

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public) APPLICATION NO. PI-3
Service Commission Investigation of)
Intrastate Garbage Transportation)
Regulation.) ENTERED: DECEMBER 8, 1992

APPEARANCES: For Adams & Son Trucking, Inc.:
Laverne R. Holdeman, Esq.
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Lincoln, NE 68505

For Arthur E. Smith & Sons Trucking, Inc.
Bradford E. Kistler, Esq.
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BY THE COMMISSION:

OPINION AND FINDINGS

On June 2, 1992, the Commission, on its own motion, decided to reopen Docket PI-3 for purposes of receiving comments and making further inquiry into the matter of regulation of the transportation of garbage in general and recyclable material in particular. Notice of the investigation was published in the Daily Record on June 10, 1992, pursuant to the rules of the Commission. Hearing on the matter was held July 13, 1992, with appearances as shown.

Laverne Holdeman testified: He represents the interests of Adams & Son Trucking, Inc. (Adams), an oil field commodities carrier in Nebraska intrastate commerce. Adams is concerned that through this process there might be an attempt to deregulate transportation of water from oil field operations. Adams is interested in both the water that is hauled to a drilling site for the purpose of operations and the waste water which is the product of oil field operation. Adams is concerned this investigation may result in the deregulation of the transportation of the waste water which would nullify the substantial investment of oil field carriers who transport waste water to a disposal site. Water which is produced from oil field drilling has high salt and chemical content which, if not properly disposed of, can harm soil for as long as ten years. The Environmental Protection Agency is in the process of closing open pits for the dumping of water and there are to be wells designated to take the waste water. In Colorado where Adams also operates, transportation of waste water is not regulated. Colorado is experiencing major problems due to unsafe dumping practices. Adams and other certificated oil field carriers have developed special procedures at their expense to train employees, update and improve equipment. The carriers have been able to make this expenditure because, though the hauling is limited, it is a regulated commodity with a limited number of carriers in the field. Deregulation of the transportation of drilling waste water would result in dilution of traffic which would not warrant or not make it feasible to spend the time and money involved in the training and updating of equipment. Control of waste water by EPA is not comprehensive and is reactive. Control by the Commission is pro-active.

Bradford Kistler testified: He represents Smith Systems (Smith). Smith was organized specifically for the purpose of transporting hazardous waste materials. The application was filed in December 1991 and is still pending. Smith was seeking authority in order to serve the developer of the disposal incinerator near Kimball. He is concerned that the order entered March 10, 1992, was ambiguous. He questions what is garbage and solid waste. Does the order refer not only to dry materials, but to liquid? If the order intends to exempt from regulation waste, oil, and spent acid, Smith would probably dismiss its application. If those products are regulated, Smith does not want to dismiss its application and will need that authority sometime. The Commission would be remiss in its duties if it deregulated what are commonly known as hazardous materials defined by the EPA and regulated by the Department of Transportation. Dangerous materials should be transported by carriers the Commission has had an opportunity to check, who are qualified to do so, have requisite insurance, and are able to provide the service required. The Commission should follow the DOT and EPA definitions of hazardous waste.

Kay Stevens testified: The concern of the Nebraska State Recycling Association is dealing with the businesses it represents and the private non-profit programs, the city programs, the county programs, who are currently involved in recycling activity. NSRA has about 250 to 300 members. Its concern revolves around the addition of regulatory and financial burdens to the businesses which are already burdened. In 1988, aluminum was selling for 65 cents a pound. It is now selling for 25 cents a pound. Newspaper was selling for \$40 per ton, now there are communities in Nebraska which pay \$5 to \$20 a ton to get rid of newsprint. The issue is whether the Commission should regulate a material which is usable but of no value. NSRA is opposed to taking any measure that would create a bigger problem than it has already. Recycling programs in Lincoln, Minden, Sidney, Scottsbluff, Chadron and Omaha are subsidized. The only reason those cities are recycling is that each city provides financial support. In Nebraska recycling is a depressed industry. NSRA opposes additional layers of regulation on small businessmen in the state. If movement of recyclables is regulated, then she thinks the transportation of garbage should be regulated.

