

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1671

IN THE MATTER OF:

Served April 13, 1977

Application of NATIONAL BUS LEASING,)  
INC., for Certificate of Public )  
Convenience and Necessity to Perform) )  
Charter Operations Pursuant to )  
Contract )

Application No. 963

Docket No. 348

By Application No. 963, filed August 23, 1976, National Bus Leasing, Inc. (National Bus), seeks a certificate of public convenience and necessity, pursuant to Title II, Article XII, Section 4(b) of the Compact, to perform charter operations pursuant to contract. National Bus seeks authority to transport persons travelling on official government business, government employees, and others travelling for personal convenience, together with baggage, over irregular routes, between the United States Energy Research and Development Administration (ERDA) office at 20 Massachusetts Avenue, N. W., Washington, D. C., and the ERDA office near Germantown, Md., which is situated adjacent to the intersection of Interstate Highway 270 and Maryland Highway 118. The transportation service would be performed pursuant to a contract between ERDA and National Bus.

Pursuant to Order No. 1599, served August 31, 1976,\* National Bus was granted temporary authority to perform the proposed transportation service. However, by Order No. 1613, served September 24, 1976, that temporary authority was cancelled. The Commission then by Order No. 1614, served September 29, 1976, granted National Bus temporary authority to perform the proposed transportation service effective October 1, 1976. A subsequent petition for reconsideration filed by Atwood's Transport Lines, Inc. (Atwood), was denied by Order No. 1615, served September 30, 1976. National Bus' temporary authority expired March 29, 1977.

Pursuant to Order No. 1599, National Bus' application for a certificate of public convenience and necessity was heard by the Administrative Law Judge for the Commission on October 6, 1976. Atwood participated in the public hearing as a protestant.

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\* The description of the proposed transportation service set forth in Order No. 1599 on pages 1 and 2 is incorporated herein by this reference. National Bus has made no substantial change or modification in the proposal since August, 1976.

National Bus is a Maryland corporation with its principal place of business in Beltsville, Md. It has been primarily involved in rendering school charter transportation services, and also has leased vehicles to other operators of motor coach equipment. National Bus owns four motor coaches. National Bus holds no certificate authority from the Interstate Commerce Commission or this Commission.

National Bus has been awarded a contract by ERDA. That contract requires the use of two motor coaches for an eleven-month period between October 1, 1976, and August 31, 1977, to provide a shuttle service between two facilities staffed by ERDA employees. The shuttle service is operated Monday through Friday, except legal holidays, between 7 A. M. and 7:30 P. M. National Bus receives \$53.02 for each round trip of shuttle service rendered.

National Bus submitted a statement of financial condition as part of its Application No. 963. The financial statement discloses total assets of \$87,812.32, including a less-depreciation amount of \$61,048.34 for revenue vehicles. Among the liabilities the financial statement includes equipment notes payable of \$23,587.72, and capital stock of \$39,962.74. In addition, National Bus submitted a statement projecting revenues and revenue deductions for a one-year period ending August 31, 1977. The projected gross income totals \$313,551.46 including shuttle service income from the ERDA contract of \$116,352.39; operating revenue deductions were projected at \$276,382.01, including deductions of \$98,117.46 attributable to the ERDA shuttle operations; the projected net profit was \$37,169.45, of which about \$13,000 would be derived from the proposed ERDA contract operations.

An ERDA representative explained the procedures used in selecting a contract carrier for its shuttle service. The initial step is a solicitation of bid proposals. After receiving the proposals, ERDA identifies the lowest bidder and offers to enter into a contract with that carrier, if the bidder is qualified under ERDA's rules to render the service. The qualifications of the carrier are determined by an ERDA contracting officer. If the low bidder is qualified, it gets the contract. If not, the qualifications of the next lowest bidder are determined, and so on until the lowest priced qualified bidder is ascertained and a contract entered. Under ERDA's regulations the contract must be re-bid annually.

