

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In re Wayne F. Rowe, Director, ) Application No. PI - 2  
Transportation Department of )  
the Nebraska Public Service ) Petition for Commission  
Commission, ) Investigation of the  
Relator, ) intrastate carrier service  
vs. ) conducted to and from  
Mayflower Contract Services, ) Eppley Airfield, Omaha,  
Inc. (B-1275); Happy Cab Co. ) Nebraska, from on or about  
d/b/a Happy Cab (B-1215), ) October 25, 1991, to on or  
Yellow Cab (B-1122), and ) about October 30, 1991, to  
Checker Cab (B-1121); John ) determine whether violations  
Doe; and John Doe's un-named ) of the Nebraska Motor  
organization, ) Carrier Act occurred.  
Respondents. )  
Dated: February 25, 1992

DISMISSED

APPEARANCES:

For the Respondent,  
Happy Cab Co., Inc.:  
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For the Relator:  
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For the Commission:  
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BY THE COMMISSION:

Preliminary Matters:

Wayne F. Rowe, Relator, filed a petition for investigation in this matter on November 1, 1991, following a complaint received by a group of Omaha, Nebraska, cab drivers. On November 5, 1991, the Commission ordered a hearing to be set on the Relator's petition and notice of the hearing was mailed to all interested parties on November 8, 1991. The hearing was held on December 16, 1991, with appearances as shown in the Commission Hearing Room at Lincoln, Nebraska.

OPINION AND FINDINGS

I. Summary of the Evidence

John (Jack) Foral testified. Mr. Foral is the Omaha area inspector for the Nebraska Public Service Commission. Foral

testified that he was informed of a problem at Eppley Airfield on October 28, 1991, after receiving a phone call from Ray Testerman, an employee of Happy Cab Company, Inc. (Happy Cab). Upon his arrival at the airport, Foral met with Don Smithey, Airport Authority Director, and Happy Cab representatives Matt Butler, Lois Feddersen and Ray Testerman. The people from Happy Cab informed Foral that a group of conventioners had rented a bus and parked it close to the airport cab stand and had been soliciting passengers in the airport terminal prior to Airport Authority officials commanding them to stop.

Foral then contacted Sharon Perina of Mayflower Contract Services, Inc. (Mayflower) which operated the bus in question. Foral wanted to determine what arrangement Mayflower had with the National Indian Educational Association (NIEA), which was the convention group apparently utilizing the Mayflower bus operating at the airport terminal.

During the course of his investigation, Foral learned that it was a member of the NIEA by the name of Art Hill, who was the party actively soliciting \$6.00 per person at the airport terminal on behalf of the NIEA to help recoup the costs associated with rental of the Mayflower buses. Two buses had been leased from Mayflower with Mayflower providing its own drivers. Mr. Hill was carrying a sign in the airport area advertising the shuttle service and \$6.00 per passenger fee. According to Foral's testimony, Mayflower itself did not initiate the solicitation, nor did any Mayflower employee on or off the buses participate in soliciting fees at the airport. A second sign was placed on the bus itself which identified it as the NIEA shuttle, Foral said.

Foral also testified that certain cab drivers boycotted the airport following the Mayflower bus incident on the 28th of October. Specifically, the Happy Cabs would not service the feeder line into the airport terminal area until approximately October 30 when they returned. Foral added that the boycott was an endeavor planned and carried out by a group of cab drivers only. Happy Cab management did not sponsor the boycott, he said.

On cross-examination, Mr. Foral testified that the initial allegation that someone without proper PSC authority was transporting passengers for hire turned out to be inaccurate as the convention passengers from the NIEA were being transported under the Mayflower authority. The particular bus observed by Foral on October 28 did not bear a PSC plate, however, and Foral testified that Mayflower representative, Sharon Perina, told him that this was possibly an oversight. The bus used was of the school bus variety and not the travel coach type. Foral issued no citation or warning for Mayflower not displaying the proper PSC plates.

Foral said it would be a Commission violation for a Happy Cab to refuse a dispatched call from the airport, but was unaware of any request for service to the airport actually being refused by any Happy Cab driver. Foral witnessed Happy Cab taxis dropping people off at the airport during the boycott period, but did not view any Happy Cab vehicles under the canopy or in the feeder line.

