

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. B-1612
of Thomas J. Wyman dba American)
Eagle Shuttle Express, Omaha,)
Nebraska, seeking authority as a)
common carrier of passengers in)
open class service over)
irregular routes by van between)
points in Douglas and Sarpy) DENIED
counties and between points in)
said counties on the one hand,)
and, on the other hand, points)
within a 60-mile radius of)
Douglas and Sarpy counties.)
RESTRICTION: The transportation)
of railroad train crews and)
their baggage is not authorized.) Entered: August 5, 2003

APPEARANCES:

For the Applicant:

Dan Rock, Esq.
8805 Indian Hills Drive
Omaha, Nebraska

For MAVM Ventures LLC dba

A&B Shuttle:

Marshall D. Becker, Esq.
3714 Dodge Street
Omaha, Nebraska

For Happy Cab Company, Yellow Cab,
Checker Cab, and DonMark, Inc., dba
Cornhusker Cab:

Jerry Sena, Esq. and
Patrick Sullivan Esq.
1246 Golden Gate Drive
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Papillion, Nebraska

For the Commission:

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BY THE COMMISSION:

B A C K G R O U N D

By application filed December 4, 2002, Thomas J. Wyman dba American Eagle Shuttle Express (Applicant or American Eagle) seeks authority as a passenger carrier as follows:

COMMON: Transportation of passengers in Nebraska intrastate commerce in open class service over irregular routes by van between points in Douglas and Sarpy counties and between points in said counties on the one hand, and, on the other hand, points within a 60-mile radius of Douglas and Sarpy counties. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized.

Notice of the application was published in The Daily Record, Omaha, Nebraska, on December 16, 2002. (Ex. 2.) Notice of the hearing was sent to all parties of record on April 2, 2003. (Ex. 1.) On December 17, 2002, a protest was filed by Happy Cab, Yellow Cab, Checker Cab and Cornhusker Cab through its attorney. On December 26, 2002, a protest was filed by MAVM Ventures LLC dba A&B Shuttle through its attorney. On January 3, 2003, a protest was filed by Servant Cab Company LLC dba Yellow Cab Company and Capital Cab Company through its attorney Jack Shultz. On June 3, 2003, a restrictive amendment was filed by the applicant. One June 5, 2003, Servant Cab withdrew its protest.

A hearing in the application was held in the Commission Library and via videoconference to Omaha, Hastings and McCook on June 26, 2003 with appearances as shown above.

SUMMARY

In support of its application, American Eagle presented four witnesses.

Dr. John Bartle, a Ph.D. in public policy and management, testified first on behalf of the applicant as follows: He is an associate professor at the School of Public Administration at the University of Nebraska at Omaha. He has held that position since 1994. He has published several articles in a variety of public administration and management journals and has recently edited a book. Dr. Bartle's entire curriculum vitae was offered and admitted as Exhibit 4. In preparation for the hearing, Dr. Bartle prepared a report titled "Market Analysis of the Demand for Shared-Ride Vans at Omaha-Eppley Airfield." Dr. Bartle's

report is an independent market study on shared-ride van usage. This report was marked and received as Exhibit 5. The report defines different modes of transportation both public and private. Most importantly it defines "shared-ride van service" as a public service for transit to the airport. The definition of taxicab service is different than that of a shared-ride van (SRV) service. Taxi service as well as limousine service are defined as private transportation, while SRV service falls into the public transit category along with bus and rail service. The report further argues that there is no single market for ground access service to airports; rather there are a series of sub-market segments which each has a distinct characteristic. Dr. Bartle stated that there is a heterogeneous market and the Commission should consider SRV service as separate and distinct from taxicab service. Dr. Bartle concluded that taxicabs don't necessarily serve the same needs, for example, as SRV's do. (Tr. at 13:10-14.) There is no evidence that he has found that indicates that the introduction of SRV service in the market reduces the usage of taxicab service. (Id. at 14.)

With respect to the Omaha area in particular, Dr. Bartle stated that in his opinion, with the completion of the convention arena, the airfield will likely see more diversity in travelers and that different travelers prefer different ground access modes of transportation. There is only one multi-bus service to the airport.

