

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) APPLICATION NO. B-1634
of Liberty Transportation, Inc.,)
Omaha, seeking authority as a)
common carrier of passengers and)
their baggage in open class)
service by van over irregular)
routes between points in)
Douglas, Sarpy, Cass and) DENIED
Washington counties to include)
the transportation of client of)
the Nebraska Department of)
Health and Human Services)
clientele and subcontractors)
thereof. RESTRICTION: The)
transportation of railroad train)
crews and their baggage is not) ENTERED: JULY 20, 2004
authorized.)

BY THE COMMISSION:

By Application filed June 23, 2003, Liberty Transportation Inc. (Liberty) of Omaha, Nebraska seeks the following authority:

COMMON: Transportation of passengers and their baggage in open class service by van over irregular routes between points in Douglas, Sarpy, Cass and Washington counties to include the transportation of client of the Nebraska Department of Health and Human Services clientele and subcontractors thereof. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized.

Notice of the application was published in the Daily Record, Omaha, on June 26, 2003. Protests to the application were duly filed by R & F Hobbies d/b/a Prince of the Road (Prince of the Road), MAVM Ventures, LLC d/b/a A & B Shuttle (A & B Shuttle), Happy Cab, Checker Cab, Yellow Cab and Cornhusker Cab. A public hearing on the application was held on March 3, 2004. Appearances were entered by Jackie Barfield for the applicant, by John Boehm on behalf of Prince of the Road, by Marshall Becker on behalf of A & B Shuttle, and by Jerry Sena on behalf of Happy Cab et al. Ryan Tessendorf entered an appearance on behalf of the Commission staff.

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E V I D E N C E

Applicant's Case

Mrs. Atinuke Ibidapo testified first as the applicant. She has worked as a certified nursing assistant (CNA) since 1998. In her capacity as a CNA, she cared for elderly patients and accompanied them to medical appointments. She did not transport patients or arrange transportation service for them; rather, she thought that a family member arranged the transportation. There were occasions where the transportation provider would be late picking patient up from appointments and getting them back. Because of these delays, she was forced to work overtime. She observed that delays in transportation service were a common problem. If granted a certificate of public convenience and necessity, she intends to market the service to those with medical needs and to the elderly. She believes her CNA experience would be useful for clients with medical problems.

She has also worked as a staffing coordinator and as a home health aide. As a staffing coordinator she arranged transportation for other staff members. She again observed delays in transportation service.

She possesses a bachelor's degree in business administration and a master's degree in public relations. While attending school, she worked for a transportation company owned by her father-in-law. She was employed as a dispatcher. She believes the experience gained by that employment would be useful in the proposed operation.

On cross-examination, Mrs. Ibidapo testified that she plans to purchase more vehicles if there is a demand. Currently, she owns only one van. The statistical study she relies on to support the application does not show whether there was an increase in transportation providers. It did not show whether there was an increase in demand for transportation. However, she assumes that there is.

She does not arrange the transportation for her clients. She contacts her patients' relatives to check as to whether transportation has been arranged and to determine who has been selected. In her personal experience, she has dealt with two providers Rural Metro and MAT.

As a CNA, she assists patients with daily living. She is authorized to help her patients get dressed, assist them with personal hygiene, and to remind them to take their medication.

She is not authorized to administer medication. Specifically, she remembers a delay in transportation service on February 16, 2004. Metro Area Transit (MAT) was delayed because of the snowstorm. Metro was late on one other occasion in December. She waited two hours for a return trip. The transportation was arranged by the family of her client. Her client was wheelchair bound. The Metro driver apologized for the delay.

She does not have any clients or organizations that have committed to using his transportation service.

As far as financial ability, she provided a summary of assets and liabilities on the application form. She did not produce a balance sheet or any audited financial statements.

She does not have any clients with a need to go to Washington, Cass or Sarpy counties.

Mr. Michael Ibidapo testified next. He possesses a food technology degree from Nigeria. He has a Master's Degree in public relations. He is also a CNA. In Nigeria, he worked for FedEx. In the states, he has been employed by First Data, and Boys Town. He also has experience as a dispatcher. Currently, he is employed at a nursing home in Omaha.

As a CNA, he does not arrange transportation but accompanies his clients to their appointments. He has heard complaints about delays in transportation service.

Mr. Ibidapo recalled an incident in late January 2004 where Rural Metro was an hour late in picking up a patient on a return trip. He is not in a position to complain about the delays. He does not know why the nursing home continues to use that provider.

Ms. Kimberly Scott testified next in support of the application. She is a registered nurse. Her job is affected by transportation delays because when transportation providers are late, patients waiting on them cannot be discharged. She is then unable to have new patients admitted. She never arranges the transportation. Usually the social worker will arrange transportation. She has discussed those arrangements with the social worker.

On cross-examination, Ms. Cross testified that she did not know whether the policy of her employer was to use only the two Omaha ambulance companies to pick up patients. Usually, when patients are discharged by the doctor, the patients wait in their rooms until their transportation arrives. Ms. Cross

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believes anything longer than an hour and a half wait is too long.

