Service Date: September 8, 1988

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

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IN THE MATTER of the Petition of Molerway Freight Lines, Inc. for a Declaratory Ruling on Whether Molerway can Lawfully Operate Over Montana Highway 16 Between Glendive and Sidney.	)	TRANSPORTATION DIVISION DOCKET NO. T-9164

DECLARATORY RULING

Background and Law

On December 16, 1987, the Public Service Commission (Commission) received a Petition for Declaratory Ruling from Molerway Freight Lines, Inc. (Molerway). The question raised by Molerway is as follows:

> Whether Molerway, which holds no Montana intrastate authority over Highway 16 between Glendive and Sidney, can carry freight from one Montana point to another Montana point over that portion of Highway 16 by routing that freight through its Williston, North Dakota terminal?

The law to be applied to this question was stated succinctly by this Commission as follows:

> Both the Motor Carrier Act of 1935 and the Motor Carrier Act of 1980 provide that the Interstate Commerce Commission (ICC) has jurisdiction over persons or property transported by motor carrier between a place in a state and another place in the same state through another state. See 49 USCA § 303(10) and 49 USCA § 10521(a)(1)(B). Thus, as the ICC explained in Pennsylvania

P.U.C. v. Arrow Carrier Corp., 113 M.C.C. 213, 219 (1971) (Arrow), "shipments originating at and destined to points in the same state are unquestionably in 'interstate commerce' if routed through another state, even though the out-of-state portion of the mileage be small." However, it is also the case that both the 1935 and 1980 Motor Carrier acts reserve to the states the power to regulate intrastate motor carriage. See 49 USCA § 302(b) and 49 USCA § 10521(b)(1). "[I]t is well established that interstate routings may not be employed in 'bad faith' as a 'subterfuge' to avoid legitimate state regulation." Arrow, supra at 219 (and cases there cited). The question, therefore, is whether Molerway's routing of intrastate freight through Williston should be interpreted as an attempt to avoid legitimate state regulation.

The ICC still recognizes Arrow as the leading case in this area. See Oregon P.U.C. v. Southwest Delivery Co., Inc. (Southwest), 1985 F.C.C. 47,726, 47,728. In Arrow the ICC described the criteria for determining "bad faith" and "subterfuge" as follows:

> Generally speaking, this Commission and the courts have looked ... to the "reasonableness" of a carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority and desire to transport otherwise unavailable traffic, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling. Nor is there any presumption in favor or against any one.

Arrow, supra at 220; 1971 F.C.C. 45,232.

Notice of Hearing, Docket No. T-9164, Service Date March 15, 1988.

The Commission held a hearing on this Petition to establish the facts of Molerway's operation through its Williston terminal sufficient for the Commission to determine, pursuant to the above criteria, whether that operation is a "subterfuge" to avoid intrastate regulation. All certificated carriers in Montana were notified of this Petition. Carriers who commented on the Petition were notified of the hearing. Bob's Pickup and Delivery, ANR Freight System, Inc. and Dixon Bros., Inc., appeared at the hearing in opposition to the Petition. They were allowed to cross-examine Molerway and to present testimony. Post hearing briefs were submitted.

Discussion and Ruling

As noted above, freight that is transported from one Montana point to another, through a point outside of Montana, is in interstate commerce and not subject to this Commission's jurisdiction. The only exception to this statement is if the freight is deliberately routed through an out-of-state point, in bad faith and as a subterfuge, to avoid legitimate intrastate regulation. In this case, Molerway does not have an intrastate certificate allowing it to transport freight over Montana Highway 16 between Glendive and Sidney. Molerway does have Class A, route specific authority to serve Sidney by going north from Billings to Malta, then east across the hi-line. Similarly, Molerway has

authority to serve from Billings through Glendive to the North Dakota border along Interstate 94. The question, therefore, is whether Molerway deliberately established its Williston, North Dakota terminal in order to overcome its lack of intrastate authority to travel a portion of Highway 16? The Commission finds from the evidence, as explained below, that it did not.

The first consideration is whether the degree of circuity involved in the out-of-state route indicates subterfuge. Specifically, does the evidence indicate that there is no reason, other than avoiding intrastate regulation, to route freight from Billings to Williston and then backhaul as far as Sidney? Both witnesses for Molerway explained that its system utilizes several terminals as hubs. Freight is linehauled to these hubs where it is sorted for distribution, often in the form of a backhaul. Molerway uses this system for both interstate and intrastate freight. In addition to the testimony provided by Molerway, the Commission is aware that linehauling to central hubs for sorting, and then backhauling to distribution points, is common in the motor carrier industry. The record does not support a finding of this Commission that Molerway's backhaul of freight from Williston to Sidney is circuitous to such a degree that it can only be justified by a desire to avoid state regulation. The uncontradicted testimony is that Molerway would continue its backhaul to Sidney, even if it had intrastate authority to travel the section of Highway 16 in question. The Commission does

not find the circuity involved in Molerway's operation through Williston unreasonable or evidence of bad faith.

The second issue to be considered is whether Molerway has demonstrated a business justification for its Williston terminal apart from its desire to avoid state regulation. The unrefuted evidence on the record indicates that there were sound business reasons for Molerway moving its terminal from Glasgow to Williston. Because of increased competition, the Glasgow terminal was not as profitable as it had been. In the course of searching for an alternative, Molerway recognized Williston as 1) a larger city than Glasgow with a larger labor force, 2) a city with adequate dock facilities, 3) a city with more vendors for truck parts and tires, 4) a convenient location for interlining with carriers to and from the east, as well as for serving northeastern Montana points. These appear to the Commission to be sound reasons for relocating the terminal. In the absence of evidence, the Commission will not infer a bad faith motive for the relocation.

