

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1342

IN THE MATTER OF:

Investigation of Authority to)	Served July 12, 1974
Perform CONTRACT OPERATIONS)	
		Application No. 828
		Docket No. 234

By petition filed February 15, 1974, 1/ the Washington Metropolitan Area Transit Authority (WMATA) 2/ has requested this Commission to institute an investigation to determine whether a type of service that is performed pursuant to a contract for transportation on more than one occasion, and on a regular basis for an extended period of time, over regular routes as well as irregular routes, may be performed by carriers pursuant to charter authority issued by this Commission. WMATA contends that this type of service has been and is being performed by carriers pursuant to charter authority certificates from this Commission. WMATA further submits that the practice heretofore has existed that charter operators merely have filed copies with the Commission of contracts which embraced services to be performed over an extended period of time either over regular routes or over irregular routes. WMATA's petition seeks to have this type of service defined, to have it placed within the regulations of this Commission, and that a designation made as to the type of certificate issued by this Commission that would authorize this type of contract service to be performed.

By Order No. 1172, served October 4, 1971, following several complaints filed by certificated carriers, the Commission instituted a general investigatory proceeding to delineate the authority necessary to operate "contract"

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- 1/ The petition has been labeled Application No. 828 for administrative purposes.
- 2/ WMATA acquired the charter authority between points in the Metropolitan District of A. B. & W. Transit Company, WMA Transit Company, Inc., D. C. Transit System, Inc., and W. V. & M. Coach Company, Inc., and is performing charter operations, pursuant to the provisions of the National Capital Area Transit Act of 1972. See Order No. 1304, served February 21, 1974, and the prior orders referenced therein.

or "charter-contract" service. ^{3/} As stated in that order, there is no doubt that such operations constitute "transportation for hire by any carrier of persons between any points in the Metropolitan District" and, thereby, should be subject to the provisions of the Compact. See Compact, Title II, Article XII, Section 1. By that order all certificated carriers were made parties to the general investigatory proceeding.

Order No. 1172 also incorporated into the general investigatory proceeding Formal Complaint No. 24, filed by A. B. & W. Transit Company against WMA Transit Company, Inc., Formal Complaint No. 26, filed by WMA Transit Company, Inc., against Aiken Transport, Inc., and Application No. 715 filed by WMA Transit Company, Inc. For the reason that A. B. & W. Transit Company and WMA Transit Company, Inc., each have been purchased by WMATA, and no longer hold valid regular-route certificates from this Commission, the aforesaid Formal Complaint Nos. 24 and 26, and Application No. 715 are without significance and should be dismissed.

A prehearing conference, scheduled by Order No. 1172, was held October 26, 1971. At the conclusion of the conference, the parties agreed that each would submit a draft order setting forth its views of the pertinent issues and the procedure to be followed during the investigation. By Order No. 1177, served November 8, 1971, the Commission ordered, *inter alia*, that the draft orders be submitted to the Commission and that the Commission staff circulate the submissions to each party of record for additional comments and suggestions. No further orders in the proceeding were issued by the Commission, and the investigation file remains open.

The Commission is of the opinion that the petition by WMATA for an investigation of contract service should be made part of the general investigation of charter-contract service instituted pursuant to Order No. 1172. Obviously, the subject matter of the prior general investigation and the investigation requested by WMATA are substantially the same. Accordingly, the Commission shall consolidate the petition of WMATA into the related general investigation proceeding, Docket No. 234. The directives set forth in Order No. 1177, served November 8, 1971, shall be vacated and set aside.

The Commission believes that further submissions by any person should be permitted at this time. In order to avoid any potential redundancy or duplication of statements and arguments in the record, the basic contentions and requests contained in the draft orders currently part of the file are

^{3/} The terms "contract" and "charter-contract" are not defined in either the Compact or in the Commission's Rules and Regulations.

summarized in the appendix attached hereto. The summary does not constitute findings by the Commission as to the validity or the evidentiary weight of any of the arguments contained in the submissions.

This Commission believes that there are three questions to be resolved and that each question involves an interpretation and application of the Compact to the performance of contract service. These questions follow:

- (A) Whether a carrier may perform transportation for hire within the Metropolitan District in the nature of contract service without authority from this Commission?
- (B) Whether a certificate authorizing a carrier to perform charter operations over irregular routes, within specified areas, also authorizes by implication, the performance of contract service over irregular routes within specified areas?
- (C) What would be the nature of the authority, if any, that must be granted pursuant to the provisions of the Compact, to a person seeking to perform contract service within the Metropolitan District?

If the Commission determines that the Compact mandates that a person desiring to perform or render contract service must obtain authority from the Commission, then an additional problem may be presented for consideration. The problem involves the question of adequate service by existing carriers to perform contract service. The question of the adequacy of other available service was not resolved by the Court in Case No. 2023, Alexandria, Barcroft and Washington Transit Company et al. v. United States of America et al., U. S. District Court for the Eastern District of Virginia at Alexandria (1961), but, rather, reference was made therein to the United States Supreme Court decision in I.C.C. v. J-T Transport Company, 368 U.S. 89, 82 S.Ct. 204 (1961). The issue of adequacy involved the problem of determining whether a currently certificated carrier of property, the common carrier service of which is reasonably adequate to serve the needs of a person seeking contract service, may prevent the willing and able applicant from obtaining authority to perform the contract service. The Court stated the following:

"The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet the specialized need. If that is done, then the burden shifts to the applicant to

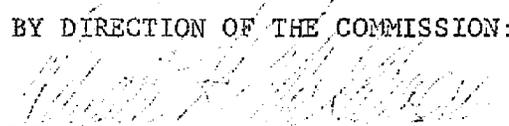
demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.

