

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2576

IN THE MATTER OF:

Served July 12, 1984

Application of BATTLE'S )  
TRANSPORTATION, INC., for a )  
Certificate of Public Convenience )  
and Necessity--Special Operations )

Case No. AP-84-07

By application filed March 1, 1984, Battle's Transportation, Inc., seeks a certificate of public convenience and necessity to transport passengers over irregular routes, in special operations, round-trip or one-way, for health care services between health care facilities in the Metropolitan District, on the one hand, and, on the other, points in the Metropolitan District, restricted to the performance of such operations in vehicles with manufacturer's designed seating capacity of eighteen (18) passengers or less, excluding the driver. 1/

By Order No. 2537, served March 7, 1984, which is incorporated herein by reference, a public hearing on the application was convened on April 12, 1984. Subsequently, the hearing was adjourned until May 10, 1984, to enable witnesses on applicant's behalf to appear. 2/ Rosetta D. Murray t/a Murray's Non-Emergency Transport Service, WMATC Carrier No. 63, appeared and presented evidence in opposition to the application. 3/

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1/ To the extent it could be construed to seek authority to transport passengers solely within the Commonwealth of Virginia, the application was dismissed pursuant to Title II, Article XII, Section 1(b) of the Compact. See Order No. 2537.

2/ Order No. 2549, served May 1, 1984, postponed the continued hearing from April 26, 1984, its originally scheduled date, until May 10, 1984.

3/ Applicant's motion to exclude Ms. Murray from the hearing for failure to file a proper protest under the Commission's Rules of Practice was denied by the presiding Administrative Law Judge. Ms. Murray timely filed and served upon applicant's counsel notice of her intent to appear at the hearing and oppose the application, but failed to indicate precisely the nature of her interest in the proceedings. The Judge held that applicant suffered no material prejudice by the omission, and we agree.

McKinley Battle appeared at the hearing and testified in his capacity as president of the applicant. Battle's Transportation, Inc., is incorporated in the District of Columbia and authorized to do business in Maryland and Virginia. It presently holds WMATC Certificate No. 62, which authorizes the following transportation:

IRREGULAR ROUTES

SPECIAL OPERATIONS, round-trip or one-way, transporting persons confined to wheelchairs:

Between medical treatment facilities located in the Metropolitan District, on the one hand, and on the other, points in the Metropolitan District.

RESTRICTIONS: The service authorized herein is restricted to the transportation of non-ambulatory participants in the Medicaid program of the District of Columbia, and is further restricted to transportation in van-type vehicles specially equipped with ramps and mechanical devices for securing wheelchairs in transit.

Battle's Transportation, Inc., presently employs six persons, including five drivers and one clerical employee. All of the drivers have satisfactory driving records. If this application is granted, the anticipated profits from expanded operations would enable applicant to provide fringe benefits such as hospitalization insurance and paid sick leave for its employees.

Battle's Transportation, Inc., has a fleet consisting of eight vehicles, 4/ and there are plans to buy a ninth vehicle if this application is granted. Of the eight vehicles presently on hand, all are vans. Only five of the vans, however, are equipped with ramps and mechanical devices for securing wheelchairs in transit, as required by applicant's certificate. Mr. Battle testified that the remaining three vans are not specially equipped to transport persons confined to wheelchairs. 5/

Mr. Battle further testified that the three vans not equipped to handle wheelchair-bound passengers have been used by applicant to transport mentally retarded passengers who are not confined to wheelchairs, in direct violation of the applicant's existing WMATC

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4/ The equipment list filed with the application showed only six vehicles in applicant's fleet.

5/ These are the 1984 Dodge (gray) and 1981 Dodge (red and white) vans shown on the equipment list filed with the application, and a 1983 Ford van not shown on the list.

Certificate No. 62. The illegal and unauthorized operations began on or about December, 1982, 6/ when the applicant was approached by the Bureau of Community Services, a branch of the Mental Retardation and Developmental Disabilities Administration of the District of Columbia Department of Human Services, and asked to transport some of their patients who are not in wheelchairs.

Mr. Battle testified that he knew the transportation of patients not in wheelchairs requested by the Bureau of Community Services was beyond the scope of his company's WMATC authority. He testified also that he knew of the Commission's procedures for temporary authority, but did not apply for authority to transport patients for the Bureau. Mr. Battle further testified that he had met with the Commission's Executive Director to discuss the broadening of his certificate to be able legally to perform the service requested by the Bureau. Mr. Battle was advised by the Executive Director that appropriate operating authority would be necessary to enable Battle's Transportation, Inc., to serve the Bureau of Community Services.

