

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2722

IN THE MATTER OF:

Served June 20, 1985

Application of BATTLE's TRANSPORTA-)
TION, INC., for a Certificate of)
Public Convenience and Necessity —)
Special Operations)

Case No. AP-85-12

By application filed March 13, 1985, as amended, Battle's Transportation, Inc. ("BTI" or "applicant"), seeks a certificate of public convenience and necessity to transport passengers for the purpose of receiving health care services, over irregular routes, in special operations, round-trip or one-way, 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 a manufacturer's designed seating capacity of 18 passengers or less, excluding the driver. 1/

Pursuant to Order No. 2688, served March 28, 1985, which is incorporated herein by reference, protests against the application were timely filed by three carriers: Rosetta Murray t/a Murray's Non-emergency Transport Service ("Murray's" or "protestant"); Jones & Washington, Ass'n. ("J & W" or "protestant"); and Mobile Care, Ltd ("Mobile Care" or "protestant"). A public hearing was held April 30, 1985, at which the applicant and the protestants appeared and presented witnesses.

SUMMARY OF EVIDENCE

Mr. McKinley Battle testified on behalf of the applicant in his capacity as president of BTI. BTI holds Certificate of Public Convenience and Necessity No. 62, which authorizes the following transportation:

IRREGULAR ROUTES:

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

1/ To the extent this application could be construed to seek authority between points solely within the Commonwealth of Virginia, it was dismissed pursuant to the Compact, Title II, Article XII, Section 1(b) by Order No. 2688, served March 28, 1985.

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.

At some point in 1983, BTI began transporting passengers in violation of the restrictions in its certificate. These illegal operations led to a finding of unfitness and the consequent denial of BTI's application in Case No. AP-84-07, Application of Battle's Transportation, Inc., in which it sought a grant of authority substantially similar to the authority it now seeks. Chastened by the denial of its request for broader operating rights, BTI ceased operating in violation of the restrictions in Certificate No. 62 in June or July 1984. This reduction in service forced BTI to lay off drivers, remove vehicles from service, and forego substantial revenues. Mr. Battle testified that BTI is presently operating within the limits of Certificate No. 62 and that, if the instant application is granted, BTI will observe strictly the requirements of the Compact and the Commission's rules and regulations.

The intent of this application is to enable BTI to transport any passenger who requests service for the express purpose of receiving any type of health care treatment. In this regard, health care treatment is considered by Mr. Battle to include not only surgical, diagnostic, and hospital services but also any type of physical or emotional rehabilitative therapy. Furthermore, BTI seeks to transport such passengers to or from any type of health care facility. Mr. Battle construes the term "health care facility" broadly to include any location that is associated with the provision of medical services or rehabilitative therapy.

BWI owns eight vehicles. Three of these vehicles are equipped with ramps and wheelchair tie-downs and are currently in use. The remaining five vehicles lack special equipment for the handicapped and, while not used in applicant's current operations, could be used to provide transportation if BTI's application is granted. The vehicles range in seating capacity from one to 15 passengers; all are in good mechanical condition and are kept in repair by means of a systematic maintenance program.

BTI presently employs three drivers, including Mr. Battle, all of whom have good driving records. Two of the drivers who were laid off in 1984 would be immediately available for re-hire in the event BTI

needs to increase its staff should this application be granted. Any new drivers hired by BTI would be given appropriate training, including training in CPR techniques and first-aid.

If this application is granted, BTI intends to purchase at a cost of \$27,900 a new 18-passenger vehicle specially designed to transport handicapped passengers. Mr. Battle indicated that availability of the necessary financing depended on the expansion of business a grant of this application would make possible. In this regard, BTI's projected operating statement showed that anticipated operations under the requested authority at the rates proposed in the application would generate a profit in excess of \$3,000 a year when combined with applicant's current operations. Continued operations absent the increased revenues projected from the new authority would lead to losses of approximately \$40,000. Mr. Battle testified that purchase of the 18-passenger vehicle would be advantageous to BTI because it would enable the transportation of more passengers by fewer drivers.

Ms. Roberta Ponds testified in support of the application in her capacity as director of rehabilitation services for Metropolitan Care Centers, a group engaged in the business of providing day care and rehabilitative therapy for mentally retarded persons. Metropolitan Care Centers serves 105 clients, of whom 85 percent are wheelchair-bound or otherwise require special assistance when using transportation facilities. These clients live in 50 to 60 group homes located throughout Prince George's and Montgomery Counties, Md., the District of Columbia, and Arlington County and Alexandria, Va. Most of the clients need to be transported from their respective group homes to Metropolitan Care Centers' facility at 25 M Street, S.W., Washington, D.C., and return, on a daily basis, five days a week. The remainder need such transportation only two or three days a week, or on an irregular basis. Public funds pay for the transportation of approximately 90 percent of the clients, and private funds pay for the remainder.