Mr. Ole Fakunola testified next on behalf of the applicant. He is a licensed practical nurse and a personal friend of the Ibidapos'. He also has knowledge of transportation problems. He testified that transportation providers are commonly late. He arranges the transportation. He contacts the provider. He contacts them from a list provided by his patient, the social worker or the patient's family. He contacts two providers, one of which is Rural Metro.

Ms. Esther Banwo testified next on behalf of the applicant. She is a CNA. She is employed at Creighton Hospital. She has observed delays in transportation service. She is a student at Metro Tech. She has also observed disabled students waiting for transportation.

On cross-examination, she testified that it was mostly wheelchair accessible vans that were late. Some of the people waiting for transportation could be waiting for family or friends. Ms. Banwo does not know who provides the transportation service.

Ms. Kimberly Scott was the last witness to testify in support of the application. Ms. Scott has a condition, which requires ongoing medical care. She has a need for transportation to and from her appointments. Two to three times per week she uses taxicab service to get to and from doctor and dental appointments. She became so frustrated with taxicab service that she stopped going to the doctor. Ms. Scott stated that the taxi drivers and the dispatchers were rude to her. She testified that she used Liberty Transportation service once and she liked their service. She does not contact the transportation provider to set up the service but she contacts the provider for the ride home.

On cross-examination, Ms. Scott testified that she does not know, other than that taxicab provider, the names of the other providers she has used. HHS gives her the option to choose amongst providers. Shared Advantage calls the cab company while she is on the phone. Ms. Scott stopped using taxicab service in August of 2003. When she asked Shared Advantage if there was an alternative transportation provider, she was told that her options were Happy, Yellow, Checker, Safeway and Cornhusker cab companies.

Protestants' case

Mr. Sena called Mr. Daniel Deveney to testify on behalf of Happy, Checker and Yellow Cab. Mr. Deveney has been employed by Happy Cab for four years. Currently, he is the operations manager. In that capacity, he oversees the day-to-day operation of the fleet, dispatch, and drivers. He also oversees their information technology department. Currently, they own Happy, Yellow and Checker Cab. They also manage the operations of Cornhusker and Metro. The combined fleet of the aforementioned companies is approximately 165 vehicles. Their cabs are not full all of the time. Mr. Deveney testified further that there is not enough business to keep all of the vehicles full. A significant factor in driver turnover is the inability of drivers to pay their weekly lease.

Omaha is divided into about 30 different geographic zones. The drivers are able to work in whichever area they choose. Their average response time is approximately five to 20 minutes under normal circumstances.

Mr. Deveney further testified that he has heard of a client waiting in excess of an hour, but it is a very rare occurrence such as during a snowstorm.

On cross-examination, Mr. Deveney testified that if a driver were consistently late, they would work with the driver and try to encourage the driver to operate more efficiently. If they are at a point where they are unable to correct the problem, they will cancel the lease. The cab companies managed by Mr. Deveney have a computer dispatch center. Everything is logged and recorded. He can tell if a driver is late, only when the customer calls him. They try to estimate the response time when a client calls. The drivers go through a six to seven hour training course when they are hired. The drivers are also required to attend quarterly safety meetings. They do not offer service in wheelchair-equipped vehicles.

Ms. Heather Sutherland testified next on behalf of Happy Cab. She supervises the dispatch department and oversees various other employees. She also performs customer service functions. She has been employed by Happy Cab for four years. She takes complaint calls from customers. Happy Cab and its affiliates contract with HHS, and particularly with Shared Advantage. Ms. Sutherland testified that Shared Advantage sends, by facsimile message, a report containing information on which clients they need to pick up. She never receives phone call orders from Shared Advantage. When asked if she recalled situations where people were waiting over an hour, two hours or three hours for a

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ride, Ms. Sutherland replied that such delays only occurred only in inclement weather.

On cross-examination, Ms. Sutherland testified that she received around four complaints per week. Most of the complaints regarding Shared Advantage clients stem from the cab company not being informed of a client change of address.

Mr. Scott Findell testified last for Happy Cab. He is an independent contractor for Happy Cab and Yellow Cab. He transports clients of HHS. He works in North Omaha. About 25 percent of the clients he picks up are either Shared Advantage or Magellan clients. About half of his other clients are over the age of 65. His average response time is around five minutes. He believes in the past five or six years, he has only been late on about five occasions. If he is late it is usually because of weather conditions or traffic related problems.

