

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1769

IN THE MATTER OF:

Served November 16, 1977

Application of D. C. MEDICAID TRANSPORTATION, INC., for a Certificate of Public Convenience and Necessity to Perform Special Operations )

Application No. 968

Docket No. 354

Application of McKINLEY BATTLE for a Certificate of Public Convenience and Necessity to Perform Special Operations )

Application No. 974

Docket No. 360

Application of DAMON T. GARY T/A DAMON'S TRANSPORT for a Certificate of Public Convenience and Necessity to Perform Special Operations )

Application No. 980

Docket No. 363

Application of WILLIAM C. DYE T/A W & D TRANSPORTATION SERVICE for a Certificate of Public Convenience and Necessity to Perform Special Operations )

Application No. 985

Docket No. 365

Application of ROBERT EARL GRAHAM for a Certificate of Public Convenience and Necessity to Perform Special Operations )

Application No. 991

Docket No. 370

By Order No. 1749, served September 16, 1977, each of the above-captioned applications was denied. 1/ By application filed October 17, 1977,

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1/ Order No. 1749 also denied Application No. 965 of Ebony Medivan, Inc., and Application No. 970 of D. C. Transport, Inc., and granted the following applications: No. 946, Rodwell Buckley; No. 951, Thomas A. Pickens; No. 952, John W. Brown; No. 953, Otis F. Smith; No. 954, Dan Jenkins; No. 955, Alfred L. Gaines; No. 956, Ellis B. Harrison; No. 960, Noral Harvey; No. 961, John Otis Pickens; and No. 966, David C. Pearson. Certificates of public convenience and necessity have been issued to each carrier whose application was granted. Each of these persons shall hereinafter be referred to by appropriate short titles.

William E. Dye (sic) trading as W & D Transportation Service (Dye) seeks reconsideration of Order No. 1749, generally, and particularly as related to the denial of Dye's Application No. 985. By joint application filed October 17, 1977, D. C. Medicaid Transportation, Inc. (DCMT), McKinley Battle (Battle), Damon J. Gray (sic) trading as Damon's Transport (Gary), and Robert Earl Graham (Graham), hereinafter referred to collectively as the joint applicants, seek reconsideration of Order No. 1749, generally, and particularly as pertinent to the denial of their respective applications. The joint applicants also urge that their proceedings be reopened for the purpose of accepting additional evidence or for further public hearing. In addition, joint applicants request that the filing of their application operate to automatically stay the issuance of any certificates of public convenience and necessity authorized to be issued by Order No. 1749.

On October 25, 1977, the joint applicants filed a reply to Dye's application for reconsideration. On the same date Buckley, T. A. Pickens, Brown, Smith, Gaines, Harrison, Harvey, and J. O. Pickens filed a joint reply to the joint application for reconsideration.

Dye asserts the following errors:

1. The Commission erred in failing to find that the public convenience and necessity requires operation by more than ten additional carriers; 2/
2. The Commission erred in failing to find that Dye is fit, financially and otherwise, to conduct the proposed operations; and
3. The Commission erred in failing to find that approval of Application No. 985 would not have a substantial adverse effect on existing carriers.

The joint applicants allege error as follows:

4. The Commission erred in concluding that the public convenience and necessity will be served by denial of joint applicants' applications;
5. Certification of applicants by chronological order is arbitrary and capricious; and
6. The finding that DCMT is financially unfit is based upon an arbitrary standard;

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2/ Ten carriers were certificated by Order No. 1749, in addition to two who were already certificated to perform the type of service proposed by each applicant herein.

Moreover, the joint applicants seek to submit additional evidence concerning the financial fitness of DCMT and the transportation requirements of the District of Columbia Department of Human Resources (DHR). Obviously, the contentions of Dye are duplicative of those of the joint applicants to a certain extent, and, where possible, separate discussion of these overlapping arguments will be avoided. Moreover, only those facts necessary for clarity of discussion will be reiterated herein. 3/

Each applicant herein seeks a certificate of public convenience and necessity to transport persons who are confined to wheelchairs between points within the Metropolitan District and hospitals, doctors' offices or clinics within the Metropolitan District at per capita rates. As indicated above, a total of 17 such applications were considered in Order No. 1749, and ten of these applications were granted. These applications were filed over a ten-month period beginning June 11, 1976, and ending April 11, 1977. Hearings thereon commenced September 29, 1976, and concluded, for Application No. 991, on May 25, 1977. Each applicant submitted evidence of its method of operation, either actual or proposed, the equipment that it would use, and its financial status. As pertinent, DCMT's only financial exhibit found to be credible was its profit and loss statement for the period January through September, 1976, reflecting total revenue of \$18,408, total operating expenses of \$18,758.86, and a net loss of \$350.86. Certain other financial exhibits were not supported by competent testimony and we, therefore, accorded no weight thereto.

