

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

DEPARTMENTAL COMPLAINT
NO. 3021

ORDER AND JUDGMENT

Defendant.

ENTERED: AUGUST 30, 1993

For the Complainant:

Mark A. Ludwig
Attorney-at-Law
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(Pro se)

On August 3, 1993, pursuant to proper notice, hearing was had in the Commission Hearing Room at Lincoln, Nebraska, on the Commission's granting of complainant's motion for an order to show cause why suspension of defendant's fine entered in the Commission's order of April 7, 1992, should not be revoked and judgment entered accordingly. Defendant received notice of the hearing by certified mail, the affidavit of service and return receipt being offered and admitted as Exhibit A. Defendant appeared without counsel. Commissioner Frank Landis served as hearing officer.

I. Summary of the evidence

The complainant offered certified and authenticated copies of Commission orders marked as Exhibits B, C, D, and E which were entered on June 30, 1993; April 26, 1993; April 7, 1992; and March 10, 1992, respectively. The exhibits were duly admitted into evidence. Exhibit B is the order to show cause and order for hearing entered in this docket based upon the motion filed by complainant on June 29, 1993, for determination on whether the suspension of defendant's fine should not be revoked and judgment entered accordingly. Exhibit C is the order and judgment entered on April 26, 1993, in the docket MCC-3069, wherein defendant was fined \$500 for transporting household goods for hire in Nebraska intrastate commerce contrary to the state's Motor Carrier Act. Exhibit D is the Commission's order entered on April 7, 1992, sustaining defendant's motion for reconsideration and conditionally suspending the Commission order of March 10, 1992, wherein the defendant was fined \$4,500 on three counts of violating the state's Motor Carrier Act by transporting household goods for hire in Nebraska intrastate commerce without authority. Finally, Exhibit E is the

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original order and judgment entered by the Commission on March 10, 1992, wherein the defendant was fined \$4,500 following a hearing on Departmental Complaint No. 3021, the original docket at issue here. The complainant reiterated his request that the Commission reinstate the original fine of \$4,500 against the defendant for violation of the Commission's probation order. The defendant offered no evidence and made no statement in his own behalf.

II. Analysis and conclusion

From the record it is clear that defendant violated the Commission's conditional probation order of April 7, 1992, as evinced by the certified record of the order and judgment entered against defendant on April 26, 1993, for conducting a subsequent household goods movement on October 14, 1992, in blatant contravention of the Commission's order of April 7, 1992.

Clearly, defendant's violation merits reimposition of a penalty. The defendant has repeatedly displayed his contempt for the Commission's orders and the state's Motor Carrier Act. Neb. Rev. Stat. Section 75-322.02 allows the Commission to assess a civil penalty of up to \$5,000 against the defendant for the violation of any provision of Chapter 75, article 3, or for the violation of any rule, regulation, or order of the Commission issued pursuant to Chapter 75, article 3. The defendant was found guilty of violating Section 75-309 on at least five charged counts, and for violating Section 75-307 and the Commission's repeated cease and desist orders and probation order.

Neb. Rev. Stat. Section 75-322.02 states as follows with respect to assessment of a civil penalty:

The amount of civil penalty assessed in each case shall be based on the severity of the violation charged. The Commission may compromise or mitigate any penalty prior to hearing if all parties agree. In determining the amount of the penalty, the Commission shall consider the appropriateness of the penalty in light of the gravity of the violation and the good faith of such violator in attempting to achieve compliance after notification of the violation is given.

Rule 027.02B of Chapter 1, Title 291 of the Rules of Commission Procedure lists the following discretionary considerations available to the Commission in determining the amount of the penalty: The defendant's history of previous violations, the gravity of the violation(s), the good faith of the defendant in attempting to achieve compliance after notification of the violation is given, any hazard to the health or safety of the public caused by the violation(s), the economic benefit gained by the violation(s), the amount necessary to deter future violations, and finally, other circumstances as the public welfare may require.