Upon cross-examination, Dr. Bartle testified that his analysis does not take into consideration the number of vehicles providing service to the airport. Rather, the measures are in the percentage of the market. The report does not analyze whether the addition of one SRV service would have a negative effect on other pre-existing SRV services. Dr. Bartle stated that he did not look at the existing taxicab, van and shuttle services right now in Omaha to determine whether the existing operators could or could not support public demand. (Tr. at 24:8-12.)

Mr. Thomas Wyman testified next on behalf of American Eagle as follows: He would be the sole proprietor of American Eagle. He owns several businesses now under an S Corporation structure whereby he and his wife are the sole shareholders. Applicant offered and the Commission accepted into evidence Exhibit 6 which is S Corporation's 2001 income tax return. He has operated several financially successful businesses and testified that he has adequate capital to operate the proposed business. Mr. Wyman testified that insurance has been set in place contingent upon Commission approval. He plans to hire his son as the dedicated driver for the one vehicle they intend to use

initially in the proposed operation. He has arranged for background checks of his future drivers. He plans to provide the transportation service in a 2003 E-350 van which is a 12 or 15 passenger van. The new vehicle would come with a warranty for its maintenance.

Mr. Wyman further testified that the traffic for Eppley Airport was increasing every year. There is also going to be an increased need when the Omaha convention center opens. Mr. Wyman has observed Eppley's heightened security measures and stated that SRV service would need to be timely.

Upon cross-examination, Mr. Wyman testified that his proposed rates would be similar to that of existing carriers. Mr. Wyman's business plan also includes transportation around Douglas and Sarpy counties at large and is not restricted to airport traffic. He did not know how that type of transportation would be distinguished from taxicab service. The applicant would market its proposed service through the yellow pages, business cards and word of mouth. He testified that he will comply with every Commission rule and regulation.

Mr. Tim Leininger, accountant for the applicant, testified as follows: He has worked with Mr. Tom Wyman in his business ventures. He prepared Exhibit 6 for Mr. Wyman. He is familiar with the overall finances of the Wymans and has discussed the proposed operation of the applicant. Based on his knowledge of the applicant's assets and income, Mr. Leininger believes that the applicant has the financial ability to operate the proposed service.

Mr. Brad Matkins testified next on behalf of the applicant as follows: He is the owner of All City Services, All City Pest Control and other businesses. He travels often and frequently needs a ride to and from Eppley Airport in Omaha. When flies into other cities he uses shared ride vans. He has not used A & B Shuttle because, he states, reservations are required by A & B Shuttle. If there were a shared ride van service in Omaha, which did not require reservations, he would make use of that service.

Upon cross-examination, Mr. Matkins testified that he has not seen A & B Shuttle's service available at the airport. He testified that he did not know what transportation services were available at the airport. Mr. Matkins has never called A & B Shuttle to request transportation service. He learned about A & B Shuttle after he was asked to be a witness for the applicant.

The Protestant, A & B Shuttle, presented one witness in opposition to the application. Mr. Michael VanMeter, owner of A & B Shuttle testified as follows: A & B Shuttle holds authority to provide passenger transportation service in Sarpy, Douglas and Lancaster counties. He purchased the company two years prior. A & B Shuttle offered and the Commission admitted its equipment list into evidence as Exhibit 7. A & B Shuttle owns seven 15-passenger E-350 Club Wagons. Five vans were active and two are presently not in use.

Mr. VanMeter stated that if there is a need for additional vans, he could activate the two idle vans and bring them into his fleet. He stated that at the present time, A & B Shuttle does not have a need to increase its fleet.

Mr. VanMeter further testified that A & B Shuttle provides transportation service to and from the airport. A & B Shuttle advertises its service in the newspaper and in the yellow pages. The vast majority of A & B Shuttle's business is prearranged. Mr. VanMeter testified that A & B Shuttle tries to work with anyone that calls them last minute, but normally they schedule their runs one day in advance. A & B Shuttle asks for reservations in advance of 24 hours. A & B Shuttle offered and the Commission received into evidence as Exhibit 8, a copy of A & B Shuttle's manifest for the first two weeks of June 2003. Mr. VanMeter stated that business has been down in terms of the number of rides to and from the airport as compared to two years ago. He testified that A & B Shuttle is presently capable of meeting the current needs for transportation and that the grant of an additional authority would have an adverse impact on his company.