DHR presented evidence only on September 29 and 30, 1976. It, of course, could have presented evidence at each hearing, including such revised estimates of its need for service as may have existed. In this connection, we note that DHR was served with a copy of each order scheduling a hearing on the five applications which are the subject of this order. Although DHR failed to appear in specific support of any of these applications, it offered and we considered its evidence as pertaining to all applicants, including the five seeking reconsideration herein. 4/ DHR estimated a need

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3/ For a more complete recitation of the facts in these proceedings, see Order No. 1749, incorporated herein by this reference.

4/ It should be noted that DHR expressed no preference for any particular applicant(s). In fact, DHR's representative stated in response to questions as to whether ten carriers could meet DHR's needs and which carriers, if any, DHR specifically supported: "Possibly, yes, possibly 11, possibly 9. I don't know. My position is that I am not in the business to provide specific individuals with income. I am in the business to provide service to the people. My position is that the more inventory of services that I have to draw upon, the better off I will be. \* \* \* As a matter of fact, I will tell you the truth, sir. I couldn't give you a recitation out of my head as to who these people are." (Transcript of September 29, 1976, pages 70-71)

for 1,800 vehicle trips per month. It assigns passengers to carriers on a strict rotational system, 5/ i.e., each carrier gets one call in turn regardless of the number of vans operated by that carrier or its service capacity. If a carrier is called which does not have the capacity to take the trip, the next carrier is called, and so on until a carrier is found who can take the trip. DHR also testified that the number of calls for service had been increasing at a decreasing rate and was tending to level off.

Both Ironsides Medical Transportation Corporation and Rehab Transportation, Inc., 6/ presented evidence in opposition to the applications. While they did not appear in all proceedings, the protestants evidence, like that of DHR, was considered as applicable to all applications. The evidence of these carriers consisted generally of their operating abilities and the adverse effect on their operations which the competition of uncertificated carriers had engendered.

Turning now to the specific contentions of the applicants for reconsideration, we note that Dye was inadvertently omitted from the list of carriers found fit on page 27 of Order No. 1749. While this omission is unfortunate, it is of little import inasmuch as it was found that Dye had failed to show that the public convenience and necessity required his certification. Inasmuch as the Commission has not found Dye to be unfit, however, his contentions on that point need not be summarized herein. For the record, Dye was found to be fit, and the denial of his Application No. 985 turned on other grounds.

With respect to the issue of public convenience and necessity, Dye asserts that the Commission erred by considering the service capability of the protestants (who have several vans) rather than giving proper effect to the rotation system employed by DHR. Moreover, Dye asserts that the Commission's Order No. 1749 is inconsistent with DHR's desire to foster larger numbers of small entrepreneurs. Finally, Dye asserts that a

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5/ This system pertains to "regular" orders. There is another type called a "standing" order which is recurring and subject to longer range scheduling. According to DHR, it attempts to equalize standing orders among the carriers. This, too, is done without regard to the number of vehicles or the service capacity of the various carriers. For a more complete discussion see Order No. 1749.

6/ Rehab's Certificate No. 30 is now owned and operated by Conval Port Medivan, Inc., pursuant to Order No. 1764, served September 26, 1977. As recited in that order, Rehab was financially unable to continue in business.

reduction in the number of carriers will result in a windfall for the remaining carriers. We reject each of these contentions. 7/

