

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3370

IN THE MATTER OF:

Served June 30, 1989

Application of RICHARD W. BUTLER,)
JR., Trading as RWB TOURS for a)
Certificate of Public Convenience)
and Necessity)

Case No. AP-88-52

By Order No. 3331, served May 10, 1989, the Commission denied the application of Richard W. Butler, Jr., trading as RWB Tours for a certificate of public convenience and necessity after finding that Mr. Butler had failed to prove that the public convenience and necessity require the proposed operations for which he was seeking a certificate. By application filed June 8, 1989, Mr. Butler seeks reconsideration of that order based on four alleged errors. The errors and our consideration of them in light of the entire record in this case are set out below.

Issue No. 1: The Commission erred by raising without deciding the issue of applicant's fitness.

The Compact, Title II, Article XII, Section 4(b) requires that the Commission issue a certificate upon a finding "that applicant is fit, willing and able to perform such transportation [as it seeks a certificate to provide] properly and to conform to the provisions of this act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation [as applicant seeks a certificate to provide] is or will be required by the public convenience and necessity." Emphasis added.

If any other condition pertains, Section 4(b) requires that the Commission deny the application. By Order No. 3331 the Commission found that Mr. Butler had failed to meet his burden of proof relative to public convenience and necessity. This having been done, Mr. Butler's fitness or lack thereof became a moot point relative to the granting or denial of his application for a certificate of public convenience and necessity. Therefore, the Commission properly noted the requirement that a successful applicant be fit but accurately stated that it was unnecessary to explore fully that element of Mr. Butler's case.

Issue No. 2: The Commission erred by failing to give full credence to the testimony of Mr. Butler's public witnesses.

Two public witnesses supported the application. Their testimony is summarized on page three of Order No. 3331. Mr. Butler claims that "the quantum of public needs cited was far in excess of that often cited by witnesses in public hearings especially . . . concerning Mall Transportation." In support of that allegation Mr. Butler cites applications of Madhu Sudan (Case No. AP-88-52) and Leo Lagana (Case No. AP-83-51). Neither of Mr. Butler's witnesses arranges transportation for individuals. Both witnesses currently use with satisfaction the service provided by Mr. Butler's employer and one would continue to do so if this application is granted. Neither specified any geographic requirements or time requirements. After reviewing all evidence of record, we find no error in either our recitation of these witnesses' testimony or in our finding that Mr. Butler failed to meet the burden of proof on the issue of public convenience and necessity imposed by the Compact.

Issue No. 3: The Commission erred by not placing weight on the delineated reasons for applying for "his own certificate."

Richard W. Butler, Jr., trading as RWB Tours filed this application on November 14, 1988. The application was docketed as Mr. Butler's own, and a hearing was scheduled by Order No. 3272, served January 11, 1989. Both Order No. 3272 and Order No. 3331 from which reconsideration is sought expressly state the territorial scope of Mr. Butler's application and the hours which Mr. Butler intends to offer service. Neither the geographic scope of Mr. Butler's application nor the hours Mr. Butler purposes to offer service can be inferred to be of any import to Mr. Butler's public witnesses because neither made any reference to the areas where or times when tours are required. Moreover, as Order No. 3331 makes clear, these items were "delineated" only on reconsideration.

Issue No. 4: The Commission erred by misapplying the Pan-American standard regarding public need.

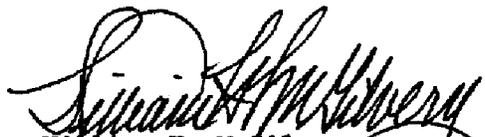
In determining whether an applicant has met his burden of proving that the public convenience and necessity require the proposed transportation, the Commission relies on the test enunciated in Pan-American Bus Line Operations (1 MCC 190, 230 [1936]). The Pan-American tests consists of three parts:

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

In Order No. 3331, the Commission decided, after examining the testimony of the public witnesses, that Mr. Butler had failed to meet the requirements of the first part of the Pan-American test. We adhere to this position. However, we noted that even had we found that Mr. Butler proved his proposed operations would serve ". . . a useful public purpose responsive to a public demand or need . . ." we would have been forced to deny this application. Mr. Butler's two witnesses made no distinction between the proposed service and the service they are currently using. One of the witnesses intends to continue using existing service. Thus, we are unable to find that the public need at issue will not be served as well by existing carriers. For these reasons the application for reconsideration of Richard W. Butler, Jr., trading as RWB Tours for a certificate of public convenience and necessity is hereby denied.

IT IS SO ORDERED.

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


William H. McGilver
Executive Director