

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2783

IN THE MATTER OF:

Served November 4, 1985

RODGERS E. JOHNSON T/A J&J BUS)
SERVICE, Investigation of Compli-)
ance and Order to Show Cause)

Case No. MP-85-08

PROCEDURAL BACKGROUND

By Order No. 2700, served April 23, 1985, the Commission instituted the above-captioned investigation to determine whether respondent Rodgers E. Johnson trading as J&J Bus Service was operating in compliance with the Compact and the Commission's rules and regulations. The initial results of the investigation are contained in Order No. 2729, served June 27, 1985. There the Commission found that respondent had changed his rates, route, and operating entity without the authorization and scrutiny required by law. In response to applications filed during the investigation the Commission conditionally approved a transfer of Certificate No. 39 from Rodgers E. Johnson, a sole proprietor, to J&J Bus Service, Inc., conditionally amended Certificate No. 39 to comport with the operations being conducted by J&J, and conditionally authorized a rate increase commensurate with that which respondent had instituted. These grants and dismissal of the pending investigation were contingent upon respondent filing an updated equipment list and a revised tariff within 30 days. The order further provided that if respondent failed to comply with these requirements, the investigation would continue, the grants of authority would be void, and the application to amend Certificate No. 39 would stand denied in its entirety.

Respondent filed a revised tariff but failed to file an equipment list as directed. Therefore, by Order No. 2754, served August 22, 1985, the Commission scheduled the case for public hearing to commence September 19, 1985. In that Order the Commission stated the rationale for continuing the investigation as follows:

Respondent's admissions on the record of this case clearly show that he was not operating in accordance with either his Certificate No. 39 or his WMATC Tariff No. 2. However, we continue to be keenly aware that regular route commuter services are at stake here. Our high regard for such service cannot, however, extend as far as exposing passengers to the

operations of an unfit carrier. Our strenuous efforts to resolve this matter in respondent's favor having failed, and this investigation remaining open and unresolved, we shall again schedule this case for public hearing and direct respondent to show cause, if any there be, why he should not be found unfit and why Certificate No. 39 should not be revoked in its entirety.

Mr. Johnson was directed to appear at the hearing; to produce a written description of all routes operated, points served, rates charged, and vehicles operated since July 27, 1985; and to pay an assessment in the amount of \$400. Mr. Johnson failed to comply with Order No. 2754 in any respect. 1/ Counsel for the Commission appeared at the hearing and presented two witnesses.

SUMMARY OF TESTIMONY

William H. McGilvery is Executive Director of the Washington Metropolitan Area Transit Commission. Mr. McGilvery's duties in this position include serving orders and handling official correspondence on behalf of the Commission. Mr. McGilvery testified that Mr. Johnson was served with Order No. 2729. In response to that order Mr. Johnson filed a revised tariff. By letter dated July 18, 1985, Mr. McGilvery informed Mr. Johnson that he would not be considered to have complied with Order No. 2729 unless he filed, by July 27, 1985, a list of equipment used in daily service. Mr. McGilvery received no reply to this letter. On August 1, 1985, the time for compliance with Order No. 2729 having run and no equipment list nor motion to extend time for filing the list nor any word at all having come from Mr. Johnson, Mr. McGilvery informed him by letter that his sole WMATC operating authority was that contained in Certificate No. 39. No response was received to this letter. By letter dated August 13, 1985, Mr. McGilvery advised Mr. Johnson that because he had failed to comply with the requirements of Order No. 2729, the grant of authority contained in that order had become void, the application dealt with in that order stood denied in its entirety, and the investigation of compliance remained open. Enclosed with the letter was a copy of

1/ When Mr. Johnson failed to enter an appearance at 9:30 a.m., the time at which the hearing had been scheduled to commence, the hearing was recessed to provide for the possibility of inadvertent delay on respondent's part. At 10 a.m. the case was recalled, but Mr. Johnson failed to appear. Mr. Johnson was informed by letter dated September 26, 1985, that the hearing had taken place as scheduled, that briefs in the matter were due October 21, 1985, and that a transcript of the hearing was available for viewing at the Commission's offices. Mr. Johnson did not respond to the letter and did not file a brief.