Upon cross-examination, Mr. VanMeter testified that his rates posted on the website are not consistent with the rates he charges for transportation service provided without reservations. Mr. VanMeter testified there was some sharing of the market with taxicabs. Mr. VanMeter further stated that the Airport Authority would not allow A & B Shuttle to have vans waiting for people who have not prearranged their transportation. However, they did not make a formal request of the Airport Authority for that privilege. A & B has not performed a study to determine how many traveling public stand at the curb without prearranged ground transportation at the airfield. Mr. VanMeter stated that A & B is better able to serve its clients if they make reservations. A & B applies an extra charge for every 15 minutes that its drivers wait at the airport past midnight until 4:00 a.m. The website is incorrect if it says from 11:00 p.m. to 4:00 a.m. A & B also applies a

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cancellation fee. This may discourage people from making a reservation if their flight time is uncertain.

Mr. Mark Mitchell testified on behalf of Happy, Yellow and Checker Cab Companies. These entities operate taxi services in the Omaha metropolitan area. Their fleet includes vans. Mr. Mitchell stated that business in general is down from previous years. Airport business has also increased. Happy, Yellow and Checker Cab have 87 vehicles in operation. There are also other cab companies in Omaha. To his knowledge Happy, Yellow and Checker Cab have never refused someone who has called in and requested a van because they were too busy. With respect to independent contractors who have driven for the cab companies, he knows of 57 who have gone out of business because of the unavailability of business. Mr. Mitchell is confident that need and necessity is satisfied whether it is prearranged or on demand.

Mr. Steven Dorman testified next on behalf of Happy, Yellow and Checker Cab. He testified as follows: He is one of the operations managers at Happy Cab. He has been employed in that position for two months. Prior to that he was an independent contractor, taxi driver. He operated as an independent contractor/driver for about 13 years. He ceased driving because business went down. There was not enough work to support him in that business.

Closing arguments were filed by Happy Cab, Yellow Cab and Checker Cab through its attorney on July 7, 2003 and by American Eagle through its attorney on July 8, 2003. Both filings should be admitted into the record as though fully argued at the hearing on this application.

O P I N I O N A N D F I N D I N G S

For a grant of authority, an applicant must prove that it is "fit, able, and willing" to provide the proposed service and that the proposed service "is or will be required by the present or future public convenience and necessity." Neb. Rev. Stat. § 75-311 (Reissue 1996). At the hearing, the applicant sufficiently demonstrated that it is fit willing and able to properly perform the proposed service. The applicant demonstrated that it possesses the requisite financial ability to initiate the proposed business, acquire insurance and the vehicle(s) and driver(s) necessary to operate the business desired. The applicant also demonstrated that it possessed sufficient business acumen to operate the proposed business, as it has been successful in many other business endeavors.

The Commission must next turn to the issue of whether the service "is or will be required by the present or future public convenience and necessity." Id. The traditional analysis for determining "need and necessity" was set forth by the Supreme Court in its May 8, 1998 ruling,

In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591 (1998).

The issue of whether an applicant has met its burden of demonstrating that the proposed service is consistent with public convenience and necessity is ordinarily a factual issue. Id. The statute requires us to determine whether the proposed operation will serve a useful purpose that is responsive to the public demand or need. Neb. Rev. Stat. § 75-311 (Reissue 1996). Therefore, we must examine the evidence based upon what is responsive to the public need and demand.

From the evidence adduced at the hearing, we find that the applicant has not sufficiently demonstrated an existing need for the proposed service. The applicant produced insufficient evidence of need.

The Commission first analyzes the testimony of the applicant's expert witness, Dr. Bartle. Dr. Bartle gave convincing evidence that the market surrounding the airports contained in his study were heterogeneous. He testified that there was no single market for ground access to the airport. Dr. Bartle also distinguished SRV's from taxicabs. Some distinguishing factors were travel time, the fare and the sharing of the van with others. Dr. Bartle's study did not contain a market analysis of Eppeley Airfield or of Douglas and Sarpy counties. Rather, Dr. Bartle concluded that Eppeley would be similar to the other medium-sized airports that were included in his study. Dr. Bartle then concluded that because there was a gap in the market for SRV's generally, that Omaha, specifically Eppeley Airfield, would benefit from a SRV service. Dr. Bartle further concluded that the long-term trend in air travel is on the rise, which would make it appropriate for the

Commission to consider the number of authorities of SRV's serving Eppley Airfield.

