

single customer, a cement operation. Its other operation is conducted in Lincoln. The Hannibal facility is operated with a terminal manager, dispatcher, and drivers. No corporate personnel are based at the Hannibal terminal. The equipment displays in Missouri the name Bulk Carriers, Inc., Lincoln, Nebraska. Bulk's operation in Lincoln consists of a single truck, a petroleum unit, used to make petroleum deliveries in the Lincoln area. Bulk has an office on West "O" Street, where the equipment is stationed and minor maintenance is performed. Partially due to the concerns expressed by the Commission, the corporate headquarters was changed to its present location. Bookkeeping and accounting for Bulk is performed by TFM (Transportation Finance Management, Inc.). TFM does the paperwork for Commonwealth Petroleum of Cincinnati and Quickie Transport of Minneapolis. TFM is owned by Earl Wood, Ned Carleton, and himself. The address of Bulk is now 641 West "O" Street, Suite 2. That address will be shown as corporate headquarters to all government entities. Its resident agent is Brashear & Ginn of Omaha. Its resident agent will be relocated to Lincoln. Exhibit 1 shows a bill of sale for the equipment which will be stationed in Lincoln. Exhibit 2 shows a motor carrier cab card and an IRP permit. That piece of equipment has not been delivered to Lincoln. In the interim Bulk has obtained equipment from Leasco. Bulk operates one leased trailer. Bulk will not seek domicile in any other locality. Bulk looked at Lincoln as a town that had a void of carriers. Neither Wynne nor Wheeler is based in Lincoln. He expects Bulk's name to appear in the next Lincoln telephone directory. If the Commission agrees with his position that Bulk's operation in Lincoln is not regulated by the tariff, the rate will be whatever he deems it necessary to be and somewhat less than the existing tariff. The pipeline terminals from which Bulk operates are between two and three miles south of Lincoln. One is a Conoco terminal and the other is Williams Brothers Pipeline. Exhibit 5 shows a letter on Herman Brothers letterhead which was sent out by a salesman from Herman Brothers without authority. Herman Brothers has never hauled anything under rates as Herman Brothers. He is familiar with the Kwik Shop account and the individual, Rick, who wrote the letter shown as Exhibit 7. Kwik Shop has a proposal from another carrier dealing on a national basis which would haul to shops in Iowa, Kansas, Missouri, Oklahoma, and Nebraska. It could be that the \$25,000 mentioned in the letter refers not just to Lincoln, but the overall operation. Bulk has approximately 20 vehicles which are owned or leased operating in Missouri. Ninety-five percent of its business comes from Missouri. Bulk has been operating in Missouri since January 1992. He has been trying to get business started in Lincoln since the first of the year. If Wynne and Wheeler take action according to the testimony of Mr. Swerczek and Mr. Noel, within two or three months Bulk will have gained a base of business in Lincoln nevertheless. He thinks that if he can get customers on a temporary basis, he will retain the business.

Brit Carleton testified: He lives at 700 S. 17th Street in Lincoln. He is the terminal manager for Bulk's Lincoln facility. He handles the paperwork. He is currently working on a degree from the University of Nebraska. He has been a truck driver for three years.

He has had a commercial driver's license for two years. He has driven for Herman Brothers. He is certified to load at two pipelines. He is a stockholder of Bulk. Exhibit 3 shows correspondence with T.O. Haas regarding the lease of space for Bulk. Exhibit 4 shows photos of the space leased from T.O. Haas and the door of a Bulk truck. He moved to Lincoln July 1, 1992, but had been working with customers for two and a half weeks before that. The office has a one-line phone and answering machine. The number is not in the telephone directory but will be in December.

An Attorney General's Opinion dated October 15, 1950, and another Attorney General's Opinion dated December 19, 1951, and an Advisory Opinion prepared for the Commission dated December 5, 1989, were made a part of the record. A memorandum prepared by Mark Ludwig is also part of the record as Exhibit D.

Donald Swerczek testified: He is vice-president and general manager of Wynne Transport (Wynne). The issue is a rate issue, a competitive advantage on a rate situation. Wynne is extremely concerned about the issue. It has already lost some business to Bulk. The shipper, 7-Eleven Stores, has been with Wynne for 10 to 15 years. Wynne will not stand aside and let business be siphoned away. Either Wynne will do the same thing that Bulk is doing by setting up a separate corporation, or it will ask the Commission to reduce the rates to whatever is being charged by Bulk. Costs will have to be reduced in order to operate at the lesser rates. The first place that he would think of to cut would be wages and benefits for the drivers. When that is done, the carrier loses good drivers. He cannot believe that the law as it was outlined was intended to set up the type of operations under study in this matter. Wynne is doing the type of business in Omaha that it is protesting in this matter just in order to stay in business and be competitive.

