

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of 5th Avenue Cab,	)	APPLICATION NO. PI-15
Council Bluffs, Iowa, seeking a	)	
declaratory order from the Commission	)	DECLARATORY ORDER
regarding taxi service from Eppley	)	
Airport to Omaha.	)	ENTERED: NOVEMBER 7, 1995

BY THE COMMISSION:

OPINION AND FINDINGS

By petition filed September 7, 1995, 5th Avenue Cab of Council Bluffs seeks a declaratory order as to whether the Commission has jurisdiction over transportation of passengers from Eppley Airport in Nebraska across Abbott Drive to downtown Omaha and other points in Omaha. Petitioner notes that a section of Abbott Drive, approximately seven tenths of a mile, is located in Iowa. The Abbott Drive route is the most direct route between the airport and destinations in most of Omaha. The question is whether the transportation is interstate or intrastate in nature.

Chad Patterson testified: He lives in Omaha but operates 5th Avenue Cab under a permit from the City of Council Bluffs, Iowa. He complies with the safety requirements of the City of Council Bluffs. He previously drove a cab leased from Happy Cab. He transports passengers between Council Bluffs and Eppley on a daily basis. His cab is equipped with a meter calibrated by an Omaha company. His rate is \$1.80 for the drop and \$.25 for every 1/5 of a mile. Exhibit 3 shows that Abbott Drive runs through Iowa. When he transports passengers from Eppley to Omaha, he drives down Abbott Drive which passes through the city limits of Carter Lake, Iowa. He passes through the State of Iowa and back into Nebraska. The portion of Abbott Drive which is in Iowa is approximately a half mile. It is not possible to go down Abbott Drive without taking the route through Iowa. There is no other way to go from the airport to downtown Omaha unless a circuitous route is taken. Even if he took the Locust Street route to a portion of Omaha, he would still have to go through Iowa. He could turn right coming out of the airport, head north on Pershing, drive to the Storz Expressway, which connects with the Sorenson Expressway and the 480 Expressway. Sorenson Expressway heads north and west, and the 480 Expressway turns south. Only passengers located in the northeast corner of the city can be carried by the most expeditious route without going through Iowa. Passengers who want to go north of Ames Avenue in Omaha can be transported most efficiently without going through Iowa. The only hotel he knows of in Omaha that could be served more expeditiously by going over the north route is the new Best Western. If someone would ask him to pick them up at that hotel or take them from the airport to that hotel, he would tell them that he did not have the requisite authority. He would also place a notice in his cab to inform passengers of the portions of Omaha that he is capable of serving. The notice is shown as Exhibit 5. Even if he had authority, he would still serve most of Omaha over the route that goes through Iowa.

Happy Cab produced one witness, Ray Mundy, who testified: He is a professor of transportation logistics in the college of business at the University of Tennessee in Knoxville. He has also served as Executive Director of the Airport Ground Transportation Association, which handles issues dealing with airport and ground transportation, taxicab, limousine, bus services, and regulatory nature of those vehicles serving airports across North America. Through his work with the association and the university, he has become familiar with airport taxi issues through a dozen or more taxicab studies dealing with municipal regulation of taxicabs or state and airport management of taxicabs over the last 15 years. In a study completed for the Kansas City airport, the report recommended that the airport contract with one stand manager that would subcontract with a limited number of taxicabs so that there was enough business for the cabs to go around. The subcontractor would inspect the cabs that wanted to be part of the system and maintain the level of service of the vehicles, check the ages and conditions of the drivers and dress so that the system was low cost but performed a high level of service. State regulation of taxicabs is unusual. Nebraska, Colorado, Pennsylvania and Nevada are the states that regulate local taxicab services. Many public service commissions used to, but over the years that was delegated through enabling legislation to the cities to manage intracity transportation, taxicabs, limousines and vans for the individual cities. Certain states still regulate taxicabs primarily because they feel the need to protect the public, provide sufficient regulation with respect to entry and insurance. Most of the taxicab companies that belong to his association that cross state lines are not regulated by the ICC. They typically don't have dual authority in two states. Typically they travel under the ICC's commercial zone exemption provided for airport baggage and passengers. The ICC sometime decided that it didn't want to regulate movements across state lines of smaller vehicles. It was basically a local matter and as long as the company was serving the airport and the rather loosely defined commercial area around the airport, it was exempt from ICC. An airport can't have someone in a general cab line that refuses service to where the general public wants. He checked with the ICC. A lawyer told him the ICC does not regulate vehicles with six passengers or less.

