

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In re	)	APPLICATION NO. PI-3
Nebraska Public Service	)	
Commission Investigation	)	APPLICATION NO. M-13773
of Intrastate Garbage	)	
Transportation Regulation,	)	
	)	
&	)	
	)	
In the Matter of the	)	ORDER
Application of Auburn Haulaway,	)	
Inc., which seeks authority to	)	
transport solid waste materials	)	
between points in Nebraska over	)	
irregular routes.	)	Entered: March 10, 1992

BY THE COMMISSION:

On its own motion the Commission held a hearing on February 5, 1992 in the Commission Hearing Room at Lincoln, Nebraska, to determine whether the intrastate transportation of garbage and solid waste material should be regulated motor transportation. Said hearing was ordered following the filing of a Petition for Investigation by Transportation Department Director Wayne F. Rowe on December 19, 1991.

All interested parties were invited to appear and give testimony as notice of the hearing was published in the Daily Record, Omaha, Nebraska, on December 23, 1991. Individual notices were also mailed to those motor carriers which currently possess certificates of authority to transport solid waste and those motor carriers currently on file which have made application for such authority. As a matter of expediency, the investigation hearing was consolidated with the hearing on the application of Auburn Haulaway, Inc. (M-13773) for authority to transport solid waste materials between points in Nebraska over irregular routes.

At the hearing, no appearances were entered by or on the behalf of applicant, Auburn Haulaway, Inc. Chairman Frank Landis presided at the hearing with Commissioner James Munnelly and Staff Attorney Hal Hasselbalch also present. Staff Attorney Mark Ludwig was present on behalf of the petitioner, Wayne F. Rowe, Director of the Transportation Department. The Transportation Department provided testimony on the options available to the Commission in regulating the transportation of garbage and how other states regulate the same. Also testifying were Gary Skokan of OmaHaul Transportation Services, Richard Holliday of Nebraska Transport Company, Inc., and Richard Cahoon representing the National Solid Wastes Management Association.

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

## I. Summary and Analysis of the Evidence

The Interstate Commerce Commission (ICC) at the federal level has made a distinction between "valuable" and "valueless" garbage for purposes of defining garbage as property under the Interstate Commerce Act. The ICC has in effect said that garbage which has no value is not property subject to economic regulation under the federal Act. This would apply to garbage such as debris and rubble or other trash which is transported for the sole purpose of disposal.

Further, the ICC has then distinguished between garbage that is merely dumped in a sanitary landfill, and garbage which is recycled or potentially recyclable. Garbage items made of paper, aluminum, plastic, glass, etc. which will either be or have been recycled will become raw material again in whatever manufacturing process they are utilized in. Therefore such garbage material no longer has a negative property value, but assumes all the characteristics of property, according to ICC reasoning. Transportation of "Waste" Products for Reuse and Recycling (General Motor Carrier Licensing); Ex Parte No. MC-85, 114 M.C.C. 92 (1971).

The Nebraska Statutes give this Commission general regulatory control "over all common carriers, . . . including contract carriers, engaged in the transportation of freight or passengers for hire . . . in Nebraska intrastate commerce." Section 75-109 R.R.S. 1943 (1990 Reissue). Common carriers and contract carriers are both statutorily defined in part as any person or motor carrier who or which transports property or passengers for hire. Section 75-302(10)(11). The statutes also give the Commission authority to promulgate rules and regulations deemed necessary to regulate persons within the Commission's jurisdiction. Rule 002.01 of Chapter 3, Title 291 of the Motor Carrier Rules and Regulations reads in pertinent part as follows:

*Unless exempted by statute, a motor common or contract carrier of property or passengers shall not operate any motor vehicle for the transportation of property or passengers for hire on any public highway in this state except in accordance with Chapter 75, articles 1 and 3 of the Nebraska statutes, as amended, and with the provisions of these rules. A motor common or contract carrier of property or passengers shall not operate upon any public highway without first having obtained from the Commission a certificate or permit of authority.*

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With regard to how our statutes and regulations apply to the regulation of garbage transportation, the key operative word is "property," and nowhere in the Motor Carrier statutes or regulations is that word specifically defined. However, there also exists no specific enumeration under Section 75-303 of the statutes exempting garbage transportation from Commission regulation.