Jerry Noel testified: He is president of Wheeler Transport in Omaha (Wheeler). He believes the exemption was set up initially for local cartage. He does not think the exemption was intended to be used as it is being used; but if it is not used, business will be taken away from Nebraska and go to Council Bluffs. He believes Wheeler could establish a corporation in Norfolk, hire a leased operator, make him an officer of the corporation, and start hauling tomorrow. He thinks that Bulk is a vehicle for Herman Brothers to move into Lincoln by simply renting office space and doing the things that the advisory opinion requires to accomplish its goal of a presence in Lincoln. If the Commission finds that Bulk's operation is within the law, Wheeler would establish a corporation, put in a leased operator, and make him a part owner, letting him run as he wants to run. Wheeler could do the same thing in Columbus, Norfolk, and Sidney.

The statutory language that the Commission is called upon to construe in this docket is Neb. Rev. Stat. Section 75-303(4) which states:

75-303 The provisions of Section 75-301 to 75-322.04 shall apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce except: ***
 (4) The operation of any motor carrier owned in any city or village of this state engaged in the transportation of property within such city or village or within a radius of five miles beyond the corporate limits thereof.

The exception under consideration in this matter finds its origin in Section 75-224, C.S. Supp. 1937:

except: (c) the operations of any motor carrier in transportation of property within any city or village of this state or within a radius of five miles beyond the corporate limits of such city or village.

In 1939 that section was amended to its present language by adding the requirement that the motor carrier be owned in the city or village in which it transported property. The title of the bill, LB2 of the 1939 session, said in pertinent part the bill was "...to prescribe the several types of transportation of passengers or property by motor vehicle or by motor carriers for hire or compensation engaged in intrastate commerce to which the provisions of the Act shall not apply;..." 1939 Session Laws p. 412.

Exhibit D of the record shows that interpretation of this subsection has been a problem for the Commission and motor carrier industry going back to 1937. An Attorney General's Opinion dated October 5, 1950, addressed these two questions:

(1) Where a motor carrier owns and licenses his equipment in Omaha, Nebraska may he go to Lincoln, Nebraska, and conduct motor carrier operations in Lincoln and within five miles of the corporate limits thereof by virtue of the above exemption even though he continues to reside in and license his equipment in Omaha, Nebraska?

(2) May a motor carrier conducting regular route operations between Omaha and Grand Island with headquarters at Omaha, Nebraska, purchase Hall county license plates for equipment which he intends to use primarily in pick-up service in and around Grand Island and within five miles of the corporate limits thereof, and claim exemption under the above-numbered provision from compliance with the rules and regulations of this Commission and Sections 75-222 to 75-250, R.S. Nebraska, 1943?

In his opinion the Attorney General replied that the answer to question one is no, and the answer to question two is yes, providing the equipment used in the Grand Island area is licensed, stationed, and used in that area. In arriving at his conclusion in that opinion, the Attorney General noted that it would seem the exemption in the form originally adopted in 1937 contemplated that the vehicle operations would be exempt within the municipal area regardless of

the situs of the vehicle or the motor carrier. The Attorney General construed the 1939 amendment to mean that "location and situs of ownership is prerequisite to application of the exemption."

In 1951 two more questions were addressed to the Attorney General:

1. Does the exemption in section 75-224, subsection 4, as to operations of a motor carrier "owned in any city or village" require the owner of the vehicle to be a resident of such municipality?
2. Does the five-mile limit in such exemption beyond the corporate limits preclude unregulated service to the loading docks of an area or governmental reservation whose entrance is within five miles, but whose loading docks are outside the five-mile radius?

The Attorney General then came to the following conclusions:

1. Yes. The motor carrier and vehicle must have a sufficient situs in the municipality so as to be owned therein. Ordinarily this would require a residence relationship in the municipality as a basis for local registration and use.
2. Yes. The limit of transportation service under the exemption is the specified five miles from the corporate limits and this limitation is not extended by reason of any division of areas that will result therefrom.

On December 5, 1989, the Commission delivered an advisory opinion in which it concluded:

Therefore, if a motor carrier for hire is to successfully use the exception in Section 75-303(4), the motor carrier must show a presence within the city or village of a nature sufficient to demonstrate its commitment to providing local service. The residency and licensing requirements the Attorney General specifies would seem to indicate the following sort of evidence successfully proves the motor carrier is owned and used within the city or village so as to qualify for the exception. While not an exclusive list, the following items, taken together, tend to demonstrate such a presence and, in the opinion of the Commission, satisfy the statutory requirement that the motor carrier be owned within the city or village:

- residence of the motor carrier within the city or village
- office location
- dispatcher
- office staff
- telephone
- equipment facilities
- loading dock
- parking facilities

Application No. PI-4

Page Six

- power units licensed within the county identifying the particular city or village as site of ownership
 - repair facilities
 - local advertising of service
- Other factors may be taken into account also depending upon the particular circumstances.

