

Service Date: August 9, 1988

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Petition of)
Molerway Freight Lines, Inc. for a) TRANSPORTATION DIVISION
Declaratory Ruling on the Validity)
of, or, in the Alternative,)
Legitimate Operation Under PSC) DOCKET NO. T-9181
Certificate No. 5703.)

DECLARATORY RULING

1. On January 25, 1988, the Public Service Commission (Commission) received a Petition for Declaratory Ruling from Molerway Freight Lines, Inc. (Molerway), Billings, Montana. In the Petition Molerway asked the Commission to rule on the validity of PSC Certificate No. 5703, owned by J-L Company, Inc., Billings, Montana and presently leased to Robert L. Bell, Sidney, Montana. Certificate No. 5703 allows for the transportation of general commodities (with certain exceptions not relevant here), Class C, between all points and places in Montana. Operation under Certificate No. 5703 is limited to shipments moving on bills of lading or freight bills of six shipping associations named in the Certificate.

2. The specific question raised by Molerway is as follows:

Whether it is proper for a motor carrier to operate under a state-wide Class C Certificate of Public Convenience and Necessity which restricts the carrier to shipments

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moving on bills of lading or freight bills of six shipping associations.

It is Molerway's position that Certificate No. 5703 is in violation of State laws and regulations governing Class C motor carriers and should be revoked.

3. Notice of Molerway's Petition was issued on April 6, 1988. The Notice indicated that the Commission would consider the specific question raised by Molerway, as well as the following:

Assuming PSC Certificate No. 5703 is found valid, what constitutes legitimate operation under that Certificate?

Comments and/or requests for hearing were to be received by May 2, 1988. Although no request for a hearing was received, the Commission determined that it was necessary to establish the nature of the present and past operations under Certificate No. 5703 before it could make an informed ruling on the questions raised. Therefore, a hearing was held for this purpose on June 10, 1988.

Discussion

4. A Class C carrier in Montana is one that furnishes transportation service under contract for six shippers or less. See 69-12-301(4), MCA, 69-12-302(1), MCA, and ARM 38.3.104(1). Though there is no definition in Montana statute or Commission rule that defines "shipper" or restricts the nature of the persons or entities with whom a Class C carrier may contract, the

Commission finds it entirely implausible that the legislature should on the one hand seek to encourage and enhance a system of common carriage, and on the other hand countenance the undermining of that system.

5. There are two kinds of motor carriage that are subject to certification by the Commission: common carriage and contract carriage. A common carrier is defined at ARM 38.3.104(2) as "one who holds himself out to serve all the general public for business at regular rates and charges filed with this Commission." The Commission has an obligation to encourage common carriage in Montana. Section 69-12-202, MCA, reads as follows:

Encouragement of common carrier motor transportation. To fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof, the Commission shall encourage a system of common carrier motor transportation within the state for the convenience of the shipping public. The maintenance of a common carrier motor transportation system within Montana is hereby declared to be a public purpose.

A contract carrier is defined and restricted at ARM 38.3.104(1) as "one who hauls for less than six shippers under contract or special agreement." The six contract limitation is also contained in 69-12-302, MCA, which statute also sets forth criteria for determining when a contract carrier is considered a common carrier. Rates for common carriers, with the exception of garbage carriers, are set by the Commission. 69-12-201, MCA. Increases or decreases in rates charged by common carriers must be approved by the Commission. 69-12-501, MCA. Rates charged by

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contract carriers are generally not regulated by the Commission. See, 69-12-201(b) and 69-12-301, MCA. However, the Commission does have the power to regulate contract carrier rates if it is in the best interest of public transportation. 69-12-201(3), MCA.

6. It is the evident concern of the legislature, as reflected in Title 69, Chapter 12, MCA, that there should be a sound system of common carriage in Montana. Contract carriage is permitted, but it is restricted by a limitation on the number of contracts that can be in place at any one time, and by the power to regulate contract carrier rates if deemed necessary. The legislature recognized that an unrestricted system of contract carriage would undermine a healthy system of common carriage, which the legislature declared to be a public purpose.

7. A shippers' association is an organization designed to procure lower transportation rates for its members primarily by acquiring bulk discount rates. It can be made up, theoretically, of an infinite number of members. The Commission finds that for a contract carrier to contract with an association with more than six members is a violation of Montana law. Though the entity actually contracted with may be the association, the Commission finds that the real shippers are the individual members of the association, and that an association is merely a vehicle for improving the transportation efficiencies of its members. The Commission finds that if it were to authorize contract carriage for an association with more than six members, it would violate

Montana law, with respect to both the limitation on the number of contracts a contract carrier may have, and the injunction to encourage a strong system of common carriage.