While it may be true as Dr. Bartle's market analysis provided, that shared ride vans serve a different market, there was little evidence that additional transportation provider, or an SRV service, was presently needed for passengers at Eppley Airfield. Dr. Bartle's study did not contain any information on the number of vehicles currently available for passengers needing rides to or from Eppley Airfield. Nor did this study contain any information regarding the existing need or demand in Omaha specifically. Even if the addition of an SRV authority would serve a different market from the existing taxicab authorities, Dr. Bartle offered no evidence that there was an actual need for that service in Omaha or at Eppley Airfield.

Mr. Matkins testified that he needed a larger vehicle, such as a van, to accommodate his luggage when traveling to and from an airport. Mr. Matkins stated that if there were a SRV service in Omaha, for which he did not need to make a reservation ahead of time, he would use it. Mr. Matkins admittedly had not known about A & B Shuttle's service prior to preparing for the hearing. He also did not know what other transportation services were available from Eppley Airport. He further had not attempted to contact A & B Shuttle for transportation service to or from the airport. There was no evidence therefore, that A & B Shuttle's service was inadequate or unsatisfactory.

On the other hand, A & B Shuttle, an open class van provider, demonstrated that it was willing to meet the need for transportation services to and from the airport whether it was prearranged or on demand. Although it was established that reservations were preferred, there was no indication that A & B Shuttle was unwilling or unable to perform on-demand service to and from the airport or that A & B Shuttle was unwilling to operate as a SRV provider to and from the airport if needed. The Protestant taxicab providers also provided evidence that they could meet the needs of Mr. Matkins because they had vans in their fleet available on demand. The existence of an adequate and satisfactory service by motor carriers already in the area is a complete negation of public need and demand for added service by another carrier. In re Application of Kilthau, 236 Neb. 811, 464 N.W.2d 162 (1991). The applicant was also unable to controvert the testimony of A & B Shuttle with respect to their investigation of airport policies on picking up passengers at the airport. The evidence offered by Dr. Bartle, the applicant, and Mr. Matkins failed to establish that there was a need for this service that was not being met, specifically for the territory sought in Omaha. From the evidence adduced, we

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further find that the existing carriers are presently meeting public demand and need.

The Commission was further concerned that the service applied for was not specific to "shared ride van" service to and from Eppley Airfield or that it was restricted to on-demand service. Although the applicant attempted to make a distinction between the proposed service to be offered and that currently offered by the Protestants, a grant of the application as a whole would have been overly broad and would have allowed the applicant to operate in the same or in a similar manner as the Protestants. There was no restriction in the application that required applicant to make on-demand trips, charge lower rates or to transport a certain number of passengers at one time.

Finally, we turn to the issue of whether the proposed service can be provided by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. The Commission finds the applicant presented insufficient evidence that this service would be provided in a specified manner that would not affect current operators including current taxicab operations. The Protestants offered specific evidence of a decrease in business within the last two years. However, the decline in airport traffic and other transportation business, in general, was due in large part, to the state of the economy. While we find this relevant to show that the need in the market may have decreased, it does not show that a grant of the application per se would bring specific harm to their operations. However, since the Commission finds that applicant failed to overcome its burden in demonstrating need consistent with prongs (1) and (2) of the Supreme Court's analysis above, the application should be denied.

If the applicant so desires, it may file a subsequent application for the requested authority in ninety days pursuant to Title 291 NAC Ch. 1, section 009.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1612 be, and it is hereby, denied.

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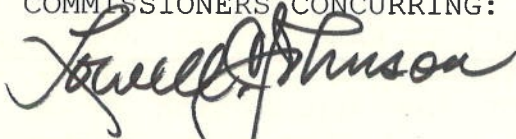
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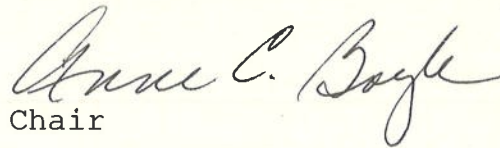
MADE AND ENTERED at Lincoln, Nebraska, this 5th day of August 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Anne C. Boyle
//s//Rod Johnson
//s//Frank E. Landis


Chair

ATTEST:



Deputy Director