South Dakota's statutes read very similar to those of Nebraska in this area, and certificates are issued in that state for common carriers of garbage. Recently the Eighth Circuit Court of Appeals held that carriers of garbage or solid waste were not provided an exemption from regulation under South Dakota law since no specific exemption to that effect was expressly provided for in the statutes. Northern Hills Sanitation, Inc. v. Cossart, 264 NW2d 711 (1978). The South Dakota statute in question which lists a series of specified exemptions is similar to Nebraska's own Section 75-303. Again, the term "property," though used in South Dakota's statutes as in our own, is not specifically defined.

Information was provided at the hearing regarding the regulation of for-hire garbage transportation in other states as well. The State of Connecticut does not regulate the local hauling of municipal waste, similar to Nebraska's exemption under Section 75-303(4). However, regardless of whether particular materials are considered "throw away" garbage or valuable recyclables, if the carriage is performed on a for-hire basis and the garbage is not the carrier's own property to begin with, then the carrier would need to obtain operating authority.

In Georgia the PSC also provides a municipal exemption. Materials that are recycled or which have recyclable value if hauled outside the local exempted zone require the carrier to obtain authority from the PSC.

In Idaho, recyclables or any material with potential value are regulated as general commodities, such as scrap metal.

In Indiana, the PSC there follows ICC designations of the treatment of a particular material and therefore does regulate and require operating authority for the intrastate carriage of recyclable waste.

The Maryland PSC requires operating authority for all for-hire transportation of garbage, whether such garbage contains recyclables or not, without exception.

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In Massachusetts, all for-hire transportation of materials requires authority no matter if the materials consist of garbage, recyclables, or a combination of the two.

In Missouri, potential value of the commodity is the key to whether or not its intrastate transportation will be regulated. Operating authority is required for anything that may be recycled and has monetary value. It does not matter what the destination of the commodity itself may be, i.e. a landfill or recycling center.

All for-hire carriage in Montana is regulated, including the common carriage of garbage and solid waste, regardless of any recyclable value. There are no local commercial zone exemptions in Montana.

In New Hampshire, operating authority is required for all refuse and recyclable material haulers. Such authority is granted either on a statewide basis or county by county.

A load of garbage containing recyclables in Oklahoma would be considered to have value and thus constitute property under the ICC interpretation. It would therefore be regulated in Oklahoma whether it was destined for a recycling plant or dumped in a landfill. This is similar to the practice in Missouri.

In Tennessee, if any commercial carrier is in the business of hauling garbage outside their commercial zone radius, he or she must obtain operating authority from the Tennessee PSC.

Common carrier authority is required in the State of Washington for the intrastate transportation of garbage there whether such garbage contains recyclables or not.

In West Virginia, "trash, rubbish and garbage" used to be exempt from regulation but are now considered property and carriers are required to possess authority for intrastate transportation of these materials.

Finally, in Wyoming commercial zone exemptions are also recognized as in Nebraska, but transportation of garbage outside those zones is regulated. Only contract carriers are allowed to transport garbage in Wyoming and must therefore obtain contract authority.

Because Nebraska law provides no specific exemption for the intrastate transportation of garbage outside the five-mile radius of the corporate limits of any city or village, and because the statutes do not state that the term "property" is not to include garbage of any sort, this Commission would

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appear to have broad discretion based on the South Dakota example in determining to what extent intrastate for-hire garbage transportation should be regulated in Nebraska.

If garbage hauling is considered common carriage, the Commission must either interpret the term "property" to include all garbage, since no specific exemption applies, or only garbage with value or potential value, as in the nature of recycled or recyclable materials. The latter interpretation would parallel the ICC opinion.

