

Service Date: Jan 24, 1989

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

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IN THE MATTER of the Application to)	TRANSPORTATION DIVISION
Transfer PSC No. 8987 from EDSON)	
EXPRESS, INC., Thorton, Colorado,)	DOCKET NO. T-9291
to ROBERT L. BELL dba BOB'S PICKUP)	
AND DELIVERY, Sidney, Montana.)	ORDER NO. 5913

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

John R. Davidson, Davidson & Poppler, P.C., Suite 810, First Bank Building, Billings, Montana 59101, appearing on behalf of Edson Express, Inc. and Robert L. Bell dba Bob's Pickup and Delivery

FOR THE PROTESTANTS:

Todd D. Gunderson, Galles & Gunderson, P.O. Box 926, Billings, Montana 59103, appearing on behalf of Montana Carriers, Inc. and Molerway Freight Lines, Inc.

FOR THE COMMISSION:

Ivan C. Evilsizer, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner and Hearing Examiner
HOWARD L. ELLIS, Commissioner
JOHN B. DRISCOLL, Commissioner

BACKGROUND

On August 8, 1988 the Commission received an application from Edson Express, Inc. (Transferor) requesting approval of the transfer of Certificate of Public Convenience and Necessity PSC Nos. 4930, 4930 (Sub A, Parts 3 & 8), 4930 (Sub B), 4930 (Sub G) and 4930 (Sub L) to Robert L. Bell dba Bob's Pickup and Delivery (Transferee). Said certificate and subparts were thereafter redesignated as PSC No. 8987, 8987 (Sub A), 8987 (Sub B), 8987 (Sub C) and 8987 (Sub D).

Notice of the above described application was given by first class mail and publication. Protests were received from Williston-Scobey Transfer, Inc., Montana Carriers, Inc. and Molerway Freight Lines, Inc.

On October 3, 1988 the Commission granted the Applicant's motion to limit the scope of the hearing in this matter solely to the issue of the fitness of the Transferee.

Following notice by mail and publication, a public hearing was held on November 10, 1988 at 9:00 a.m. in the Conference Room of the Commission offices, 2701 Prospect Avenue, Helena, Montana. Protestant Williston-Scobey Transfer, Inc. did not appear by counsel, but its President, Mr. Mark Bussinger, attended and testified.

TESTIMONY

Mr. Raymond Bell, part owner of the Applicant/Transferee, appeared and testified in support of the application. He is now operating, with his mother Joan Bell and his brother, Randy Bell, the transportation business which his father, Robert L. Bell, began many years ago. In addition to the current lease of certain portions of PSC No. 4930, the Applicant has interstate authority (MC-149072 Sub 2), and intrastate Class B authority within a 75 mile radius of Sidney (PSC No. 4765). Mr. Bell also sponsored Applicant's Exhibit No. 5, constituting a current equipment list, which includes 12 power units and 28 trailers. All equipment is owned by the company. Applicant currently serves the areas and routes appearing on Applicant's Exhibit No. 4 including runs from Billings to Great Falls five days per week, Billings to Miles City five days per week, Forsyth to Colstrip four days per week, and Colstrip to Hardin three days per week. Their company employs nine drivers, two dock workers and four secretaries.

Mrs. Joan Bell, part owner of the Applicant/Transferee, appeared and testified in support of the application. Mrs. Bell's testimony established the sound financial condition of the company. See Applicant's Exhibit Nos. 8, 9 and 10. She acknowledged that the Annual Reports which she prepared and previously filed with the Commission probably contain inaccuracies and discrepancies, but noted that she recently retained an accountant to assist in the preparation of financial statements for future reports.

Mr. Mark Bussinger, President of Williston-Scobey Transfer, Inc., appeared and testified in opposition to the application. Mr. Bussinger expressed concern regarding past alleged illegal activities by the Applicant; and he presented certain freight bills, introduced as Protestants' Exhibit No. 9, which allegedly establish certain illegal shipments by the Applicant.