Jerry Batliner testified: He represents Dennis Paper Sales in Lincoln. It is a recyclable material processor. It has a subsidiary called DPS Transport, Inc., which has ICC and PSC authority. Most recycling groups are hauling their own material. In small communities a farmer or small trucker who lives in the community will bring the recyclables to a collection point on his farm truck for free. The market prices rollercoaster. Two or three years ago prices were at an all time high. Currently, prices are at an all time low for 20 years. There is no money to pay anybody to haul recyclables to a recycler. Sorting is the only processing that takes place in Lincoln. The recycling industry is hanging by its fingernails. He recycles paper, aluminum, and glass. He doesn't get glass from other than local sources. He hauls some aluminum from around the state. It is mostly paper in which he deals. There is a lot of encouragement from state, local, and federal governments to

recycle. The market to handle all the material hasn't materialized. In some cases, the recycler has to pay the freight to get rid of the paper.

Gary Skokan testified: He represents Omaha Transportation. He is all for state agencies, Boy Scouts, 4-H, and local communities who participate in recycling. They are not going to be regulated because they are exempt anyway. He has been pro-regulation since he was born. Recycling is a commodities market. Whether gas, oil, plastic, paper, the price is going to rollercoaster. Hauling waste material whether it is water, solid waste, whatever is big, big business. It needs to be regulated. His authority does not permit hauling of hazardous waste. He does not want that authority because of the insurance requirements.

The Legislature adopted the Motor Carrier Act and designated the Commission to enforce the act in order to regulate the economics and safety of motor transportation. The act was adopted more than 55 years ago. Congress adopted the concept of economic regulation of the motor carrier industry in 1935, and the states' motor carrier laws were patterned on the federal model giving comprehensive regulation of the economics and safety of motor carriage, subject to a number of exceptions. In the 1980's Congress and the Interstate Commerce Commission virtually abandoned economic regulation of motor carriage and Congress transferred enforcement of most of the safety aspects of carrier regulation to the Department of Transportation. Now DOT enforces its safety code on transportation of hazardous materials in intrastate commerce as well as interstate commerce by regulated and unregulated carriers. The federal government has virtually preempted the regulation of the safe operation of motor carriage. Every witness that appeared in this proceeding recognized the ascendancy of the DOT where hazardous materials are concerned. Over and above the regulation imposed by DOT, EPA oversees the handling and disposal of almost all waste of any kind. It is clear that the public does not need another layer of regulation by this Commission to protect it from the transportation and disposal of hazardous waste, ordinary garbage, or recyclable materials.

That leaves the question of the efficacy of economic regulation of the transportation of waste and those elements of waste that from time to time can be retrieved and reused. It is readily apparent from the testimony of the witnesses in this proceeding that products which may be reusable are not necessarily in demand by those industries which could make use of them. The market for reusable materials fluctuates widely. It is apparent that imposition of economic regulation on the transportation of recyclable material will not encourage collection and handling of those items. In order to create, sustain, and take advantage of markets for materials which have been discarded by the public, those who seek to compete in those markets require the utmost flexibility.

In its order entered herein on March 10, 1992, the Commission held that "garbage which is transported to or from a collection and/or sorting site to a recycling center, or from the recycling center to a manufacturer or other purchaser consignee should continue

to be regulated on the basis that recycled or recyclable property has value and is, therefore, properly subject to economic regulation." The evidence brought out in this hearing shows that although recyclable material may have value from time to time, the value fluctuates radically and at times has no intrinsic value. Part of the theory behind the adoption of economic regulation of motor carriage was that the public needed a certain amount of protection to insure that the value of the commodities entrusted to common carriers would be guarded and preserved. Adoption of safety measures and insurance requirements fulfilled that purpose. It would be specious to argue that the same rationale should apply to recyclable materials. All the evidence shows that although the recyclable materials have a measure of value, they are of such nature that the value is not jeopardized by the exigencies of transportation. If a truckload of paper, scrap aluminum, or scrap iron is involved in an accident, the value of the cargo when it is salvaged will not be substantially less than what it was before the accident. All trash and garbage including any items retrieved from discarded material does not have value within the meaning of the Motor Carrier Act or the common law of common carriage. The Commission finds that it would not be doing the public any service to impose economic regulation on transportation of recyclable commodities.