Certificate No. 39 issued June 21, 1978, and unamended since that date. Also enclosed was a copy of Mr. Johnson's WMATC Tariff No. 2 which constituted the rates that he had on file with the Commission and which he was authorized to charge but which in fact were somewhat less than the investigation had revealed he actually was charging.

It is Mr. McGilvery's opinion that Mr. Johnson failed to file the equipment list required by Order No. 2729 because Mr. Johnson himself may not know from day to day what equipment will be operated.

Mr. McGilvery testified that J&J has two leases on file with the Commission. One contract of lease covers two vehicles owned by H&M Bus Company: a 47-passenger coach, serial number 9050, 2/ and a 41-passenger coach, serial number 6439. By its terms the lease commences March 14, 1985, and is continuous. A second contract of lease covers a 47-passenger coach, serial number 8220, owned by Faure Bus Company, Inc. The lease contains no start date and is continuous. Both leases were approved by the Commission on April 10, 1985.

Howard Goodrich is Supervisor I, Department of Transportation, Maryland Public Service Commission ("P.S.C."), a position he has held for over 15 years. Mr. Goodrich is responsible for the inspection of all buses which operate in or through Maryland, and he personally participates in 85 percent of those inspections.

According to the witness Mr. Johnson holds no authority from the P.S.C. to transport passengers between points in Maryland. However, because he operates a regular route, part of which is located in Maryland, he is required to apply annually to the P.S.C. for a permit to operate vehicles. In 1984, Mr. Johnson listed three pieces of equipment as being used in fixed route service: (1) a 1962 38-passenger bus, vehicle number 501 (serial number PD4105-1125); (2) a 1964 40-passenger bus, vehicle number 224 (serial number PD4106-2586); and (3) a 1962 41-passenger bus, vehicle number 526 (serial number PD4106-896). The application includes an equipment list which must be

2/ Buses are marked with two identifying numbers: a serial number, also called the vehicle identification number, which is assigned by the manufacturer, and a vehicle number, also referred to as the "bus number," which is assigned by the owner and painted on the bus. The leases referred to by Mr. McGilvery list serial numbers only. The equipment lists on file with the P.S.C. indicate both serial numbers and vehicle numbers. A comparison of serial numbers reveals that leases are on file with the Commission for only two of the buses which Mr. Johnson has been using to transport passengers between points in the Metropolitan District: vehicle number 3435 (serial number 9050) and vehicle number 406 (serial number 6439).

updated during the year should vehicles be added to or retired from service.

In October 1984 the P.S.C. received a complaint from Mr. Clement McCarty, Camp Springs, Md., that J&J's vehicles were unsafe. Mr. Goodrich inspected three vehicles which Mr. Johnson was using in regular route service: vehicle numbers 501 and 526 and vehicle number 5959 (serial number 7600). 3/ All three vehicles were placed out of service due to severe mechanical problems.

Bus number 5959 4/ was inspected on November 2, 1984, at the Naval Research Laboratory, Washington, D.C., Mr. Johnson's place of employment. Its out-of-service defect was in the braking system where loss of pressure at the rate of 11 pounds per minute was observed in the diaphragm controlling the left front brake. When air pressure in the system drops to 30 pounds, the brakes lock causing the vehicle to stop abruptly. Once stopped the vehicle cannot move until air pressure builds back up to 60 pounds. A bus of this type operates at 110-120 pounds pressure. Thus, it might be able to sustain a loss of 79-89 pounds before locking. However, because the consequences are so serious, the out of service standard is 3 pounds per minute pressure loss. Other safety defects revealed by the inspection included a malfunctioning brake warning light and buzzer and a bald rear tire. Mr. Johnson was issued a copy of the equipment compliance check on which Mr. Goodrich recorded the results of his inspection. In order to place a vehicle back in service, it is the carrier's duty to repair all out-of-service defects, attest to that fact by signing an accompanying form, and return the form to the P.S.C. Mr. Johnson never returned the completed form.