Robert Logsdon testified. He is a rate auditor with the PSC Transportation Department. Mr. Logsdon reviewed the freight bills from Mayflower, and also copies of written correspondence sent by Mayflower to the NIEA representative in Omaha outlining Mayflower's proposed rates and services. There were no signed contracts between Mayflower and the NIEA. Logsdon testified that Mayflower was operating within its authority for the service provided to the NIEA during the episode in question.

Logsdon testified that Mayflower charged the maximum hourly rate of \$18/hour but on cross-examination testified that Mayflower originally charged \$20/hour and discounted ten percent (10%) which resulted in the net charge of the maximum allowable rate of \$18/hour.

Although he stated that discounting is not generally allowed, Logsdon did not know if Mayflower's action would constitute a violation under the Commission's rules since the discount did not amount to a rate undercharge. A violation would have occurred had the original \$20/hour been charged, Logsdon said. No reports of any nature were filed with the Commission regarding Mayflower's charter service with the NIEA, he added.

Sharon Perina testified. She is the contract manager in Mayflower's Omaha office. Ms. Perina was the party directly responsible for arranging the charter bus service for the NIEA. Perina testified that the majority of her business is conducted over the telephone. Mayflower performs hundreds of charters every month and formal legal contracts are not drawn up for these charter trips. No contract was signed between Mayflower and the NIEA. All business between Mayflower and the NIEA was conducted over the telephone and followed up by a series of Mayflower memos (Exhibits C, D and E). Mayflower has never filed any report on any specific charter operation with the Commission and was not aware that any such filing was required, Perina said.

The buses provided by Mayflower to the NIEA were 35-foot yellow school buses with the words "School Bus" painted on the front and back of the buses. These particular buses are also used to transport school children. The Mayflower buses displayed an NIEA sign on the windows toward the front of the vehicles. Perina said she spoke with security personnel at the airport to determine where her buses could park outside

the terminal. Perina asked the Airport Authority at the behest of the NIEA if a booth could be set up inside the terminal to collect funds for the bus transportation provided by the NIEA. The Airport Authority official Perina spoke to refused permission. Mayflower direct billed the NIEA for its transportation services and did not participate in the individual solicitation at the airport.

According to Perina, only one of the buses used was not PSC-plated because a driver exchanged a PSC-plated bus for a non-plated bus in the Mayflower bus yard which had a full tank of fuel. Perina said the driver gave no thought to the fact that the bus was not PSC-plated. Mayflower had about 100 buses in that particular pool of which only 20 are fitted with PSC plates.

With respect to the billing practice employed by Mayflower, Perina testified that she billed the NIEA \$20/hour less 10% discounted for a final sum of \$18/hour. Perina stated that the discounting was a marketing ploy which has also been done for some of Mayflower's senior citizen clients. For the senior citizens, the 10% discount was taken off the \$18/hour maximum rate. Perina said she didn't know such discounting was not a "legitimate thing."

On cross-examination Perina classified Mayflower's arrangement with the NIEA as a charter service. This is because she billed a lump sum to the NIEA for the transportation service and did not individually contract with or bill the NIEA member passengers. With regard to the filing of Commission reports, Perina stated that she was not familiar with any Commission rule or requirement regarding the filing of such reports, and she had never filed one. She added that she was never advised that it was a requirement, nor had she ever received any written indication to do so.

Paul Hagerty testified. He is the Director of Fleet Management at Happy Cab, responsible for the recruiting and retention of cab drivers. Hagerty testified that as many as 50% of Happy Cab drivers do not service the airport in Omaha. Nothing requires Happy Cab drivers to participate in the feeder line at the airport, Hagerty said. However, the witness testified that to his knowledge no request for service was ever refused an airport passenger during the boycott period, nor did the Happy Cab Company take any action to enhance or encourage the boycott.