Mr. Alvin Schroll testified on behalf of R & F Hobbies, Inc. (Prince of the Road). He is the chief executive officer. Prince of the Road has authority from the Commission to provide van service in the counties identified in the application. In the Omaha metropolitan area, Prince of the Road has approximately 25 to 30 drivers. Three of their vehicles in Omaha are wheelchair accessible. A substantial percentage of their client base is made up of HHS, Magellan, and United Health Care transports. In his experience, the HHS caseworkers make the determination which provider will pick up a particular client. Prince of the Road does not provide ambulance service. Prince of the Road does receive calls to transport discharged patients from area hospitals, but only for persons who do not require medical attention because of certain liability requirements. The bulk of their work involves transportation to hospitals, doctor appointments, and dental appointments, but Prince of the Road does not compete with the ambulance services. Prince of the Road is prepared to hire additional drivers to meet the demand. Its services are not booked at the current time. The waiting time for Prince of the Road is usually less than 15 minutes. There have been occasions where a client of Prince of the Road has waited an hour for transportation, but he cannot recall a time where a client has waited for two hours. Prince of the Road provides approximately 2,000 transports per week. Mr. Schroll testified that about once or twice a week on average, his clients have to wait an hour or more for transportation services.

Mr. Schroll testified that Prince of the Road would be harmed by an additional carrier in the Omaha area. One vehicle would not have a serious impact, but should the authority be

sold to someone with more resources, it would create a serious competitive problem for Prince of the Road.

On cross-examination, Mr. Schroll testified that most of Prince of the Road's drivers are subcontractors. He is not concerned that applicant would provide a better service. Prince of the Road is steadily growing and placing additional vehicles into service.

Prince of the Road requires its drivers to have its clients record the time of the pick-up. These sign-off sheets are sent to the home office. Therefore, he knows when pick-ups or drop-offs are late.

Mr. Schroll testified Prince of the Road has established goodwill with HHS, Magellan and its other clients; however, caseworkers also make choices based on rates and personal preferences.

Due to a death in the family, the A & B Shuttle witness was unavailable at the time of the hearing. The Commission took judicial notice of the authority held by A & B Shuttle as published in the Commission's Authority Book.

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

The granting of a certificate of public convenience and necessity is governed by Neb. Rev. Stat. § 75-311 (Reissue 1996), which states,

A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the applicant is fit, willing, and able properly to perform the service proposed...and (b) the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, is or will be required by present or future public convenience and necessity. Otherwise the application shall be denied.

In other words, the Commission must apply a two-part test. The burden of proof rests with the applicant to show that all requirements of § 75-311 are met. Application of Greyhound Lines, Inc., 209 Neb. 431, N.W.2d 336, 339 (1981). First, the Commission must determine if an applicant is "fit, willing and able." Applicant presented testimony that it has obtained a

van to provide the service and has investigated costs of insurance. Applicant further presented evidence of experience in the transportation industry. Applicant's proposed business plan presents a benevolent solution designed to address problems some of its patients are experiencing. Applicant proposes to provide transportation and care services to its elderly and physically disabled clients. Although the Commission wholly supports the applicant's business plan, the applicant carries the burden of proof on all elements of the application.

In the present case, the applicant produced no evidence of financial fitness, other than simply referencing the application. To comply with the statute, "the applicant must prove, in part, that the applicant is fit financially." Overland Armored Express of Lincoln, Inc. v. Wells Fargo Armored Service, Inc., 428 N.W.2d 166, 229 Neb. 524, 528 (1988). The applicant did not confirm, under oath, that the figures represented an accurate assessment of his financial condition. Nor was there any showing that the applicant had financial statements prepared by an accountant from an examination of the applicant's books. Rather, in response to a question on cross-examination, the applicant referred the protestant's attorney to the financial statement on the application. We find that the applicant's simple reference to the financial information contained on the application without more is not sufficient to satisfy the statutory burden.

We further turn to the issue of whether the proposed service is or will be required by the present or future public convenience and necessity. The traditional analysis for determining public convenience and necessity was set forth by the Nebraska 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 at 591, 578 N.W.2d 28 (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. Given the record before us, we find that the applicant has

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failed to demonstrate that the proposed operation would serve a public demand or need which could not be served as well by existing carriers. There was no evidence of need presented relative to Sarpy, Cass and Washington counties. With respect to Douglas County, the applicant did not present sufficient evidence to support the claim that there was a need for transportation service which the proposed operation would address and that could not be met by other carriers. The Commission finds that the evidence supported a general desire for more transportation on the part of other individuals, however, applicant failed to show that the need could not be met by the existing carriers.

The Commission finds further that the Protestants presented sufficient evidence that the Protestants can meet the transportation needs that the applicant asserted exists. We find that the applicant's service will endanger or impair the operations of existing carriers including the Protestants.

Accordingly, we must find that the applicant has not presented sufficient evidence of fitness, and further, has not met the public convenience and necessity test of Nebraska law. The Commission, therefore, finds that the application should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application filed by Liberty Transportation Inc., in Application No. B-1634, be and it is hereby denied.

MADE AND ENTERED at Lincoln, Nebraska, this 20th day of July 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Louise Johnson
Anne C. Boyle
R. Johnson

Chairman

Gerald L. Vap

ATTEST:

And S. Pollack
Executive Director

/s/ Gerald L. Vap
/s/ Frank E. Landis