On November 9, 1984, Mr. Goodrich inspected bus numbers 501 and 526. Both vehicles were placed out of service with the added condition that they be reinspected before use. Vehicle number 501 had an impaired braking system in which a loss of 20 pounds pressure per minute from the right front diaphragm and an oil-contaminated left rear brake drum were observed. Other defects included a very bad steering system with excessive oil leaks from the steering box and a faulty right-side steering arm connection, and a sizeable hole in the muffler. Vehicle number 526 had a battery that was "cooking" -- a condition which could result in an explosion in the event a spark or flame

3/ Vehicle number 5959 was not added to Mr. Johnson's P.S.C. equipment list until April 1985. The serial number is taken from that list.

4/ Mr. Goodrich identifies J&J's vehicles by vehicle number (bus number) in his testimony and on the inspection reports which were introduced into evidence. Except when specifically noted the number by which a vehicle is identified in this order is its vehicle number (bus number).

reached that area -- malfunctioning horn, inoperative brake lights and rear directional signals, a bald left rear tire, a bad right steering arm, and leaking fluid. In addition, the braking system was faulty due to air leaks at the engine's compression valve and the rear relay valve which directs all air to the braking system as well as a defective "ICC valve," the valve which causes the brakes to lock when air pressure decreases to 30 pounds. Absent this safety system the bus could continue to operate regardless of how little air was contained in the braking system. If pressure dipped below 30 pounds, a driver might attempt to stop without success. Mr. Goodrich testified that over the years he has seen fewer than 10 buses comparable to number 526.

Bus number 5959 was reinspected on November 9, 1984, and placed back in service because the requisite repairs had been made. Bus number 501 was reinspected on December 7, 1984. No repairs had been made since it had been placed out of service on November 9, 1984. The bus remained out of service with an added notation reserved for particularly egregious situations, "not to be removed." To Mr. Goodrich's knowledge the bus was never used again in J&J's operation. Bus number 526 was never produced for reinspection.

In 1985, Mr. Goodrich inspected respondent's equipment on several occasions. According to the witness the P.S.C. attempts to inspect every carrier's fleet annually. However, due to J&J's poor maintenance history, the Transportation Department attempts several inspections of its equipment each year. Mr. Johnson's 1985 application for a permit to operate vehicles in Maryland indicates that he would be using the following four vehicles to transport passengers interstate in regular route operations: one 47-passenger coach owned by ABC Bus Sales, vehicle number 5959, two 47-passenger coaches and one 39-passenger coach owned by H&M Bus Company, vehicle numbers 3435 (serial number 9050), 378 (serial number 9347), and 406 (serial number 6439), respectively. The P.S.C. has been informed of no additions to or retirements from this fleet since it was registered in April 1985.

On July 9, 1985, Mr. Goodrich inspected bus number 5959. The bus was placed out of service due to a faulty steering mechanism and braking problems as indicated by 20 pounds per minute pressure loss to the right front diaphragm. A bald left rear tire was also cited. This bus was not permitted back in service inasmuch as the P.S.C. received no indication from Mr. Johnson that the required repairs had been made and reinspection was not possible. 5/

On July 16, 1985, Mr. Goodrich inspected bus numbers 405 and 378. Both vehicles were placed out of service. Bus number 405 was

5/ On July 16, 1985, Mr. Goodrich attempted to reinspect the vehicle. However, it had sustained such heavy damage in an accident which occurred subsequent to July 9 that inspection was not possible.

placed out of service due to an inoperative "ICC valve." The bus also had a bald right front tire. Bus number 378's ICC valve was also inoperative. At the conclusion of the inspection an out-of-service sticker was placed on each bus indicating that the bus could be removed only if the defects which had caused it to be placed out of service were repaired.

One month later the P.S.C. had received no indication that J&J had made any of the repairs required to place the vehicles inspected in July back in service. As a result, Mr. Johnson was directed by letter dated August 29, 1985, to produce for inspection bus numbers 5959, 378, 3455, and 406. The inspection was scheduled for September 4, 1985, at 2019 West Virginia Avenue, Washington, D.C. On August 30, 1985, members of the P.S.C.'s Transportation Department observed J&J bus numbers 5959, 378, and 3435 transporting passengers.