Despite Mr. Battle's admitted knowledge of the fact that serving the Bureau of Community Services in the manner requested would be beyond the limitations of his company's certificate, nevertheless Battle's Transportation, Inc., performed the requested transportation. The only excuse offered in mitigation of this illegal conduct was Mr. Battle's claim that the Bureau of Community Services desperately needed the requested transportation and there was not enough time to file an application for appropriate authority.

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6/ Mr. Battle's testimony on this point was contradictory. At first he indicated that the transportation of persons not in wheelchairs for the Bureau of Community Services began when the 1981 Dodge van was purchased, which was in September, 1983. Later he testified that it began in December 1982 or 1983, and that he was not absolutely positive about the date. We resolved this conflict in Mr. Battle's testimony by resort to our official records; namely, the 1982 annual report filed by Battle's Transportation, Inc. That report showed over \$4,000 in "miscellaneous business income" other than income derived from operations under WMATC Certificate No. 62. In a letter filed on May 31, 1983, in response to the inquiry of the Commission's Executive Director as to the source of this income, it was stated that "Mr. Battle explains that the income was earned for transporting the elderly and handicapped to and from hospitals and doctor's appointments." A form 1099 accompanying the letter shows that the income was paid by the government of the District of Columbia. Taking official notice of these data from our records, we conclude that the illegal transportation began in 1982.

Mr. Battle's revelation of his company's illegal operations occurred on the first day of the hearing, April 12, 1984. At the continued hearing held on May 10, 1984, Mr. Battle resumed the witness stand and testified that after April 12, 1984, his company's transportation of patients not in wheelchairs for the Bureau of Community Services had been stopped for one day, but then resumed upon the Bureau's request.

Ms. Nena Tharpe, Acting Administrative Officer of the Bureau of Community Services 7/ appeared at the continued hearing and testified in support of the application. Her office provides health care services for mentally retarded and developmentally disabled citizens. This involves a need to transport approximately 63 individuals from their homes to health care facilities, and return, on a daily, scheduled basis. 8/ Occasionally there are unexpected transportation needs that are unscheduled, and require the services of a carrier with some flexibility.

Ms. Tharpe testified that the Bureau's clients travel from foster homes and group homes located in the Metropolitan area, but she indicated with certainty that no such homes are located in Northern Virginia and she was unsure whether any were located in Montgomery County, Md. She testified that the majority of the health care facility destinations were in the District of Columbia. She did not know if any destinations were located in Maryland, but she was positive none were located in Virginia.

Ms. Tharpe further testified that during her two-month tenure as Acting Administrative Officer of the Bureau, the only private transportation contractor to have been used by the Bureau was Battle's Transportation, Inc. She had no knowledge whether the Bureau ever used the services of Rosetta D. Murray t/a Murray's Non-Emergency Transport Service. Her only knowledge of other existing services consisted of information gleaned from a review of the telephone book, which yielded the names of only one other carrier besides the protestant.

Ms. Antonia B. Fisher also appeared at the hearing to testify in support of the application. She is the Acting Center Director of PSI Associates, Inc., a private, for-profit corporation providing health care services for mentally retarded clients.

PSI currently serves approximately 125 clients, of whom 7 are confined to wheelchairs. Ms. Fisher testified that an increase of

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7/ This is the same organization for which Battle's Transportation, Inc., performed the unauthorized operations noted above.

8/ This number could increase in the current fiscal year, according to Ms. Tharpe's testimony, to as many as 100 individuals.

approximately 100 new clients is expected shortly, of whom perhaps 15 or 20 will be confined to wheelchairs.

Ms. Fisher testified that approximately 80 of her company's clients need to be transported twice a day, from the Forest Haven facility in Laurel, Md., to a location at 16th and P Streets, N.W., in the District of Columbia, and return. PSI has contracted with Metro to transport PSI's clients who are not in wheelchairs, and Ms. Fisher did not expect that to change if this application is granted.

As for clients confined to wheelchairs, Ms. Fisher testified that up until approximately two months before the date of the continued hearing they had been transported by the protestant. She stated the protestant's service was unsatisfactory due to excessive equipment breakdowns. PSI switched from the protestant's service to that of the applicant, 9/ and found the applicant's service to be preferable. The applicant's service, however, was discontinued after April 12, 1984, pending the outcome of this application.