#### DISCUSSION

49 USCS § 10526(b)(1)(B) states:

(b) Except to the extent the Commission finds it necessary to exercise jurisdiction to carry out the transportation policy of section 10101 of this title (49 USCS § 10101), the Commission does not have jurisdiction under this subchapter (49 USCS §§ 10521 et seq.) over --

(1) transportation provided entirely in a municipality, in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except -- ...

(B) that in transporting passengers over a route between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State, the transportation is exempt from the jurisdiction of the Commission only if the motor carrier operating the motor vehicle also is lawfully providing intrastate transportation of passengers over the entire route under the laws of each State through which the route runs;

From a reading of that statute, it would appear that the ICC would have jurisdiction over Mr. Patterson's operation because he does not have authority from this Commission; however, even though the statute provides for it, there is no evidence that the ICC does in fact regulate taxi operations which use vehicles of six passenger or less capacity. The only Nebraska case that has confronted the intrastate/interstate issue of motor transportation is In Re Application of Silvey Refrigerated Carriers, Inc., which said:

In determining whether a carrier's operation in hauling goods between points in one state through another state is a subterfuge, courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuitry involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling as to the outcome.

The Court found that Silvey's operation was in fact an interstate operation. That case, however, should be distinguished from the present case on the facts as well as the law. That case was decided according to a line of federal cases and statutes which controlled transportation of property. Even though Mr. Patterson plies the same route used by intrastate carriers and the routing would be used apart from the carrier's lack of intrastate authority, Patterson admits that he could not give full service to the traveling public. The evidence does not reveal whether Patterson's operation would be incidental or dominant to his overall operation.

The Commission derives its jurisdiction from Article IV, Section 20 of the Nebraska Constitution, which provides that the powers and duties of the Commission "include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated by this provision." The courts have held, "In the absence of implementing legislation the powers of the ... commission under" Article IV, Section 20 of the Nebraska Constitution "are plenary in character and

self-executing." In Re Application of Richling, 154 Neb. 108, 47 N.W.2d 413 (1951). See also, Neuswanger v. Houk, 170 Neb. 670, 104 N.W.2d 235 (1960) (recognizing that the Commission's constitutionally-granted "powers are plenary and self-executing in the absence of specific legislation on the subject").

In this case, while the Nebraska Legislature has enacted specific legislation regarding the Commission's power with regard to "intrastate" commerce, see Neb. Rev. Stat. § 75-118(1) (Reissue 1990), the language of these statutes does not purport in any manner to serve as a "limit" upon the Commission's otherwise plenary constitutional power to exercise "general control of common carriers." The Commission is "authorized to exercise the powers and perform the duties enumerated in the constitutional provision," unless the Nebraska Legislature enacts "specific legislation limiting the scope of the commission's powers." Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N.W.2d 363 (1948) (emphasis added). Thus, the Commission is authorized to exercise "general control of" 5th Avenue Cab's purely local, predominately intrastate common carriage activities pursuant to Article IV, Section 20 of the Nebraska Constitution.