First, it is clear in Order No. 1749 that full effect was given to the evidence in the record concerning DHR's rotation system. It is equally clear that effect was given to the evidence in the record relating to the service capability of the various applicant and protestant carriers. DHR's rotation system, when applied to a limitless number of carriers without regard to their capacities, promotes wasteful use of equipment, personnel, and fuel resources. DHR's witness expressed a desire only that there be a large inventory of carriers; that agency has no concern for the viability of the carrier industry and gives no consideration to the financial health of the carriers which comprise it. The evidence in these proceedings shows that virtually any individual with a public vehicle license and a little capital could become a "medivan" carrier if transportation for hire were not subject to regulation. DHR's approach would undoubtedly drive the more marginal carriers to bankruptcy and would cause degeneration of the quality of service among the survivors. As Commissioner Stratton put it in his concurring opinion to Order No. 1749, "[o]ur task in this case has been to protect the regulated industry from exploitation by its [monopolistic] customer." The Commission by Order No. 1749 applied its judgment to limit the size of the "industry" to the number of carriers which, considering their individual capacities and situations, could survive and provide reasonable, continuous, and adequate service as mandated by Title II, Article XII, Section 3 of the Compact.

Finally, Dye cannot be heard to complain about losing business that he gained unlawfully. The transcript in Docket No. 365 clearly reveals that Dye was knowingly operating without authority despite several admonitions by the Commission's staff to refrain. To the extent that Dye's business activities have succeeded through the unlawful furnishing of transportation, he has acted at his peril. This Commission, while not finding any medivan applicant unfit as a result of past operations, is under no duty to protect illegitimate profits or advance a business which is conducted illegally.

The joint applicants contend that the Commission erroneously based its conclusions on the assumption that DHR allocates passengers disproportionately among its carriers, and that, had the Commission adopted the rotation system as a basis for its calculations, it would have found that there is sufficient traffic to warrant grants of authority to the joint applicants. To the contrary, the Commission is well aware of DHR's approach to allocating business. DHR's sole concern is the movement of its clients.

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7/ We also reject the exhibits tendered with Dye's application for the reasons (a) that no leave was sought for the filing of same, and (b) that they relate to Dye's financial fitness, a matter on which there is no bona fide disagreement.

Our inquiry under the law must extend further. Our duty, as set forth in Title I, Article II of the Compact is to regulate and improve transit and alleviate traffic congestion within the Metropolitan District. DHR's rotation system, which fails to utilize vehicles, manpower and fuel in an efficient manner, which operates in disregard of the financial health of those carriers who are expected to provide service, and which confers no discernible benefit on the public, cannot be countenanced within the parameters of the Compact. We have, therefore, regulated the supply of carriers so that the above-referenced goals will be met. As a practical matter, limiting the number of carriers should encourage DHR to utilize available resources in a more efficient manner and, at the same time, assure a more stable source of transportation service than has existed heretofore. 8/

The joint applicants further assert that certification by chronological order is arbitrary and capricious. Under the circumstances here present, we must disagree. First, it is important to note that there exists little difference among the fit applicants insofar as equipment, method of operation, financial resources or locale are concerned. Our selection afforded preference to those applicants who were most experienced and had acted most promptly to comply with the regulatory requirements of the Compact.

In multiple-application proceedings the Interstate Commerce Commission formulated the following criteria, none of which is solely determinative, and each of which must be construed in the light of the evidence adduced: (1) the availability of applicants' motor vehicle equipment, including the quantum operated and the type necessary for the proposed operations, within an area in reasonable proximity to the point of origin; (2) coupled with the availability of equipment, the present certificated operations of the applicants within the territory sought in their respective applications; (3) the location and proximity of each applicant's terminal facilities to the proposed origin; (4) the supporting shipper's present and future transportation needs -- volume, frequency of movements, type of service, etc. -- to specified regions of the country and the availability of existing services relative to the quantum and scope of new authority required in individual States; (5) the extent of the respective applicants' participation and experience in transporting the involved commodities; (6) priority in the filing of the respective applications; (7) shipper support of the respective applications; and (8) the extent and nature of the opposition to the respective applications. Southwest Freight Lines, Ext. -- Colorado Origins, 108 M.C.C. 148, 153-154 (1968); Aero Trucking, Inc., Ext. -- Iron and Steel Articles, 121 M.C.C. 742, 753 (1975); and Riss International Corp., Ext. -- Amarillo, Tex., 126 M.C.C. 189 (1976). Obviously most of these factors are

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8/ In addition to Rehab several other firms once providing service to DHR have been noticeably silent of late and appear to have met their demise. Among carriers mentioned in testimony by DHR are D&J, I.S., P.D.Q., S&S, Ebony and Kelco. See Transcript of September 30, 1976, pages 260-264.

of little aid in distinguishing among the various applications determined in Order No. 1749. All of the applicants operated (or proposed to operate) similar equipment, equally available to DHR. DHR's support and protestants' opposition were properly applied to all applicants equally. Accordingly, the only distinguishing criteria were numbers (5) and (6), supra, those in fact used by the Commission. We find error neither in our determination of the facts nor in our application of the law to the evidence of record. Accordingly, our finding that the public convenience and necessity had not been shown to require the services of Dye and the joint applicants is affirmed.