Ms. Ponds bears responsibility for arranging necessary transportation for her company's clients. BTI formerly provided service for Metropolitan Care Centers, and did so in a timely and satisfactory manner. However, applicant stopped providing any service "some time ago." Thus, Metropolitan Care Centers currently uses other existing carriers, including protestants Murray's and J & W. Ms. Ponds testified that the services of existing carriers are unsatisfactory because, unlike BTI, those carriers are chronically late in their pickups and deliveries. Such tardiness is inconvenient and interferes with the daily schedule of activities Metropolitan Care Centers seeks to maintain for its clients.

Ms. Claudia Richards, executive director of Constant Care One, Inc., also testified in support of the application. Constant Care provides 24-hour residential care for mentally retarded individuals. It operates three residential facilities, all located in Washington, D.C.

On a daily basis Constant Care arranges transportation of its clients between residential facilities and day care programs. All day care programs are presently located in Washington, D.C., but the location of such programs is subject to change and potentially could be anywhere in the Metropolitan District. On weekends and other occasions, Constant Care needs transportation of its residents to recreational facilities where they receive services of a therapeutic nature. Such recreational facilities are located throughout in the Metropolitan District.

Constant Care presently has 15 residents under its care, but it anticipates expansion during the months of May and June 1985. All of the current residents are ambulatory, and the cost of transporting them ultimately will be borne by the D.C. Department of Human Services. Constant Care is presently using Jenkins Transportation as its primary carrier and Murray's as its backup carrier. Ms. Richards indicated dissatisfaction with both carriers presently being used and voiced specific complaints about Murray's. For example, she recalled one occasion within a month prior to the hearing when protestant failed to pick-up one of four residents from a day care program. Constant Care retrieved the stranded resident by dispatching one of its own employees in a taxicab. ^{2/} In contrast, based on her past interaction with BTI while employed by the D.C. Department of Human Services, Ms. Richards indicated that BTI provided satisfactory service, and she would use BTI's service if this application is granted. On cross-examination, Ms. Richards indicated she was unfamiliar with the services of Mobile Care, Ltd.

The third and final public witness to testify in support of the application was Ms. Sadie Wheeler, staff assistant in charge of clerical staff at the Washington Hospital Center. The Washington Hospital Center has outpatients for whom it provides transportation service pursuant to established criteria and upon approval of a physician. There is a need to transport an average of 20 such outpatients a day. These outpatients consist of some who are ambulatory and other who are not; some who pay their way with private funds and others who are dependent on public relief programs such as the D.C. Medicaid program. The outpatients may need to be transported at any time of the day or night. They may need to go between the hospital and their homes or other medical facilities. In Ms. Wheeler's experience, outpatients have been transported to or from points located in virtually every political subdivision within the Metropolitan District.

Ms. Wheeler has supervisory responsibility over the arranging of transportation service for outpatients, and she is the person to whom complaints are directed. Since January 1985, she has received two

^{2/} The witness for Murray's admitted that the incident did occur, but blamed it on the negligence of the operator of the day care facility.

written and three verbal complaints relating to three of the ten carriers which presently have service contracts with the hospital. 3/ No such complaints were directed against any of the protestants. The complaints related to the carriers being late for pick-ups. Ms. Wheeler indicated that it is difficult at the present time to arrange for transportation during evening hours and on weekends for those outpatients who are not recipients of public support. The witness testified that BTI is used for some outpatients whose transportation is paid for by the D.C. Medicaid program, and that she expects BTI's proposed service for other classes of outpatients to be superior to that presently available from other carriers.

Mobile Care appeared in opposition to the application through its president, Mr. Kent Miller. Mobile Care holds Certificate of Public Convenience and Necessity No. 65 which authorizes transportation as follows:

IRREGULAR ROUTES:

SPECIAL OPERATIONS, limited to the transportation of transportation disadvantaged persons together with their baggage and attendants between points in the Metropolitan District;

RESTRICTED against the transportation of participants in the District of Columbia Department of Human Resources Medicaid Program, and further restricted against operations conducted solely between points in Virginia;

RESTRICTED to the performance of such operations in vehicles with a manufacturer's designed seating capacity of fifteen passengers or less, excluding the driver.