Applying those standards to the factual situation presented by Bulk, the Commission finds that residence of the motor carrier is within the city it seeks to serve. The office is located in the city it seeks to serve. The dispatcher, office staff, telephone, equipment facilities, and parking facilities are located in Lincoln. The loading dock criterion is not relevant to a petroleum operation. According to the testimony, minor repairs are performed at Bulk's O Street terminal. Although, it has not had a chance to place its telephone number and advertising in the directory, the testimony showed that Bulk has intentions of advertising its presence and service locally.

Websters New International Dictionary, 2nd Edition, defines own as follows:

own, v. 1. To take or get possession of; to acquire or appropriate. 2. To possess; to have or hold as property or appurtenance; to have rightful title to, whether legal or natural; as, to own a house, a title, a prerogative.

It defines owner as:

owner, n. One who owns; a proprietor; one who has the legal or rightful title, whether the possessor not.

The evidence shows that Bulk has title to the motor carrier business operated by it in Lincoln, and it is the owner, within the dictionary definition, of the equipment it operates in its Lincoln-based operation.

A cursory review of all states' motor carrier laws indicates that Nebraska's exemption is unique in that it requires that the motor carrier be owned within the exempt zone. Although a number of states have commercial zone exemptions which are similar to the five-mile exception in the Nebraska statute, household goods carriers are not allowed to operate under the exemption in such states as Connecticut and Illinois. Other states such as Minnesota, Missouri, Tennessee, Texas, and Virginia deny the exemption to bulk and petroleum carriers.

Although the Commission can readily understand the frustration and disruption in the present course of doing business in their industry experienced by the carriers who urge a different interpretation, the Commission can reach no other conclusion and can only urge them to carry their case to the Legislature. There is no reasonable alternative but to construe the operations of Bulk as to

Application No. PI-4

Page Seven

be within the exception set out in 75-303(4). This ruling is the only decision the Commission can reach that is consistent with the Attorney General's opinions and the previous advisory decisions the Commission has rendered concerning the exception in question. The Commission has no discretion under the statute in question, and the Commission is without power to amend the statute. Any alteration of the scope of the exception must originate in the Legislature.

MADE AND ENTERED this 1st day of September, 1992.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Frank E. Landis
//s//James F. Munnelly
//s//Eric Rasmussen



Chairman

ATTEST:

COMMISSIONERS DISSENTING:

//s//Duane D. Gay
//s//Daniel G. Urwiller



Executive Director

DISSENT OF COMMISSIONER DUANE GAY:

The majority who promulgated this advisory opinion has, in my judgement, ignored the legislative history and intent of motor carrier regulation in Nebraska. Our motor carrier act was passed in 1937, a time when local operators had no sophisticated, specialized or high capacity equipment. It is patently obvious to me that the Legislature intended to exempt from regulation only those small-time cartage and drayage operators who had been serving their communities as the chief means of getting small motor carrier and railroad shipments from the terminal or depot to their final destinations in and around the town where they lived and worked. I suggest that corporate operators were not even contemplated for exemption. The industry as it had developed in 1937 was not dominated by large corporate carriers who competed in a single community for traffic. The Legislature could not have had in mind the nonregulation of fleets of 8,000 gallon tankers competing for local business because there weren't such operators in existence at that time. This Commission is remiss in its duty to stimulate and preserve a healthy motor carrier industry in this State when it closes its eyes to the real purpose of the five-mile exception and sets the stage for rate wars in every community located within five miles of a pipeline terminal. By adopting the Attorney General's line, the Commission has sown the wind, and the opponents' testimony in the hearing had on this matter vividly portrays the whirlwind the public will reap when the industry responds to this decision.

In its zeal to remain consistent with its advice from the Attorney General and its previous interpretations, the Commission should heed the observation of Ralph Waldo Emerson: "A foolish consistency is the hobgoblin of little minds adored by little statesmen and philosophers and divines." Section 75-303(4) has never been construed in the context in which it must be construed now. The advisory opinion should reflect the broad legislative intent of the Motor Carrier Act, which was to foster and preserve a sound motor carrier industry, and ignore a loosely drafted subsection which threatens to undermine the larger implications of the adoption of the entire act.

"Consistency is a paste jewel that only cheap men cherish,"
William Allen White.

Duane Gay
Commissioner