On September 4, Mr. Johnson produced a single bus for inspection: number 5959. Despite the fact that it had been observed transporting passengers on August 30, bus number 5959 had not been permitted back in service after its previous inspection in July. As a result of the September 4 inspection, it remained out of service. Out of service defects included a faulty steering mechanism, an air leak in the left rear and right front diaphragm of 40 pounds per minute, and a cracked right rear brake lining. In addition, the brake warning device was inoperable and 50 percent of the mounting bolts which anchor the third axle to the bus were loose enough to turn by hand. As of the date of the hearing the P.S.C. had received no indication that Mr. Johnson had repaired these defects.

Upon being contacted at his place of employment on September 4, Mr. Johnson stated that the remaining buses were unavailable for inspection that day because their owner Mr. Miles of H&M Bus Company had taken them out on a charter run.

On September 11, 1985, two buses owned by H&M were presented for inspection: vehicle number 3455 and vehicle number 402. Vehicle number 3455, which had been removed from service in July, was placed back in service. Vehicle number 402 had not been requested nor was it listed on J&J's equipment list as filed with the P.S.C. It is Mr. Goodrich's opinion that H&M owns several buses and makes three buses a day available to J&J for regular route service. The buses differ from day to day. Given the fact that J&J lacks sufficient authority over these buses to present them for inspection, Mr. Goodrich does not believe that Mr. Johnson has control and possession of those buses it claims to lease from H&M.

FINDINGS, DISCUSSION, AND CONCLUSIONS

This case is governed by Title II, Article XII, Section 4(g) of the Compact which provides in relevant part that a certificate of public convenience and necessity

. . . may . . . on the Commission's own initiative, after notice and hearing be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any lawful order, rule or regulation of the Commission, or with any term, condition or limitation of such certificate

It is clear, based on the uncontradicted evidence of record that respondent repeatedly violated Commission orders and regulations as well as the terms of his own certificate. The Commission has found that respondent operates a route within the Metropolitan District other than that described in his Certificate No. 39, that he charges rates in excess of his WMATC Tariff No. 2 in contravention of Commission Regulation Nos. 55-08 and 56-01, and that he has transferred his operating authority without the approval required by the Compact, Title II, Article XII, Section 4(h). The record indicates that Mr. Johnson admitted these transgressions through the ex post facto filing of applications seeking to legitimize past actions. By Order No. 2729 the Commission granted the applications conditioned upon receipt from Mr. Johnson within 30 days of two copies of a revised tariff and a current equipment list. Mr. Johnson violated that Order by failing to file the requisite equipment list. By Order No. 2754, served August 22, 1985, the Commission scheduled the matter of Mr. Johnson's non-compliance for public hearing and directed Mr. Johnson to appear at the hearing, to produce specific documents, and to pay an amount preliminarily estimated to cover the costs of the hearing. Respondent complied with none of these directives. Finally, the evidence adduced at hearing indicates that Mr. Johnson regularly transported passengers between points in the Metropolitan District contrary to the terms of Commission Regulation No. 69 concerning the leasing of vehicles.

These numerous and pervasive violations cannot be construed as anything other than wilful. In making this determination, we are guided by the standard which the Supreme Court enunciated in the context of a similar statute when it construed "wilfully" as meaning

. . . purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. United States v. Illinois Central R.R. Co., 58 S.Ct. 533, 535 (1939) See also Aero Mayflower Transit Co., Inc. v. Interstate Commerce Commission, 535 F.2d 997 (7th Cir. 1976).

As a certificated carrier Mr. Johnson has an affirmative duty to be familiar with the Compact and the Commission's rules and regulations. The instances of non-compliance dealt with in Order No. 2729 are of long-standing duration and effectively constitute repeated violations of Commission regulations over a period of years.