This now brings us to the issue of DCMT's fitness and, intertwined therewith, the "new evidence" tendered on behalf of that carrier. DCMT references certain decisions of the Interstate Commerce Commission which of necessity, turn on the facts involved therein. Here, of course, the facts are different and the only credible evidence concerning DCMT's financial situation is an exhibit showing that the company was operating at a loss. Moreover, DCMT's vehicle lease with a local dealer provided that the leased van was not to be used in for-hire operations. Accordingly, the finding of unfitness was warranted by the record.

DCMT has tendered for filing certain additional evidence which it desires the Commission to consider, and argues that the record before the Commission, dating back approximately one year, is too stale. This argument is also relied on as warranting the receipt of certain other tendered documents which purportedly show an increase in the service requirements of DHR. The Commission finds that the tendered documents should be rejected. These proceedings have already involved a significant expenditure of resources by the Commission. Each applicant was afforded a complete opportunity for a hearing and had at least one occasion to present evidence concerning DHR's requirements (including increased service need) as it deemed pertinent. That the applicants failed to do so is a matter of record. DCMT was afforded a second hearing date for the specific purpose of demonstrating its fitness and clearly knew, prior to the filing of its application for reconsideration, of its evidentiary deficiencies.

Commission Rule 27-01 permits a petition to reopen a proceeding only before issuance by the Commission of a final order. The tendered evidence was available prior to September 16, 1977, when Order No. 1749 was issued, but no effort was made by either DHR or DCMT to reopen these proceedings in a timely manner. Even should the Commission find DCMT to be fit, financially and otherwise, we would still conclude that its service is not required by the public convenience and necessity on the chronology-related bases. Moreover, without some showing that these applicants, by due diligence, could not have tendered supplemental evidence in a timely fashion, we see no reason to reopen this record. The evidence of record is relatively current and includes DHR's estimates of future need. There must be a closing of the evidence at some point if an administrative decision is to issue, and that

point is defined by Rule 27-01. In the absence of a showing of proper and sufficient cause, the Commission finds that the tendered documents should be rejected.

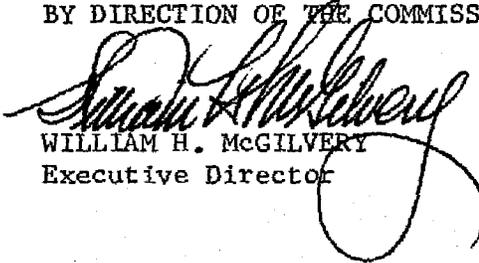
Two further matters require comment. First is the joint applicants' request that issuance of certificates pursuant to Order No. 1749 be automatically stayed. These certificates have issued inasmuch as the granting thereof was not directly challenged on reconsideration. Accordingly, joint applicants' request is both moot and inappropriate.

Finally, it is a matter of record that the applicants for reconsideration (except Graham) had been operating without appropriate authority and the instant pleadings fail to indicate that such unlawful operations have ceased. Cessation shall be directed.

THEREFORE, IT IS ORDERED:

1. That the application for reconsideration of William C. Dye be, and it is hereby, denied.
2. That the supplemental evidence tendered with the application referenced in 1. above be, and it is hereby, rejected.
3. That the joint application for reconsideration filed by D. C. Medicaid Transportation, Inc., McKinley Battle, Damon T. Gary, and Robert Earl Graham be, and it is hereby, denied.
4. That the supplemental evidence tendered with the joint application referenced in 3. above be, and it is hereby, rejected.
5. That William C. Dye, D. C. Medicaid Transportation, Inc., McKinley Battle and Damon T. Gary be, and each is hereby, directed to cease and desist from engaging in the transportation for hire of passengers between points in the Washington Metropolitan Area Transit District, unless or until there is in force an appropriate certificate of public convenience and necessity authorizing such transportation.

BY DIRECTION OF THE COMMISSION:



WILLIAM H. MCGILVEREY  
Executive Director

SHANNON, Commissioner, not participating.