Mr. Tom Combs, Personnel Training Director for Molerway Freight Lines, Inc., appeared and testified in opposition to the application. He examined the accuracy and completeness of the Applicant's drivers' logs which were introduced as Protestants' Exhibit No. 10, and noted many discrepancies, primarily apparent speeding violations and on-duty time in excess of federal regulations.

DISCUSSION AND FINDINGS

Section 69-12-325, MCA, is the only provision of the Montana Code which addresses sales and transfers of authority; and it states simply that a motor carrier certificate may be "sold, assigned, leased, transferred, and inherited as other property only by authorization of the commission." Public convenience and necessity is presumed for existing certificates, so the inquiry in transfer applications focuses on whether the new carrier is "fit" to operate as a motor carrier.

Several factors should be considered to determine whether the applicant is "fit" to provide the service: 1) the applicant's financial condition, 2) the intention of the applicant to perform the service sought, 3) his experience in conducting the service sought, 4) the adequacy of the equipment he has to perform the service, and 5) whether he has performed illegal operations in the past.

The present application fails to present an issue with respect to the first four factors. Bob's Pickup and Delivery is in sound financial condition and they fully intend to perform the service sought. The Applicant is an experienced motor carrier by virtue of their other certificates, the length of time they have been in business, and operations under the present lease. It is

also unquestioned that the Applicant's equipment is adequate to perform the service sought.

The Protestants presented considerable evidence concerning the fifth factor -- alleged past illegal operations of the Applicant. First, the Applicant's "unsatisfactory" rating from the Federal Department of Transportation. The Applicant explained that he paid a fine of \$500 to the D.O.T. in 1987, due to inadequate liability insurance coverage for the transportation of batteries. They increased their insurance from \$750,000 to \$1,000,000 (the ICC requirement) within 10 days following notification of the violation. The Public Service Commission currently requires \$100,000 liability insurance on motor vehicles used in the transportation of property. Other violations discovered at a D.O.T. Safety/Compliance audit in 1987 included failure to complete and retain drivers' logs and certain other forms. Mr. Bell stated that his company is making every effort to comply with D.O.T. requirements and correct the deficiencies, and he has requested another audit.

Mr. Combs' testimony concerning Applicant's drivers' logs was partially rebutted by the Applicant's late filed exhibit, which was admitted without objection. This exhibit explains that the driver's time in making pickups and deliveries at points of origin, destination and intermediate points was recorded as "on-duty - not driving" while actual odometer readings were used to record total miles driven. These discrepancies resulted in higher apparent speeds being noted by Mr. Combs. With these adjustments, the average speeds indicated fall within the legal highway speed limit.

With respect to the D.O.T. "unsatisfactory" safety rating, the Commission notes that the 1985 Montana Legislature withdrew specific Commission jurisdiction over safety matters; but

the Commission still considers safety to be a relevant factor in considering the fitness of a carrier. The Commission finds, however, that the evidence regarding safety presented by the Protestants is inadequate to support a finding that the Applicant is unfit.

Upon request of the Protestants, the Commission takes administrative notice of the Declaratory Ruling in Docket No. T-9181, In the Matter of the Petition of Molerway Freight Lines, Inc. for a Declaratory Ruling on the Validity of, or, in the Alternative, Legitimate Operation Under PSC Certificate No. 5703, which held that because of the six contract limit on contract carriage in Montana law, a contract carrier cannot contract with an association with more than six members. Bob's Pickup and Delivery was leasing PSC No. 5703 at the time of this ruling, and there were apparently more than six members of some of the shipping associations at that time. Nevertheless, that Petition presented a complex, unclear and difficult question of legal interpretation regarding a Class C certificate utilized for contract carriage by shipping associations; and the activities of Bob's Pickup and Delivery prior to the ruling cannot be viewed as an intentional or bad faith violation of law. In addition, there is no evidence on the record indicating that Bob's violated the ruling after it was issued by the Commission.