Four carriers bid on the proposed ERDA shuttle contract. National Bus submitted the lowest bid, and ERDA duly inspected the facilities and equipment belonging to National Bus. Determining that National Bus was qualified under its criteria, ERDA awarded the contract effective October 1, 1976. The ERDA representative testifying at the hearing spelled out the need for the shuttle service.

Protestant Atwood contends that a non-certificated carrier should not be granted authority to render the ERDA shuttle service when there are certificated carriers (including Atwood) ready, willing and able to perform the service. Atwood also submits that the mere fact that National Bus was low bidder for the ERDA contract is insufficient to support a finding of public convenience and necessity.

Atwood has provided service to ERDA which, except for price, is identical to that proposed herein. Most recently, it had been providing such service during the 13-month period ended September 31, 1976. Prior to that time, Atwood had conducted shuttle operations for the Atomic Energy Commission, ERDA's predecessor.

Under its most recent contract with ERDA, Atwood earned approximately \$155,000, resulting in net operating income estimated at \$25,000. Correspondingly, Atwood's income statement for calendar year 1975 reflects total operating revenue of \$1,517,737 and net operating revenue of \$26,034.

Atwood contends that revenue from the ERDA operation is important to offset its overhead, especially in the winter months when income from charter operations is comparatively low. Loss of the ERDA revenue also would adversely affect Atwood's employees because "the employees that work for [Atwood] are interested in 12-month employment, so in the lean months, when the charter revenue is low, our employees depend on the work this [ERDA contract] provides as an offset so that everybody gets a little work in the winter time . . . ."

Atwood bid on the ERDA contract, but it was the highest of four bidders. Assertedly, this resulted from its prior contract being a matter of public record, thereby enabling potential competitors to undercut Atwood's rate. Atwood's annual bid was for \$150,000, an \$8,000 increase from the prior year. The round-trip cost to ERDA based on its estimated quantity of 2,520 trips would be \$59.52. Atwood asserts that it is ready, willing and able to provide an adequate service for ERDA.

#### DISCUSSION AND CONCLUSION

The findings to be made by the Commission with respect to applications for certificates of public convenience and necessity are set forth in Title II, Article XII, Section 4(b) of the Compact. The Commission is required to make two separate findings. First, the applicant must be "fit, willing and able" to perform the proposed transportation properly and to conform to the provisions of the Compact and the rules, regulations and requirements of the Commission thereunder. Second, the proposed transportation "must be or will be required" by the public convenience and necessity.

Initially, the Commission finds that National Bus is fit, willing and able to perform the proposed transportation service properly and to conform to the provisions of the Compact and the rules, regulations and requirements of the Commission thereunder. A similar conclusion is compelled as to Atwood, which is already certificated. The Commission further finds that the public convenience and necessity does not require the transportation by National Bus of persons travelling on official government business, government employees, or other persons together with baggage, over irregular routes, between the ERDA office at 20 Massachusetts Avenue, N. W., Washington, D. C., and the ERDA office in Germantown, Md.

In determining the public convenience and necessity, the operative questions are

. . . whether the new operation or service will serve a useful public purpose responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

See Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936). This rule of law has been consistently followed and affirmed in hundreds of thousands of cases spanning 41 years. In essence, it constitutes the very heart of motor carrier licensing regulation.

Evaluating the evidence in light of the Pan-American criteria, it is obvious that there is a public purpose to be served by the proposed shuttle operation. This purpose, however, has been served satisfactorily by Atwood in the past, and the record clearly shows that Atwood stands ready, willing and able to provide such service now and in the future. Moreover, the testimony is uncontradicted that substantial and important revenue would be diverted from Atwood should this application be granted.

National Bus contends that a grant of the application would serve the public interest inasmuch as the shuttle service would be provided at a lower total cost. This argument, however, is extraneous to the question at hand.