It is not the purpose of this proceeding to overturn settled law of motor carrier regulation nor to induce uncertainty about the present state of regulation. The transportation of oil field water, both fresh and waste, has been regulated since the inception of motor carrier regulation. Likewise, tariffs have been in place for years for transportation of scrap iron. Transportation of fly ash, dirt, rubble, and other construction materials of dubious intrinsic value has also been regulated although tariffs no longer exist for those commodities. It is not the Commission's intention to tamper with the long-standing regulation of transportation of those commodities. The Commission does, however, want to disassociate itself from the regulation of household and industrial garbage and trash transportation. In order to clarify the issues raised by this inquiry as to what transportation of materials should be regulated and what should be exempt, the Commission will adopt four definitions. The federal government has defined three categories of materials: Sociable recyclable materials, 49 USC 10733; virgin/non-virgin waste materials, 40 USC 10731; and hazardous waste, 40 CFR 171.8. Drawing on those federal definitions and including an additional definition of garbage, the Commission aspires to lay to rest the questions of what commodities can be transported without authority from the Commission.

For purposes of construing the Motor Carrier Act and the Rules of the Commission the following definitions will govern:

Sociable Recyclable Materials: Waste products, formerly destined to landfills or incinerators, set aside for recycling or reuse in the furtherance of recognized social/pollution control programs.

Garbage: Waste products destined for an authorized landfill or incinerator for final disposal.

Virgin/Non-virgin Waste Materials: Raw materials of any kind, used or unused metal or metal ore products, wood pulp or pulpwood, textile fiber or material, or other resources, that through the application of technology, is or will become a raw material source for commercial or industrial use.

Hazardous Waste: Any material that is subject to the Hazardous Waste Manifest Requirements of the U.S. Environmental Protection Agency specified in 40 CFR Part 262 and including waste water extracted from oil wells.

O R D E R

IT IS, THEREFORE, ORDERED that all common and contract carriage of property defined as sociable recyclable materials and garbage be, and they are hereby, not subject to economic regulation by the Nebraska Public Service Commission.

IT IS FURTHER ORDERED that all common and contract carriage of property defined as virgin/non-virgin waste material and hazardous waste be, and they are hereby, subject to economic regulation by the Nebraska Public Service Commission.

MADE AND ENTERED this 8th day of December, 1992.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Frank E. Landis, Jr.

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

COMMISSIONERS DISSENTING:

//s//Daniel G. Urwiller

Mark Landis
Chairman

ATTEST:

D. R. ...
Executive Director

Commissioner Daniel G. Urwiller, dissenting:

I respectfully dissent from the majority's findings in this order. I believe the majority has abdicated its responsibility by refusing to regulate a segment of the transportation industry which poses no less risk to the safety of the traveling public than that of any other type of motor carrier we currently regulate.

The transportation and disposal of household and commercial waste is no longer limited to destination at city-owned landfills within a five-mile radius of the corporate boundaries of every city or village. Federally-imposed regulation enforced through the Environmental Protection Agency has forced closure of many local landfills and resulted in the transportation of garbage to regional landfills throughout the state. Therefore, the exemption provisions of Neb. Rev. Stat. Section 75-303(4) no longer truly apply to the transportation of garbage in Nebraska. Garbage is now transported at great distances on Nebraska's highways for disposal far from its original source.

Furthermore, I believe the Commission has shown a measure of inconsistency by attempting to differentiate between one type of garbage or waste over another. There is no difference in the intrinsic value of oil field waste water and that of household or commercial garbage, yet we choose to regulate the former and not the latter simply to satisfy a status quo argument. We have previously granted certificates of authority to garbage haulers. By this order we are in effect telling them their authorities aren't worth the paper they're printed on. One garbage hauler testified at the hearing that his company had invested a great deal of money in research and attorney's fees prior to receiving authority from the Commission.

Although I agree that regulation in the nature of imposed tariff rates on the transportation of recyclable waste material may not be justified economically at this time, I see no reason why this Commission should fail to exercise its constitutionally-mandated control over the safety, fitness, and general service of each and every motor carrier proposing to transport garbage, like any other freight, over the same highways traversed by the general public.

Commissioner Daniel G. Urwiller