Since the applicant's service has been discontinued, PSI's wheelchair-bound clients have not been transported between Forest Haven and the destination at 16th and P Streets. Instead, they have remained at Forest Haven. Ms. Fisher indicated an awareness of the existence of two other authorized carriers besides the protestant, and stated positively that one had never been used before and that she was unsure about the other.

Rosetta D. Murray testified in her own behalf in opposition to the application. Trading as Murray's Non-Emergency Transport Service, she holds WMATC Certificate No. 63, which authorizes the following transportation:

IRREGULAR ROUTES:

SPECIAL OPERATIONS, limited to transportation-disadvantaged persons and their attendants between points within the Metropolitan District.

RESTRICTED against the transportation of participants in the District of Columbia Department of Human Resources Medicaid Program.

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9/ The applicant's existing authority is restricted to passengers participating in the D.C. Medicaid program, which excludes PSI's clients. Therefore, service rendered for PSI was also unauthorized and illegal as being beyond the scope of the applicant's certificate.

RESTRICTED to the performance of such operations in vehicles with a manufacturer's designed seating capacity of fifteen passengers or less, excluding the driver, with each vehicle containing at least two wheelchair tie-downs.

Ms. Murray currently operates eight vans and employs two full-time and two part-time drivers and one clerical employee. Service is held out seven days a week, 24 hours a day. Of Ms. Murray's eight vans, six are equipped with wheelchair lifts and two are 14-passenger capacity.

In February, 1984, Ms. Murray furloughed 4 drivers due to a 40 percent decrease in traffic volume. She claimed the decrease in traffic, and the resulting impairment of her ability to provide service, was caused by the unauthorized entrance of the applicant into the market. She testified, however, that she had rendered no service for the Bureau of Community Services since 1981. She also testified that she had served PSI Associates, Inc., until approximately 2-1/2 weeks before the date of the continued hearing, which would have included a period of time subsequent to the lay-off of the drivers. Further, Ms. Murray indicated an awareness of PSI's dissatisfaction with her service, but attributed this to unreasonable demands on the part of PSI rather than any shortcomings of her service.

Title II, Article XII, Section 4(b) of the Compact provides that

. . . the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the transportation covered by the application, if it finds, after hearing held upon reasonable notice, that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise such application shall be denied.

In other words, to receive a grant of authority, an applicant must pass two separate tests. First, the applicant must be found fit, willing, and able to perform the transportation proposed by its application and to comply with regulatory requirements. Then, secondly, the transportation proposed must be found to be required by the public convenience and necessity. The applicant bears the burden of proof in both tests.

The test of fitness, willingness, and ability involves, among other things, a requirement that the applicant prove its amenability to the requirements of the law and this Commission's rules and

regulations. The applicant must affirmatively establish that it will conform voluntarily with applicable legal requirements. When there is evidence that an applicant has in the past wilfully and knowingly violated the law, then an inference arises that the applicant is not amenable to legal requirements. Unless the applicant can overcome such an adverse inference by evidence appropriate in the circumstances of the particular case, then the applicant must be found unfit.

In this case there is evidence from the applicant's own mouth of very serious past violations of the law. Mr. Battle frankly admitted that for more than a year prior to the filing of this application his company transported clients of the Bureau of Community Services who were not confined to wheelchairs. Mr. Battle specifically testified that he knew such transportation was beyond the scope of his company's WMATC Certificate No. 62 at the time it was performed and, hence, was in violation of the most fundamental legal requirement of the Compact, namely, the requirement of certification by this Commission. <sup>10/</sup> Moreover, such uncertificated and illegal transportation was performed wilfully, as is evident from the fact that the transportation for the Bureau of Community Services was continued even after the close of the first day of hearing on April 12, 1984, at which time Mr. Battle and his counsel plainly knew, or reasonably should have known, that such unauthorized transportation was a matter of concern to the Commission.

Mr. Battle's only excuse for his company's flagrant disregard of the Compact was the claim that the Bureau of Community Services needed the service badly and there was no time to file an application for temporary authority. This explanation falls far short of overcoming the adverse inference regarding fitness that is compelled by Mr. Battle's admission of his company's past and continuing illegal and unauthorized operations. As we said in Order No. 2404, In Re Webb Tours, Inc., served March 30, 1983: <sup>11/</sup>

This Commission finds little exculpation in such self-serving statements as "I didn't have time" or in the ex-post facto filing of an application seeking legitimization of past wrongs. Accordingly, we find that [applicant] has demonstrated a blatant disregard of the requirements of the Compact and this Commission's rules and regulations thereunder. Such behavior cannot be rewarded by a grant of new authority.