Mobile Care operates six vans, two of which were added in December 1984, and it provides service 24 hours a day, seven days a week. Its volume of business is growing. In January 1985 it operated at 40 percent capacity; in April 1985 it was operating at 63 percent. One of its competitors for the so-called "private pay" market 4/

3/ The only protestant apparently among the ten carriers which presently have contracts is Mobile Care. Ms. Wheeler did not know the names of all the carriers which now have service contracts, nor did she know how a carrier obtains a service contract.

4/ In the argot of the medi-van industry, this term refers to passengers who pay for their own transportation as opposed to those whose transportation is paid for by a public welfare agency.

percent capacity. Based on these facts, Mr. Miller took the position that there is excess capacity to serve the "private pay" market and that BTI's proposed additional service would be superfluous. Mr. Miller was unable to estimate how much of Mobile Care's current volume of business might be diverted to BTI if its application were granted, but he testified that the loss of \$2,000 to \$3,000 in revenue per month would be enough of a diversion to cause Mobile Care to take equipment out of service.

Mr. Linwood Washington testified on behalf of protestant J & W in which he is a partner. J & W holds Certificate of Public Convenience and Necessity No. 116, which authorizes transportation as follows:

IRREGULAR ROUTES:

SPECIAL OPERATIONS, transporting clients of the Bureau of Community Services, Mental Retardation and Developmental Disabilities Administration of the District of Columbia Department of Human Services between points in the District of Columbia, on the one hand, and, on the other, points in the District of Columbia, Silver Spring, Md., and Prince George's County, Md.,

RESTRICTED to transportation in vehicles with a manufacturer's designed seating capacity of 15 passengers or less (including the driver).

J & W operates a fleet of ten vans and is in the process of adding an eleventh one. Because it is limited to serving the D.C. Bureau of Community Services ("the Bureau"), J & W opposes BTI's application on the ground that, if granted, BTI would be allowed to compete for the Bureau's business, protestant's only source of revenue. However, Mr. Washington, stated that J & W's rates are lower than BTI's proposed rates, that the Bureau appears to be well pleased with his firm's service, and that, absent intangible considerations, BTI would be unlikely to succeed in depriving J & W of the Bureau's business.

Ms. Rosetta L. Murray testified against the application in her capacity as sole proprietor of Murray's Non-Emergency Transport Service. She operates under Certificate of Public Convenience and Necessity No. 63, which authorizes transportation as follows:

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.

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's fleet consisted of 14 vans at the time of the hearing, but three new vans were on order. Their delivery will increase the fleet to 17 pieces of equipment. Ms. Murray stated that her business is doing well, although she gave no specifics. She views BTI's application as a threat to the continued expansion of her business. She took the position that there is no need for BTI's proposed additional service, although she did acknowledge the existence, if not the validity, of certain complaints voiced against her service. Ms. Murray also testified that due to a recent court ruling in the District of Columbia, the residents of Forest Haven Children's Center will have to be relocated, which will give rise to a need to use more medi-van transportation service. It is Ms. Murray's opinion that because the bulk of the relocated residents will be other than "private pay," carriers such as BTI are already in line for a windfall and, therefore, should not be allowed to enter into the "private pay" market as well.

DISCUSSION AND CONCLUSIONS

The disposition of BTI's application is governed by the Compact, Title II, Article XII, Section 4(b), which provides in pertinent part as follows:

[T]he 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.

Thus, the applicant's burden is twofold. It must prove (1) its fitness, and (2) public convenience and necessity requiring the proposed service. For the reasons discussed below, we find BTI has met its burden on both issues and, accordingly, its application shall be granted.

The concept of fitness as used in Section 4(b) involves three elements: (1) financial capacity to undertake the proposed venture;

(2) operational capability to provide transportation service safely and efficiently; and (3) willingness voluntarily to abide by the law and obey the Commission's regulations. There is ample evidence of BTI's financial fitness, as its assets are substantial, and a grant of this application will enable it to improve its financial situation by increasing its revenues. Similarly, its operational capability is indicated by the fact that it is an experienced and successful operator of service that is similar in nature and the fact that it already has extra equipment on hand with which to implement an expanded service. Applicant's vehicles are in good condition and are regularly maintained. Applicant's drivers are experienced and have clear driving records. A training program will be required for new drivers. In addition, applicant is ready, willing, and able to purchase another larger and more efficient vehicle to handle the extra business which a grant of this application will make possible. This brings us to a consideration of the matter of compliance fitness.

