRenzell stated that his company has turned away requests for moves, but that these turn downs cam in the busiest months of the summer. He said that during the remainder of the time between September and May, that business is very slow and that he has not turned away business during these times.

On questioning by Commissioner Schram, Mr. vonRenzell stated that a company needs to have a truck that is bigger than that owned by the applicant to perform anything but the smallest moves. A one bedroom move could possibly be done with a 17 foot truck, but that anything larger than that would require a 24 foot truck or larger.

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In cross-examination by Mr. Skalka, Mr. vonRentzell stated that he had received the discovery materials and did provide some answers. He also stated that eighty percent of his business is in the same area as that proposed by the applicant. He further answered that his company was not profitable in 2008.

Brad Woodle testified for Jim's Moving and Delivery Company. He stated that his business was down thirty percent in the last two years. It was his opinion that the applicant could only perform small moves with the equipment that he stated he has. Two years ago, his company operated seven trucks and had fourteen movers. Today his company operates six trucks with eight movers who are not working forty hours per week. Mr. Woodle also testified regarding problems with one truck operations. These operations do not have the back up that other companies have. If they have a truck break down, they do not have a second truck to respond to the move. If a problem such as this arises, the public is inconvenienced. Other movers are then called in an effort to get the person moved. On questioning by Commission Boyle, Mr. Woodle said that he receives one or two "panic" no-show calls per month.

On examination by Mr. Skalka, Mr. Woodle admitted that he did not answer the discovery questions sent out by the applicant. He further stated that eighty percent of his business was in the Omaha metro area.

Kraig Kirchmann testified on behalf of Two Men and a Truck. Mr. Kirchmann testified that his company's business was down in 2009. Many of the company's trucks are idle, and most employees are working about thirty hours per week. He testified that his business was down fourteen percent in Lincoln and twenty-four percent in Omaha.

Mr. Kirchmann did state that his company did have truck availability during the dates that were addressed by the applicant in its case in chief. He further stated that his company had availability throughout most of July.

On cross-examination by Mr. Skalka, Mr. Kirchmann stated that his company was not profitable in 2008.

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Mr. Franklin was recalled for further testimony. He stated that he has done whole moves of homes in the past, and is familiar with and experienced in these types of moves. He further stated that he is not looking to perform the bigger moves at this time. On questioning by Commissioner Landis, Mr. Franklin stated that he was not interested in performing contact operations with the companies that he had listed, but he wanted the ability to perform other moves as they came to his business.

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

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2000), which provides,

A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the applicant is fit, willing and able to properly perform the service proposed. . . and (b) the proposed service is to the extent to be authorized by the certificate, whether regular, or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise the application should be denied.

In other words, the Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing and able." In this matter, the evidence is that the applicant is fit, willing and able to provide the proposed service. Mr. Franklin appears to have the financial backing and business acumen to perform the proposed service. He appears to have experience in moving that would allow him to perform the proposed operations. The Commission does have some issues regarding one truck operations such as that proposed by the applicant. In this specific case the applicant has made some investments in vehicles that would be appropriate for some of the moves that the applicant proposes to perform. He appears to have a good reputation in the community, and also appears to be financially stable. He has made the appropriate contacts

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with insurance. Based on the evidence before us and adduced from the record in the instant case, we find that the applicant has met the fitness test of Neb. Rev. Stat. Section 75-311.

We therefore turn to the issue of whether the proposed service is or will be required by the present or future public convenience and necessity. The traditional analysis for determining "need and necessity" was set forth by the Supreme Court in its May 8, 1998, ruling,

In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591 (1998).

The issue of whether an applicant has met its burden of demonstrating that the proposed service is consistent with public convenience and necessity is ordinarily a factual issue. *Id.* In this application, the Commission will look solely at the evidence presented by the applicant in its case in chief. Given the record before us, we find that the applicant has not presented sufficient evidence of need and necessity to support a grant of the application.

The first part of the test is whether the operation will serve a useful purpose responsive to a public demand or need. Mr. Franklin presented testimony regarding some contracts that he has with companies in the Omaha/Council Bluffs area that he has to perform some delivery services for them. Mr. Franklin also testified that he knew people that he could move for, but did not have any specifics as to who or what number of moves he would perform. He further stated that he wanted the ability to perform whole moves, but did not present any evidence himself as to

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members of the public who had been turned away or unable to find a mover. While one of the pieces of evidence that Mr. Franklin offered was a listing of new houses in the Omaha area that had pending sales, the Commission does not find this evidence to be persuasive regarding the moving activity that may be associated with that information.

The applicant offered two witnesses regarding need. Majijean Bechtold testified that she had called Chieftain on July 2 for a move she needed to be performed in the next few days. She said that Chieftain told her that they would not be available until July 10. She also said that she also called other movers who she said also said they were unavailable. Ms. Bechtold also contacted vonRentzell Van and Storage on July 17 to see if she could book another quick move. She was informed that they were booked for the rest of the month. The other need witness was Mr. Hill. He testified that he had contracted with Bryan's Team Moving for a move to be done in May of 2009, but that they did not show for the move. He said that he ultimately rented a U-Haul and moved himself.

In this case, the evidence is not sufficient to find need. In Mr. Hills' situation, he did have a company hired to do the move. The issue was not availability but the failure of the company to perform. In Ms. Bechtold's case, she testified that she was not able to find a mover for quick moves close to the time of a holiday (July 4th) and at the end of the month of July. Any shortage of service that is shown as limited as in this is not a basis on which to find need sufficient to grant an authority. There simply is not enough evidence before the Commission to find need for the service.

The second part of the test is whether the purpose can or will be served as well by existing carriers. In this matter, the only showing of inadequate service was that set forth by Ms. Bechtold. Mr. Hill had been able to contract with a company to perform the move. There was no evidence put forward by the Applicant regarding any other service inadequacies or from individuals service could not be arranged. Therefore, the Commission finds that the Application fails part two of the test.

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The third part of the test is whether the public demand or need can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. The Commission declines to enter a finding on this part of the test as it has found that the application failed the first and second parts of the test and thus should be denied.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that the application should be denied.


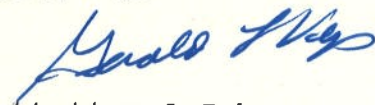
O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application M-14205, be, and it is hereby, denied.

MADE AND ENTERED at Lincoln, Nebraska, this 14th day of October, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s// Rod Johnson

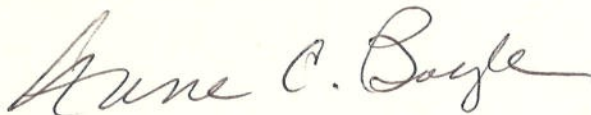
//s// Frank E. Landis


Chairman

ATTEST:


Executive Director

COMMISSIONERS DISSENTING:



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