The Commission believes that the defendant falls short of consideration for mitigation under each and every discretionary factor listed under the rule. The record shows that the defendant at one time

paid a \$1,000 fine on a previous complaint before the Commission. Then defendant was fined \$4,500 on three successive violations. That fine was suspended on the condition that the defendant commit no further violations. Six months later defendant committed a subsequent violation notwithstanding the Commission's order and was fined \$500. The history of violations by defendant is quite evident; the good faith of the defendant in attempting to achieve compliance is evident to the contrary. The defendant also failed to file proof of liability and cargo insurance so the Commission must also concern itself with the safety of the traveling public and consumer protection as both may be adversely affected by defendant's transportation operations.

The defendant is a willful renegade. The Commission once allowed the defendant the opportunity to redeem himself by conditionally suspending of the original fine. The defendant, however, appears bent on continued defiance of the state's motor carrier laws, rules, and regulations to the detriment of consumers and certificated carriers alike.

Therefore, although the defendant is undeserving of any abatement of the original \$4,500 fine, we have decided upon the following formula in imposing a civil penalty in this matter.

Pursuant to Neb. Rev. Stat. Section 75-155, as amended, any person who knowingly and willfully violates any provision of Chapter 75, any rule, regulation, or order of the Commission, or any term or condition of any permit or certificate issued by the Commission shall be guilty of a Class IV misdemeanor. Each day of such violation shall constitute a separate offense. Under Neb. Rev. Stat. Section 28-106, a Class IV misdemeanor carries a penalty with a maximum fine of \$500 and a minimum fine of \$100.

It is important that any fine imposed be of a sufficient amount to deter further violations, and take the profit out of any payments received by defendant for the illegally conducted movements. Otherwise, the defendant could consider any nominal fine to be merely an additional cost of doing business and pass on the loss by factoring such expense into the fees charged to his customers.

Therefore, based on these considerations and the defendant's history of violations and lack of good faith in achieving compliance with our motor carrier statutes, regulations, and Commission orders, we will assess the maximum penalty allowed for a Class IV misdemeanor against the defendant on all three counts defendant was found to have violated in the order of March 10, 1992. In addition, for violating the Commission's standing order of April 7, 1992, which suspended the original fine on the condition that defendant cease and desist from further illegal operations, we impose an additional \$500 for knowingly and willfully violating the Commission's probation order. This means that defendant should be assessed a total fine of \$2,000 in this docket, in addition to the \$500 fine already assessed and owing in MCC-3069 as entered in the Commission's order of April 26, 1993.

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O R D E R

IT IS, THEREFORE, ORDERED that defendant, Bill Reid, dba A & R Movers be, and is hereby, assessed a civil penalty in the total sum of two thousand dollars (\$2,000.00) for violating the state's Motor Carrier Act under Chapter 75, article 3 of the Nebraska statutes for transporting household goods in Nebraska intrastate commerce without authority as determined in the Commission's findings and order of March 10, 1992; and further for violating the Commission's order of April 7, 1992, which suspended the original fine and ordered the defendant to cease and desist from all further illegal intrastate transportation operations. Said penalty is to be made payable to the Treasurer of the State of Nebraska and remitted by cashier's check or money order to this Commission not later than thirty (30) days from the date this order is mailed to the defendant.

IT IS FURTHER ORDERED that the defendant cease and desist from all further operations in the intrastate transportation of property for hire without authority outside the exception provided under Neb. Rev. Stat. Section 75-303(4), as amended.

IT IS FURTHER ORDERED that should the defendant fail to obey these Commission orders, and, specifically, continue to transport property in Nebraska intrastate commerce without authority or fail to pay the civil penalties hereby assessed and any other civil penalty which may be due and owing to the state of Nebraska, that the Transportation Department of the Nebraska Public Service Commission petition the District Court of Lancaster County, Nebraska, to enjoin enforcement of these orders as provided by law under Neb. Rev. Stat. Section 75-140 et seq.

MADE AND ENTERED at Lincoln, Nebraska, this 30th day of August, 1993.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Daniel G. Unwiller
Duane D. Gray

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

James F. Munnelly
Chairman

ATTEST:

James F. Munnelly
Executive Director