Approximately one year ago we found BTI to be lacking the requisite willingness to abide by the law and to obey the Commission's regulations, based on admitted violations of the Compact involving unauthorized operations that came to light at the hearing on Case No. AP-84-07, Application of Battle's Transportation, Inc. That application was denied by Order No. 2576, served July 12, 1984, in which we stated

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.

It appears that BTI has heeded our admonishment and ceased unauthorized operations. The evidence from BTI to this effect, corroborated by testimony of Metropolitan Care Centers, shows not only that BTI has stopped operating beyond the scope of its certificate, but also that it has resolved to conform its conduct to legal requirements notwithstanding the opportunity cost such rectitude entails. Because of this, we find that BTI has cured its past problem and is now fit as to compliance.

Turning to the issue of whether the public convenience and necessity requires the proposed service, our analysis proceeds by considering three pertinent factors: (1) whether the proposed new operation will serve a useful purpose responsive to a genuine public demand or need for service; (2) whether existing carriers can meet such public demand or need for service as satisfactorily as the applicant proposes to do with the new operation; and (3) whether competition from the proposed new operation would adversely affect existing carriers to such a degree as to be contrary to the public interest. See Pan

American Bus Lines Operation, 1 M.C.C. 190, 203 (1936). An applicant bears the burden of presenting substantial evidence in regard to the first two factors in order to establish a prima facie case. If the applicant succeeds in carrying that burden, then the burden of going forward with the evidence shifts to protestants.

BTI has presented evidence sufficient to establish a prima facie case. The three public witnesses supporting the application would use BTI's expanded service. The supporting organizations require the movement of persons to and from health care and other facilities throughout the Metropolitan District in order that they may receive health care services, including therapeutic services as well as medical treatment. Plainly, BTI's proposal to expand its operations is responsive to a genuine demand or need for service on the part of the supporting witnesses.

Moreover, we find existing carriers cannot meet the needs of the supporting organizations as satisfactorily as the applicant proposes to do. This conclusion is not based exclusively on the complaints about existing carriers that surfaced during the hearing. While we do note those complaints, it is more significant that some of the supporting organizations have both "private pay" and publicly subsidized passengers to tender to carriers. Two of the protestants are effectively limited to "private pay" only, while the other is limited to publicly subsidized passengers only. Thus, the individual protestants are unable to handle movements of mixed loads of "private pay" and publicly subsidized passengers, whereas the applicant proposes a service that would be able to do precisely that.

The protestants have failed to present evidence sufficient to defeat BTI's prima facie case. The possibility that BTI will divert significant numbers of passengers or large amounts of revenue from the protestants amounts to nothing more than speculation. No evidence was presented from which to gauge the adverse impact upon existing carriers -- and through them, upon the public -- that might flow from a grant of this application. In any event, the three protestants are financially healthy and growing, and appear to be capable of vigorously competing with BTI. Also, as Ms. Murray pointed out, the relocation of persons from Forest Haven as the result of a local court order will increase the number of potential passengers overall, so that any adverse effects of BTI's expanded service will be offset to some extent by the expansion of the total quantum of demand for service.

THEREFORE, IT IS ORDERED:

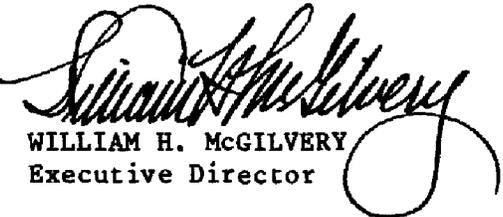
1. That Battle's Transportation, Inc., is hereby granted authority to transport passengers in special operations, over irregular routes, between health care facilities in the Metropolitan District, on the one hand, and, on the other, points in the Metropolitan District, restricted to transportation for the purpose of receiving health care

services and further restricted to transportation in vehicles with a manufacturer's designed seating capacity of 18 passengers or less, excluding the driver.

2. That Battle's Transportation, Inc., is hereby directed to file two copies of its WMATC Tariff No. 2 cancelling and superceding its WMATC Tariff No. 1 and an affidavit of identification of vehicles in compliance with Commission Regulation No. 68.

3. That unless Battle's Transportation, Inc., complies with the requirements of the foregoing paragraph within 30 days from the date of service of this order, or such additional time as the Commission may direct, the grant of the application made herein shall be void, and such application shall stand denied in its entirety upon the expiration of the said compliance time.

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


WILLIAM H. MCGILVERY
Executive Director