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<sup>10/</sup> See Title II, Article XII, Section 4(a) of the Compact.

<sup>11/</sup> Affirmed in Webb Tours, Inc. v. WMATC, \_\_\_ F.2d \_\_\_ (D.C.Cir., May 18, 1984).

We are particularly unimpressed by Mr. Battle's claim that he had no time to seek temporary authorization to serve the Bureau of Community Services because it appears Battle's Transportation, Inc., began to serve the Bureau in December, 1982, more than a year before the instant application for permanent authority was filed. We simply find it incredible that an existing carrier such as Battle's Transportation, which is deemed to know our rules and regulations and to be familiar with our procedures, could operate illegally for a period in excess of a year without filing an application for authority of any kind under a good faith belief that there was no time to file an application. In this regard, we note our recent grant of temporary authority in Case No. AP-84-24, In Re Jones & Washington, Ass'n., Order No. 2561, served June 1, 1984. That application was filed on May 14, 1984, seeking temporary authorization to serve the Bureau of Community Services -- the very same organization Mr. Battle's company seeks to serve -- and was granted in time for operations to commence on June 11, 1984, less than a month later.

Furthermore, this is not the first time we have been called upon to consider the ramifications of illegal and unauthorized operations conducted by Mr. Battle. In Order No. 1749, served September 16, 1977, in which Mr. Battle's first application for operating authority was considered along with the applications of 16 other operators of so-called "medivan" services, we noted the fact of past unauthorized operations by Mr. Battle and the other applicants and considered the impact of such illegal conduct on the issue of compliance fitness. At that time we gave Mr. Battle and the others the benefit of the doubt and we found them to be fit. But we also warned them that:

Applicants are advised of the necessity to familiarize themselves with the requirements of the law relating to the transportation for hire of passengers and to avoid violations which, in the future, will be considered more harshly.

Accordingly, we find that Battle's Transportation, Inc., has failed to carry its burden of proving that it is fit, willing, and able to comply with the requirements of the Compact and the Commission's rules, regulations and orders thereunder. The application will be denied on this basis. It is, therefore, unnecessary for us to consider whether the transportation proposed is required by the public convenience and necessity. We note, however, that were we to consider this issue, we would have difficulty in finding a need for the proposed service between all points in the Metropolitan District due to the inability of applicant's supporting witnesses to substantiate any present or anticipated future movements of passengers between points other than those in the District of Columbia and Prince George's County, Md.

Battle's Transportation, Inc., shall be directed to cease and desist from conducting unauthorized operations. It is hereby admonished strictly to comply in the future with the requirements of the Compact and the Commission's rules and regulations thereunder. Further violations may result in the commencement of an investigation to determine whether Battle's WMATC Certificate No. 62 should be suspended or revoked, and may also result in criminal and civil injunctive proceedings being instituted before the United States District Court for the District of Columbia.

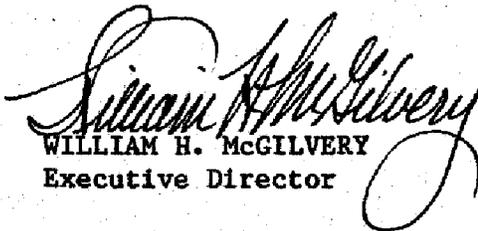
Finally, our denial of this application shall be made without prejudice to the filing of another application after a reasonable period, at which time applicant should be prepared to establish that it has brought its operations into compliance and cured the fitness problem discussed herein. Perhaps on a second try the applicant will also be able to present stronger evidence of a need for its proposed service throughout the entire Metropolitan District.

THEREFORE, IT IS ORDERED:

1. That Battle's Transportation, Inc., immediately cease and desist from conducting for-hire transportation of passengers between points in the Metropolitan District except to the extent authorized by WMATC Certificate No. 62.

2. That the application of Battle's Transportation, Inc., in Case No. AP-84-07 is hereby denied without prejudice to the filing of another application after a reasonable period, at which time applicant should be prepared to establish that it has brought its operations into compliance and that it is fit, willing and able properly to comply with the provisions of the Compact and the rules, regulations, and requirements of the Commission thereunder.

BY DIRECTION OF THE COMMISSION, COMMISSIONERS WORTHY, SCHIFTER AND SHANNON:

  
WILLIAM H. MCGILVERY  
Executive Director