Conversely, if garbage hauling is considered private carriage, then it is not subject to Commission regulation. Under the theory that garbage disposed of at the curbside becomes abandoned property thereby transferring ownership or interest to the garbage hauler who picks it up for disposal at a landfill or recycling plant, then there is no common carriage because the garbage generator is not paying the garbage hauler to transport a commodity of any value on his behalf. The garbage generator is relinquishing ownership entirely. The recycler who may purchase the garbage down the road at the end of the haul is paying for the cargo itself and not the carriage. Therefore there is no contract or common carriage involved per se.

Such a transaction, then, would remain a private carriage arrangement with the hauler as the new owner of the garbage who then sells the otherwise valueless property which was abandoned by its original owner. The original owner of the garbage is not a shipper of that commodity in the normal sense. He is giving up ownership rights entirely and does not care where the carrier takes it or what he or she does with it. The generator merely contracts with the carrier for a disposal service and not for the carriage of any goods he may have a beneficial ownership interest in. Therefore, when the carrier takes possession and even pseudo-ownership of the garbage, his transportation of that garbage inures to his own benefit, if any, which constitutes private carriage. This theory is the traditional one.

However, once separated recyclables go from a collection and sorting center to a recycling plant, or from a recycling plant to a manufacturing plant or other purchaser, then the property attributes of the garbage may be re-engaged into the equation. If one adds to that the for-hire common carriage elements of a shipper/consignor transporting this type of property to a purchaser/consignee, then one arguably has all the ingredients to justify economic regulation of the intrastate transportation of such "valuable" garbage which will not be merely buried, but actually used in some commercial enterprise after it is recycled.

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Another argument made in favor of state regulation of the for-hire garbage transportation industry is the issue of safety and requiring carriers of garbage to carry adequate levels of liability insurance coverage, especially in view of the fact that local landfills are closing due to newly implemented EPA regulations. Increasing amounts of locally-generated garbage will have to be transported at greater distances to non-local landfills across the state.

Besides regulation governing the issuance of certificates or permits of authority is the issue of rate regulation. No one testifying at the hearing advocated the regulation of rates amongst competing carriers. The example of New Jersey was raised, where there existed the regulation of rates with no regulation of entry into the marketplace. Since everyone charged the same rate, hundreds of companies were allegedly driven out of business since the market was glutted with operators all charging the same high rates. The end result was that only one fifth of the original number of haulers remain in business and charge the highest rates in the nation. New Jersey is now phasing out the regulation of rates in the hope of restoring competition and bettering service.

## II. Conclusion

Based on the foregoing analysis of this issue, it is the Commission's determination that the intrastate transportation of garbage should be regulated to the extent of regulating 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. In so ruling we follow the rationale of the Interstate Commerce Commission and a number of fellow states which hold that only garbage of a recycled or recyclable nature has potential property value and therefore properly subject to economic regulation. Garbage transported merely from the generation site to a sanitary landfill for permanent disposal has a negative property value. We do not find that the for-hire intrastate transportation of such valueless garbage qualifies for classification as property under the Motor Carrier Act and is therefore not subject to our regulation.

## O R D E R

IT IS THEREFORE ORDERED that all common and contract carriers of garbage and solid waste which have as their departure or destination point any recycling plant or collection center, or any manufacturing facility or other place where recycled or pre-recycled garbage is transported, shall not operate upon any public highway without first having

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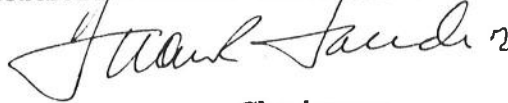
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obtained from this Commission a certificate or permit of authority.

IT IS FURTHER ORDERED that the application of Auburn Haulaway, Inc. (M-13773) be amended to make more definite and certain its request for authority if such pertains to the transportation of recycled or recyclable garbage, or in the alternative be summarily dismissed if the authority requested does not pertain to the potential transport of recycled or recyclable garbage pursuant to the findings of this Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of March, 1992.

NEBRASKA PUBLIC SERVICE COMMISSION



Chairman

ATTEST:



Executive Director

COMMISSIONERS CONCURRING:

//s//Frank E. Landis, Jr.  
//s//James F. Munnelly  
//s//Eric Rasmussen  
//s//Daniel G. Urwiller

COMMISSIONERS DISSENTING:

//s//Duane D. Gay