Further, the Commission's exercise of jurisdiction over 5th Avenue Cab's purely local, predominantly intrastate common carriage activities is permissible under the Commerce Clause of the United States Constitution, U.S. CONST., Art. 1, § 8, cl. 3, even though a minuscule portion of 5th Avenue Cab's route is interstate in nature. As the United States Supreme Court has recognized, while the "Commerce Clause significantly limits the ability of States and localities to regulate . . . interstate commerce, . . . it does not elevate free trade above all other values." Maine v. Taylor, 477 U.S. 131, 151, 106 S.Ct. 2440, 2454 (1986) (stating general rule that a State does not overstep its role in "regulating interstate commerce" when such regulation only "incidentally" places a minimal burden on interstate trade "in relation to putative local benefits"). Under the Commerce Clause, a State "retains broad regulatory authority to protect the health and safety of its citizens." Id. Thus, the Commission's assertion of jurisdiction over 5th Avenue Cab's predominantly intrastate common carriage activities represents a proper exercise of the Commission's "broad (constitutional) regulatory authority to protect the health and safety of (Nebraska) citizens." See Taylor, 477 U.S. at 151, 106 S.Ct. at 2454.

Although the federal code suggests that the ICC may have jurisdiction over carriers such as 5th Avenue Cab, the fact of the matter is that the ICC has not exercised jurisdiction. Absent regulation by the Public Service Commission or the ICC, air travelers would be at the mercy of unscrupulous, ill-equipped and underinsured carriers. Reasonable rate structures could be ignored. If the Commission were to decline jurisdiction in this case, this Commission would be introducing chaos into an otherwise well-regulated and efficient transportation system. Although the statutes and case law are not clear, what is clear in these circumstances is the Commission's duty under its constitutional mandate to act to protect the public interest.

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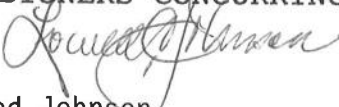
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O R D E R

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that jurisdiction will be asserted by this Commission over motor transportation by taxicab and limousine between Eppley Airport and all points in Nebraska.

MADE AND ENTERED in Lincoln, Nebraska, this 7th day of November, 1995.

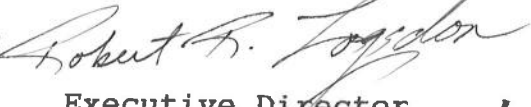
COMMISSIONERS CONCURRING:

  
//s//Rod Johnson  
//s//Frank E. Landis  
//s//Daniel G. Urwiller

NEBRASKA PUBLIC SERVICE COMMISSION

  
Chairman

ATTEST:

  
Executive Director

COMMISSIONERS DISSENTING:  
//s//James F. Munnelly

DISSENT OF COMMISSIONER MUNNELLY:

As I remarked before I moved to defer action on this matter, this petition for a declaratory opinion should be submitted to the more objective study of the Attorney General. Since my motion did not prevail, I am compelled to dissent from the opinion of the majority.

The majority clearly demonstrates that it is assuming jurisdiction over this matter simply to protect the existing cab companies as well as air passengers. My position at the Commission has always been that serving the Omaha area to assure passengers adequate service at reasonable rates is the Commission's responsibility. From that standpoint, the majority opinion may be well meaning, but it is positively contrary to the existing federal and state statutes as well as all prior case law.

The only reasonable conclusion that can be reached in this case is that a taxi operating over interstate routes is beyond the jurisdiction of the Commission and nothing in the Nebraska constitution can give it such power to regulate such transportation.

First of all, the majority does not even attempt to come out and declare that the operation in question is one of intrastate commerce.

The majority states that the Commission derives its jurisdiction over this clearly interstate operation from Article IV, Section 20 of the Nebraska Constitution. This is an absurd finding.

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It is my position that there is only one question to be decided: Is the operation of 5th Avenue Cab between points in the same state, through another state, interstate in nature. If it is not, then the Commission has jurisdiction. If it is, then the Commission obviously does not have jurisdiction. Jurisdiction has always been limited by Congress so that any operation involving a movement through another state lies exclusively with the ICC. The state cannot legislate power over such matters as interstate commerce which is governed by the Congress.

The Silvey case has been twisted then ignored by the majority. That case should be the guideline by which we determine whether an operation is interstate or not.



Commissioner James Munnelly