8. The Interstate Commerce Commission (ICC) has addressed the question of contract carriage for shipper's associations in C-Line, Inc., Extension-Precious Jewelry, 114 M.C.C. 226 (1971), and reached the same conclusion that the Commission reaches here. In C-Line, the ICC received an application for contract carrier authority to serve a shippers' association of more than 600 members. Federal law at that time defined a contract carrier as one transporting under continuing contracts with one person or a limited number of persons. In discussing whether carriage for a shippers' association with more than 600 members would meet this definition of contract carriage the ICC wrote, in part, as follows:

As indicated, applicant would have us find that the service applicant proposes to perform for JSA [Jewelers' Shipping Association] constitutes contract rather than common carriage, because JSA is a corporate entity having legal status separate from that of its members, and because it performs certain functions ordinarily performed by owners or shippers of goods, such as paying freight charges and routing traffic. Except in the most technical sense, however, we believe that this position flies in the face of plain reason and common sense. A shippers' association is an organization . . . made up of a number of individual shippers which have banded together to effect the economical and efficient marketing of their products. It is clear that a carrier which performs transportation for such an association does so for the individual shipper members, and the association merely acts as

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their agent in making the necessary transportation arrangements. . . . The fact that for certain legal purposes of its own the association chooses to incorporate and become an entity technically separate and distinct from its members does not alter the facts that from a transportation standpoint the association and its membership are in substance one and the same, and that motor carrier operations performed for such an association are performed not for the corporate abstraction but for the individual members whose traffic is transported.

* * * *

This is not to say that a contract carrier by motor vehicle may not under any circumstances contract to perform transportation for a shipper association. There may be circumstances when it may legitimately do so. But to determine whether such circumstances are present, we must look through the association to the real parties in interest -- the association members. If the carrier can legitimately perform contract carriage for the association membership, it may contract with the members' alter ego to do so. If not, it may not so contract. A bona fide shippers' association can only do that which its members may lawfully do for themselves. . . . This being the case, the relevant issue for consideration here is whether the individual members of JSA could lawfully contract with C-Line to perform the required service. We think not.

At the time of the hearing, JSA had over 600 members, some 60 of which had been added in the year before the hearing. The cost of membership is nominal, there is no requirement that a potential member's business be related to the jewelry trade, and a sizable number of present members have no such relation. Moreover, the actual number of shippers is unknowable since a grant of this application would enable C-Line to serve all subsequently joining members. Clearly, applicant does not propose to serve "one person or a limited number of persons" as contemplated by the act. . . . Rather, it proposes to provide a general-commodities

transportation service to all who funnel their goods into interstate commerce through JSA

Id. at 230, 232.

9. The Commission is not bound by decisions of the ICC, but in this case it finds the reasoning of the ICC in C-Line to be persuasive. The Commission therefore rules on Molerway's Petition as follows:

Ruling

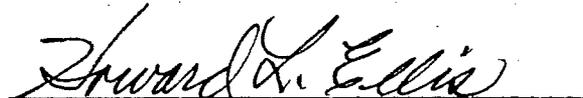
10. Certificate No. 5703 is not inherently invalid or inconsistent with Montana statutes. A contract carrier may contract with a shippers' association if the carrier also could contract with the individual members of the association. This means, because of the six contract limit on contract carriage in Montana law, that a contract carrier cannot contract with an association with more than six members. Specifically, with respect to Certificate No. 5703, the holder may contract with each association limited to one member, or the holder may contract with one association limited to six members, or some variation of these two. However, the holder of Certificate No. 5703 may not lawfully contract with an association if he could not lawfully contract with the association members. In order to conform to 69-12-302(1), MCA, a contract carrier may not serve an association unless association membership lasts at least 180 days, or, if membership terminates prior to 180 days, a new member may not

be served until 180 days from the date the terminating member joined the association.

Nothing in this ruling prevents a shippers' association of any size from using a common carrier.

Done and Dated this 8th day of August, 1988 by a vote of 3-0.

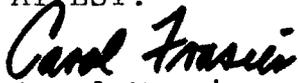
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


HOWARD L. ELLIS, Commissioner


TOM MONAHAN, Commissioner


DANNY OBERG, Commissioner

ATTEST:


Carol Frasier
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.