It is well-settled that, in considering an application for operating authority, the issue of rates has no bearing on the separate issue of public convenience and necessity unless it is shown that the rates of existing carriers are so high as to constitute an embargo. Cf. Fleet Transport Co., of Ky., Inc., Extension-Nashville, 88 M.C.C. 762, Malone Freight Lines, Inc., Extension Textiles, 61 M.C.C. 501, and especially

Wellspeak Common Carrier Application, 1 M.C.C. 712 (1937), where it is stated at page 715

The only convincing evidence as to the reason for applicants' ability to obtain this traffic is the fact that they published and applied lower rates. There is no basis for a finding that rates of carriers now in operation are too high and, even if that should be the case, that fact alone would not justify the issuance of certificates to additional carriers in this territory.

Significantly, National Bus has not alleged that Atwood's rates are so high as to constitute an embargo, and no evidence to establish such a contention has been offered. Moreover, our review of the actual and proposed contract prices involved reveals no basis for a sua sponte determination that an embargo exists.

In this connection, it should be noted that the primary purpose of regulation is to insure that adequate and continuous transportation service is available to the public, without discrimination, and at a fair price. To effect this purpose, it is sometimes necessary to limit the number of competing carriers so as to protect the revenue potential and service capability of those carriers who are already serving the public. Here, Atwood has shown that it needs the year-around revenue derived from serving ERDA to fully utilize its equipment and personnel resources. The interposition of National Bus would divert substantial revenue from Atwood without any showing that Atwood's rate is unreasonable or constitutes an embargo.

Substitution of price for public convenience and necessity as a criterion in operating rights proceedings would effectively delegate to any contracting party the certificating authority conferred on the Commission. For, if next year some other uncertificated carrier bids lower than National Bus, how, in light of a grant of this application, could the Commission refuse to issue a certificate to the new low bidder? The Commission would become a mere "rubber stamp" for contracting agencies. Such an outcome, obviously, would not be consistent with the Commission's statutory obligations. Accordingly, the application must be denied.

THEREFORE, IT IS ORDERED that Application No. 963 of National Bus Leasing, Inc., be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:

  
WILLIAM H. MCGILVERY  
Executive Director

STRATTON, Chairman, concurs:

I would not want to be found dissenting from a decision that is so clearly in the mainstream of motor carrier regulatory law, but I am impelled to record a few reflections.

I.

What this case decides is that, in a contest between a certificated carrier with authority to operate "Charter Pursuant to Contract" 1/ service and a carrier without a pre-existing certificate of authority, the Commission will award the business to the certificated carrier. This result will obtain notwithstanding a finding that the noncertificated carrier is fit, willing and able to operate the service, notwithstanding the customer's desire that the noncertificated carrier operate the new service, and notwithstanding that the price of service from the certificated carrier is higher.

As the order makes abundantly clear, this decision has hundreds of thousands of prior, similar decisions as precedent. The difficulty comes in trying to demonstrate the correctness of a rule that in the name of public convenience and necessity subordinates considerations of price and customer choice to that of the continued financial health of carriers already certificated, and in this case requires the Energy Research and Development Administration to pay \$16,380 more for equivalent shuttle bus service operated by a carrier not of its choosing.

As a result of this decision, a clearly visible and measurable added cost will be visited on ERDA and, through it, the taxpayers. What is not equally clear and quantifiable is a commensurate benefit to the public. Instead we only make obeisance to the totem of presumed benefits that will flow from protection of the financial health of the already certificated carrier.

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1/ See Order No. 1361 for the definition of this concept.

Protection of the revenue of a franchised carrier which is required to operate money-losing routes is justifiable in many instances. Extension of the doctrine to the diverse and dynamic charter market is something else again. As to that segment of the motor carrier business, certainly it is arguable that the public would receive adequate and continuously available services at lower cost if the regulatory barriers to new entrants were lowered to the level of the economic barriers, which are not high in the bus business as this case demonstrates.

After hundreds of thousands of decisions in this vein is it any wonder that the economic efficiency of regulated transportation is the subject of national debate?

## II.

The decision points out that "[s]ubstitution of price for public convenience and necessity as a criterion in operating rights proceedings would effectively delegate to any contracting party the certificating authority conferred on the Commission." Is the Commission any less a rubber stamp when, as in this case, it ritually maintains the barrier to competition with certificated carriers?