Since Happy Cab drivers are independent contractors, Hagerty said they have the right to refuse answering any given dispatch call. In the event a driver refuses a dispatch, another cab is dispatched so that service is still provided. Hagerty testified that the Airport Authority is well satisfied with the services of Happy, Yellow and Checker Cab companies, based on comments made by Don Smithey of the Airport Authority

in a Midlands Business Journal article (Exhibit 1). Hagerty claimed no knowledge of any past or present discussions between Happy Cab and the Airport Authority regarding displeasure over the boycott or Happy Cab's level of service to the airport. Also, Hagerty knew of no way Happy Cab could prevent its drivership from initiating a similar boycott in the future since the drivers are independent contractors.

Happy Cab drivers Ray Petrick and Stan Latta gave short statements explaining their observations of the Mayflower incident and subsequent boycott. Mr. Petrick admitted to organizing the boycott and stated that all the drivers wanted was an investigation into the problem and someone to tell them who had authority over the matter. Mr. Latta stressed that at no time did any member of Happy Cab management speak to any of the drivers individually or collectively to encourage them in any way to boycott the airport or refuse any orders out of the airport.

## II. Analysis

The filing of this Commission petition for investigation followed on the heels of a field investigation into an incident where it was initially suspected that some person or organization may have been operating in the for-hire transportation of passengers without authority or outside the scope of a granted authority.

As the testimony reveals, such was not the case. The buses used by the NIEA conventioners were leased from Mayflower Contract Services, Inc. (B-1275) which holds authority from this Commission to haul passengers and their baggage by bus between points in Nebraska over irregular routes. The NIEA members were transported under the Mayflower authority since Mayflower provided both the vehicles and drivers. As Commission Auditor Robert Logsdon testified, Mayflower was operating within its proper authority for the service it provided. The buses were identifiable to the public by the "NIEA" signs posted in the windows toward the front of the buses. It was a single NIEA official who was soliciting bus fare in the airport terminal on his own authority and without any cooperation or encouragement from Mayflower. Mayflower billed the service at a charter rate and did not solicit any individual riders.

Although Mayflower did not, in the final accounting, bill an actual overcharge or undercharge for its services to the NIEA, this Commission finds that the billing tactics used by Mayflower were in contravention with the law and indeed amounted to a constructive overcharge. Section 75-126 R.R.S. 1943 (1990 Reissue) reads in pertinent part as follows:

*(1) Except as otherwise provided in this section, no common carrier shall:*

*" . . . (e) Demand, charge, or collect, by any device whatsoever, a lesser or greater compensation for any service rendered than that filed with or prescribed by the commission; or  
(f) Charge any rate, schedule, or classification in any manner whatsoever before application has been made to the commission and permission granted for that purpose. . . " (Emphasis supplied.)*

The witness for Mayflower testified that she knew the maximum chargeable amount was \$18/hour but that the \$20/hour charged less the 10% discount was a "marketing ploy." Although the net effect of this creative billing scheme was that the maximum allowable fee was actually billed, the Commission finds such practice to be fraudulent and misleading to the public and violative of Section 75-126, supra, of the Nebraska statutes. Mayflower had no legal authority to initially charge a phantom rate of \$20/hour for its service, notwithstanding the 10% discount, and thereby constructively change its allowable rate. Mayflower's action was technically a rate overcharge or, at the very least, an indirect and impermissible deviation from the prescribed rate as it was overtly portrayed to the NIEA contractor.

Evidence was also adduced at the hearing which showed that Mayflower filed no report with the Commission pursuant to Title 291, Chapter 3, Rule 012.03H of the Commission's Motor Carrier Rules and Regulations. However, it is this Commission's understanding that this specific rule and those preceeding it under Section 012.03 were designed following the passage of Section 75-314 R.R.S. 1943 to accommodate common carriers with only regular route authority so that under certain circumstances as provided under the aforesaid prescribed rules and regulations, they may contract to perform special or charter party service. Rule 012.03H thus serves as a check on charter or special party services to ensure that regular route carriers do not circumvent the rules and regulations under Section 012.03 which limit the scope of their allowable charter or special party service range. {See specifically Rules 012.03A, .03B, and .03D}

Section 75-314 R.R.S. 1943 (1990 Reissue) states:

*"A common carrier by motor vehicle operating under any certificate issued under section 75-311 may occasionally deviate from the route over which, or the fixed termini between which, it is authorized to operate under the certificate, under such general or specific rules and regulations as the commission may prescribe. Any common carrier by motor vehicle, transporting passengers under such certificate, may transport in intrastate commerce to any place special or chartered parties under such rules and regulations as the commission shall have prescribed. . . "*

In Mayflower's case, the charter service provided involved no deviation from the authorized route as Mayflower holds statewide irregular route authority. Mayflower's broad irregular route authority obviates the necessity of filing a report under Rule 012.03H, the main purpose of which is to police special or charter party service operations by common carriers with regular route authority so that they do not overlap the regular routes of other carriers. The protections provided under Rule section 012.03 et seq. are for the large part inapplicable to a charter service provided by a common carrier holding statewide irregular route authority such as Mayflower.

The Omaha cab companies also named as respondents in the petition for investigation were represented at the hearing. The airport boycott initiated by a group of Happy Cab drivers lasted approximately two days. The boycott amounted to Happy Cab drivers refraining from participation in the taxicab feeder line at Eppley Airfield. The testimony indicated that Happy Cab management took no active role in either organizing the boycott or supporting its continuation after it began.

Happy Cab drivers are independent contractors and basically set their own schedules and determine their own service areas. Happy Cab drivers are not required to service the feeder line at the airport, and their refusal to do so constituted no apparent violation of any Commission rule or regulation. There was no testimony offered to support the concern that any request for service by an airport passenger was refused by Happy Cab during the boycott period. Happy Cabs were observed dropping passengers off at the airport, so it would appear from the evidence that the boycott was limited to the physical stationing of Happy Cabs outside the airport terminal.

Happy Cab introduced evidence to support a claim that the Omaha Airport Authority was well satisfied with Happy Cab's service to the airport, and no representative from the Airport Authority was present to address the issue of the boycott. We find no violations on the part of Happy Cab or its drivers.

### III. Conclusion

Based on the foregoing findings, the Commission first charges Mayflower to stop its practice of discounting inflated rates as a marketing means of attracting client accounts under false pretenses. Secondly, we find that it was the NIEA official acting alone at the airport terminal who conducted the solicitation complained of. Since he was soliciting members of his own convention party already booked on the Mayflower-leased buses, he was not soliciting passengers from the general public and we therefore find no violation of the law in that regard. How the NIEA organization raises money from within the ranks of its own membership to pay for its



convention expenses, including recouping transportation costs, is a matter of its own internal affairs and outside our jurisdiction to regulate. Though the NIEA official may have been guilty of hawking at the airport terminal, he was only seeking out his fellow convention-goers and his activity was promptly terminated by the Airport Authority. Any subsequent solicitation conducted on the Mayflower buses is again an internal fund raising enterprise outside the scope of Commission control.

Finally, we have stated that we find no obvious violations on the part of Happy Cab or the Happy Cab drivers who boycotted the airport. However, the Commission is concerned about the possibility of a similar such incident occurring again. In the interest of the public good and the public carriers which it serves, the Commission trusts that future problems can be avoided through mediation, and therefore strongly urges the cab drivers to bring any grievance directly to the Commission first before taking alternative measures of a more drastic nature, such as the Eppley Airfield boycott investigated here.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, pursuant to Section 75-126 R.R.S. 1943 of the Nebraska Statutes, as amended, Respondent Mayflower Contract Services, Inc. (B-1275) cease its practice of discounting inflated rates which are greater than those established and fixed by this Commission.

IT IS FURTHER ORDERED than upon this conclusion of the Commission investigation of Application No. PI-2, the petition for investigation in this matter be hereby dismissed.

MADE AND ENTERED at Lincoln, Nebraska, this 25th day of February, 1992.

#### NEBRASKA PUBLIC SERVICE COMMISSION

*Daniel G. Urwiller*  
Vice Chairman

ATTEST:

*John R. [Signature]*  
Executive Director

COMMISSIONERS CONCURRING:

*Duane D. Day*

//s//James F. Munnelly

//s//Eric Rasmussen

//s//Daniel G. Urwiller