The record at public hearing indicates other numerous and varied acts of non-compliance. The sheer mass and range of Mr. Johnson's violations creates a presumption that he either intentionally disregarded the statute or is plainly indifferent to its requirements. Mr. Johnson made no attempt to rebut this presumption despite the fact that he was put on notice that failure to defend his actions could result in revocation of his certificate.

We turn now to a consideration of the sanction appropriate to Mr. Johnson's wilfull non-compliance. We note first that Title II, Article XII, Section 4(b) of the Compact requires that an applicant for a certificate of public convenience and necessity prove it is "fit, willing and able to perform such transportation [as it seeks authority to provide] properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder" For purposes of analysis, fitness is divisible into issues of operational capability, financial stability, and compliance. However, fitness is a unitary legal concept inasmuch as failure of an applicant to demonstrate one aspect of fitness results in a finding that the applicant is unfit. A certificated carrier bears a continuing obligation to remain fit. Because a certificated carrier is specifically bound by the Commission's rules and regulations governing general operations and by its orders addressing specific situations, the issue of a certificated carrier's fitness always appears analytically as one of compliance. This principal is embodied at Title II, Article XII, Section 4(g) of the Compact. Having found that respondent has wilfully and repeatedly failed to comply with Commission orders and regulations as well as with the terms of his Certificate No. 39, we further find that respondent is unfit to transport passengers between points in the Metropolitan District and that, therefore, Certificate No. 39 should be revoked in its entirety.

We do not rest our decision in this case merely upon Mr. Johnson's failure to rebut a presumption but rather upon the affirmative evidence produced at hearing which established that Mr. Johnson is unfit to continue to transport passengers for hire within the Metropolitan District. Mr. McGilvery's testimony firmly establishes the fact of Mr. Johnson's failure to file a current equipment list. Mr. Goodrich's testimony in combination with Mr. McGilvery's testimony establishes the rationale for an act of non-compliance which might otherwise be considered de minimus. The evidence indicates that Mr. Johnson failed to provide that list because he was operating leased vehicles for which no lease had been filed with the Commission and over which he lacked possession and control. Moreover, he was operating vehicles with mechanical defects so severe as to cause them to be placed out of service by an agency of a signatory jurisdiction. The quality of the vehicles used by Mr. Johnson to transport passengers is completely unacceptable. Mr. Johnson's vehicles were inspected on eight occasions in the past 12 months. On each occasion the vehicles were placed out of service

until specific defects were repaired. On no occasion in that 12-month period did Mr. Johnson notify the inspecting body that the necessary repairs had been made. Only two vehicles were placed back in service following reinspection during that period. Thus, the evidence shows that Mr. Johnson consistently transported passengers in vehicles with serious safety problems including inadequate braking capacity, faulty steering, bald tires, and no horn, brake lights or rear directional signals. The record indicates that upon being informed of these problems following inspection by Mr. Goodrich or his associates, Mr. Johnson failed to make the necessary repairs and in at least some cases simply removed the out-of-service sticker from the vehicles and continued to transport passengers in the vehicles. Such behavior is nothing short of contumacy. We shall not allow a carrier so recklessly to endanger the traveling public. Accordingly, Certificate No. 39 shall be revoked in its entirety, and Mr. Johnson shall be directed to cease and desist all operations within the Metropolitan District.

THEREFORE, IT IS ORDERED:

1. That Rodgers E. Johnson trading as J&J Bus Service is hereby directed to pay to the Commission no later than Wednesday, December 4, 1985, the sum of \$243, said sum being the amount due to cover the cost of its hearing, pursuant to the Compact, Title II, Article XII, Section 19.
2. That Certificate No. 39 of Rodgers E. Johnson trading as J&J Bus Service is hereby revoked in its entirety.
3. That Rodgers E. Johnson, J&J Bus Service, and any corporate entity owned or controlled by Rodgers E. Johnson, now or in the future, is hereby directed immediately to cease and desist from providing any and all transportation of passengers for hire between points in the Metropolitan District.

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


WILLIAM H. MCGILVERY
Executive Director