The third question to be considered is whether the Montana freight routed through Williston is dominant or incidental to Molerway's Williston operation.[1] The reason for including this

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1 In Arrow, supra, the ICC referred to the incidental or dominant character of the intrastate freight as a portion of the carriers overall operation. This was modified by the ICC in later cases so that challenged single-state traffic is compared with the carriers' overall operation at the same operating terminal. See e.g., Oregon P.U.C. v. Southwest Delivery Co., supra.

question is that the larger the percentage of in-state freight, that a carrier would not be able to haul because of lack of intrastate authority, the more plausible the presumption that the carrier is taking that freight across a state line in order to defeat state regulation. The record indicates that Molerway's in-state freight constitutes from 15 percent to 20 percent of its Williston operation. There are a number of ICC cases in which a much smaller percentage of in-state freight was determined incidental. See, e.g., Arrow, supra (5%), Southwest Delivery, supra (2.5%). However, there is at least one case where 18 percent in-state freight did not preclude a finding of bona fide interstate operation. See Jones Motor Co. v. United States, 218 F.Supp. 133 (1963). The Commission concedes that its decision on this petition would be much easier if Molerway's in-state freight constituted a smaller percentage of the total freight handled by the Williston terminal. However, the Commission does not find, when all elements for determining bad faith and subterfuge are considered together, that the relatively large percentage of in-state freight evident here supports a finding of bad faith and subterfuge. First, in order to demonstrate good faith, a carrier does not have to strictly qualify under each element of the test identified by the ICC in Arrow. As the ICC said in that case, the elements are evidence of the reasonableness of a carrier's operation and "no single factor is controlling." The Commission finds that, viewed as a whole, Molerway's Williston terminal is a reasonable interstate operation, despite

handling a fairly large percentage of in-state freight. Second, the facts in this case are slightly different from the facts in the ICC cases that have addressed this question. In the ICC cases the carriers in question lacked intrastate authority so that routing freight interstate allowed these carriers to serve points they otherwise could not serve. In this case, Molerway has the intrastate authority to serve all points in question, however it must use certain specific routes. The presumption, therefore, that the greater percentage of in-state freight that is routed interstate, the more likely it is that such routing is done in bad faith, does not necessarily hold in this case. All of the in-state freight that Molerway carries through Williston, could also be carried intrastate, though perhaps not as efficiently.

Based on the above, the Commission finds that Molerway did not locate a terminal in Williston in order to circumvent its lack of authority over a portion of Highway 16. Therefore, Montana freight that is routed over Montana Highway 16, through Williston, is in interstate commerce and not subject to this Commission's jurisdiction. The Commission cannot prohibit the transportation of interstate freight on a public highway.

Having ruled, the Commission makes the following additional points. First, it was argued by those opposed to this Petition that the Commission must find against Molerway in order to be consistent with its obligation to regulate intrastate carriers and to promote common carriage. This argument is without merit

for the very simple reason that this ruling concludes that the transportation in question is interstate, and this Commission has no control over such transportation. It is not an obligation of this Commission to assert jurisdiction where none exists.

Second, Molerway stated at hearing, and at several places in its briefs, that this Commission is responsible for the increased costs that Molerway has incurred as a result of not being able to transport over a portion of Highway 16. Further, Molerway has stated that the Commission has committed waste by its enforcement action, and Molerway has strongly implied, if not stated directly, that the enforcement action amounts to harassment. The Commission strongly resents these allegations and finds that they reflect an ignorance of the Commission's obligation to enforce the Montana motor carrier statutes (Title 69, Chapter 12, MCA). The officers charged with enforcing those statutes have a responsibility to issue citations if they have reasonable cause to believe that a violation is being committed. A carrier charged with a violation has all due process rights to make a defense based on the facts, the law, or both. In this case, there is no question that the enforcement officer had reasonable cause to issue the citation because Molerway was carrying Montana freight over a section of highway on which it has no Montana authority to operate. Molerway has now convinced this Commission that it has the legal right to operate over this section of highway, despite its lack of Montana authority. But

this conclusion was reached after a lengthy analysis of the facts and federal law. Molerway apparently expected this Commission to simply accept a very complicated legal defense at face value and to refrain from enforcement. This is not the way the system works. Molerway had the option, which it never exercised, of requesting a stay of enforcement from this Commission pending a ruling on this Petition. Absent the issuance of a stay, this Commission is obligated to continue enforcement until it concludes, after a formal process, or is told by a proper authority, that such enforcement should cease.

It should be noted further that the Commission's decision to entertain this Petition was done as a courtesy, not an obligation. The United States Supreme Court has stated that the interpretation of interstate certificates should first be done by the ICC. See Service Storage v. Virginia, 359 U.S. 171 (1959). The Commission could have taken the position that Molerway's remedy was at the ICC and continued enforcement pending an ICC decision. The Commission recognized however that an administrative remedy at the ICC is time consuming and costly, and agreed to accept Molerway's Petition and refrain from enforcement if it found Molerway's Williston operation in interstate commerce according to the criteria established in federal law.

Additionally, the ruling herein is limited to the question presented and the facts revealed at hearing. The Commission does not declare in this ruling that all in-state freight transported by Molerway through its Williston terminal is in inter-

state commerce. Different facts may result in a different conclusion.

Done and Dated this 1st day of September, 1988 by a vote of 3 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

Howard L. Ellis
HOWARD L. ELLIS, Commissioner

Tom Monahan
TOM MONAHAN, Commissioner

Danny Oberg
DANNY OBERG, Commissioner

ATTEST:
Carol Frasier
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.