"* * * the standard is not whether existing service are 'reasonably adequate.' It is whether a shipper has a 'distinct need' for a different or a more specialized service. The protesting carriers must show they can fill that 'distinct need,' not that they can provide a 'reasonably adequate service.'" Supra, pp. 90 and 91.

THEREFORE, IT IS ORDERED:

1. That the petition by the Washington Metropolitan Area Transit Authority, filed February 15, 1974, be, and it is hereby consolidated with and made a part of the general investigatory proceeding instituted by Order No. 1172, served October 4, 1971, and bearing Docket No. 234.
2. That Formal Complaint No. 24, filed by A. B. & W. Transit Company, June 30, 1970; Formal Complaint No. 26, filed by WMA Transit Company, Inc., March 10, 1971; and Application No. 715, filed by WMA Transit Company, Inc., August 12, 1971, be, and they are hereby, dismissed as moot.
3. That Order No. 1177, served November 8, 1971, in Docket No. 234, be, and it is hereby, vacated and set aside.
4. That any person desiring to discuss the issues, questions, and the problem hereinbefore specified, shall submit to the Commission on or before Tuesday, August 13, 1974, a statement setting forth in complete detail any pertinent comment, opinion, and/or argument.

BY DIRECTION OF THE COMMISSION:


WILLIAM H. MCGILVERY
Acting Executive Director

APPENDIX

The following is a summary of the contentions and requests set forth in the draft orders currently part of Docket No. 234.

I. D. C. Transit System, Inc., contended in its draft order that neither the Compact nor the Regulations promulgated thereunder by the Commission relate to or define contract service or charter-contract service. It pointed out that this Commission always has held that under the Compact there is no form of carriage for hire known as charter-contract. It contended that the form of carriage for hire, known as contract carriage for hire, was an integral part of the authority vested in all regular-route certificated common carriers. Thus, D. C. Transit System, Inc., concluded that certificated carriers have held the right to perform all contract service within the areas and over the routes they are certificated to operate as common carriers. It finds support for the aforesaid arguments in the decision of the United States District Court for the Eastern District of Virginia at Alexandria in Case No. 2023, Alexandria, Barcroft and Washington Transit Company and Washington, Virginia and Maryland Coach Company, Inc. et al. v. United States of America and Interstate Commerce Commission, decided July 10, 1961, motion for new trial denied January 22, 1962, 14 Federal Carriers Cases 81,395 and 15 Federal Carriers Cases 81,428, (AB&W case).

II. A limited discussion of the AB&W case is included at this point for the purpose of clarity. That case involved a complaint to the District Court "that the Interstate Commerce Commission erroneously, arbitrarily or capriciously construed certificates" of common carriage, issued under Part II of the Interstate Commerce Act to the plaintiffs as common carrier bus lines, "as not authorizing the performance /along their prescribed routes/ under continuing contracts, of a scheduled, regular-route motor bus service for the military departments of the United States Government, and found such transportation to be contract, rather than common carriage." See 14 Federal Carriers Cases, page 50,438. The District Court stated "that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy in the case, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it." Supra, page 50,441. Thus, it was held "that the military departments' service can be performed by the plaintiffs under their common carrier certificates". Supra, 15 Federal Carriers Cases, page 51,067.

The AB&W case clearly indicates that common carriers operating pursuant to certificates specifying regular route or routes, with fixed termini, may perform an on-route service, offerable to the public generally whether or not "the nature of the carriage is . . . affected by the existence

of a contract or a contractual period". Supra, 14 Federal Carriers Cases, page 50,441. However, the AB&W case does not refer to a certificated carrier which does not operate over regular routes or between fixed termini. Moreover, the AB&W case does not indicate the treatment to be accorded a non-certificated carrier seeking authority to perform a contract service.

III. The Department of Defense filed a draft order setting forth a statement of the issues to be resolved. These issues embrace the following:

(1) What is contract service -- a definition -- to include the consideration of the following elements:

(a) the number of different persons with whom contracts may be made,

(b) time limits of contracts,

(c) dedication or modification of equipment to fulfill the specific needs of person contracting for the service, and

(d) any other elements deemed necessary.

(2) Whether the service defined in Issue No. 1 is sufficiently affected with the public convenience and necessity so as to require the restriction of entry into the field of rendering this service by requiring the affirmative grant of a certificate to perform this service.

(3) If the answer to Issue No. 2 is in the affirmative, what should be the scope of the grant and restrictions on such authorities?

IV. Atwood's Transport Lines, Inc. (Atwood) and Greyhound Airport Service, Inc. (Greyhound) jointly submitted a draft order. That draft would have scheduled a consolidated hearing on each of the proceedings forming the basis for the general investigation. Atwood and Greyhound would have required all certificated carriers conducting operations between points within the Metropolitan District, which were involved in the operation of a service pursuant to a contract with any person, group or organization, to produce a qualified company witness and to present a copy of any written contract, and/or to supply a complete description of any oral contract. Further, the order would have required the Commission's staff to prepare a copy of all contracts filed by carriers pursuant to the Commission's Regulation 56-03.

V. A draft order was submitted by ABSW and The Gray Line, Inc. That order would have discontinued, without prejudice, the general investigatory proceeding. Further, the proposed order would have scheduled a hearing for Formal Complaint Nos. 24 and 26, and a separate hearing on Application No. 715.