Mr. Bell admitted that his company was cited by the PSC for an illegal shipment in 1985 (or 1986) to Antelope, Montana, which is four road miles beyond the 75 mile radius of Sidney, Montana, authorized under PSC No. 4765.

Protestants also presented certain freight bills of Applicant as Protestants' Exhibit No. 9 (hereinafter "Salt Creek Bills"). Applicant objected to the introduction of this exhibit on the grounds that it is irrelevant and immaterial. This objection

is overruled. The Commission notes that the Salt Creek Bills, on their face, indicate that the Applicant may have engaged in illegal shipment activities, but without more information, the evidence is far from conclusive. The Commission also takes administrative notice of Order No. 5735a in Docket No. T-8861, In the Matter of the Application of Robert L. Bell, Sidney, Montana, for a Class B Certificate of Public Convenience and Necessity. It appears that these same allegations were considered in that proceeding. Although it was admitted by Bob's at that hearing that certain illegal shipments were made, the Commission based its denial of authority therein on inadequate shipper demand and not on Bob's past illegal activities.

Illegal activities are an important and serious consideration, and have been found on occasion to justify a finding of unfitness without further consideration of Applicant's case. See e.g. H.R. Ritter Trucking Co., Extension, 111 M.C.C. 771 (1970) and Antietam Transit Co., Inc., Application, 84 M.C.C. 459 (1961). However, illegal operations are only one factor in assessing an applicant's present and future fitness. See Armored Carrier Corporation v. United States, 260 F.Supp. 612 (1966). The Commission finds that when determining the fitness of an applicant who has engaged in illegal operations or practices, the following should be considered: 1) The willfulness or innocence (i.e., bad faith or good faith) of the conduct, 2) the severity and circumstances of the conduct, and 3) the public interest in the proposed service. See e.g., Application of Power Fuels, Inc. PSC Docket No. T-4986, Order No. 3038; B.D.C. Corporation, Extension, 99 M.C.C. 126 (1965); Howard Sober, Inc., Extension, 83 M.C.C. 361 (1960).

In this case, there was no showing that the alleged illegal operations were conducted with knowledge of their ille-

gality, or in bad faith. In addition, some allegations are deficient in their degree of proof, while others are rather minor in nature. Furthermore, the Applicant expressed his willingness and intent to comply with all Montana laws and regulations regarding the conduct of his business, and his past actions indicate a desire to conform his conduct to the law, when violations are brought to his attention. All of the allegations of past illegal activities, considered in conjunction with the three factors set forth above, are inadequate to support a finding that the Applicant is unfit.

In summary, the Commission's inquiry into a transfer of authority is limited to consideration of the fitness of the transferee, and the Protestants bear the burden of establishing that the transferee is unfit. The Protestants have failed to meet this burden. The Commission therefore finds that Robert L. Bell dba Bob's Pickup and Delivery is a fit transferee.

All motions and objections not otherwise decided or addressed herein are denied.

CONCLUSIONS OF LAW

The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding, pursuant to Title 69, Chapter 12, MCA.

The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

A Certificate of Public Convenience and Necessity may only be sold or otherwise transferred upon approval by the Public Service Commission. § 69-12-325, MCA.

The application for sale and transfer submitted herein is complete and in conformance with ARM 38.3.2101.

The relevant consideration in the sale and transfer of a Certificate of Public Convenience and Necessity is whether the new carrier is fit to operate as a motor carrier in the State of Montana.

Robert L. Bell dba Bob's Pickup and Delivery, is a fit motor carrier and the transfer of PSC No. 8987 to him is consistent with the public interest.

Absent further application to the Commission, operations may not be undertaken pursuant to PSC No. 8987 by any entity other than Robert L. Bell dba Bob's Pickup and Delivery.

ORDER

IT IS HEREBY ORDERED that the application to transfer PSC No. 8987 to Robert L. Bell dba Bob's Pickup and Delivery, is granted.

DONE AND DATED this 23rd day of January, 1989 by a vote of
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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting 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.