

1940

CARRIERS - MOTOR CARRIER ACT OF 1935 - ISSUANCE OF CERTIFICATES OF CONVENIENCE AND NECESSITY

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Recommended Citation

William H. Hillier, *CARRIERS - MOTOR CARRIER ACT OF 1935 - ISSUANCE OF CERTIFICATES OF CONVENIENCE AND NECESSITY*, 39 MICH. L. REV. 144 (1940).

Available at: <https://repository.law.umich.edu/mlr/vol39/iss1/12>

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CARRIERS — MOTOR CARRIER ACT OF 1935 — ISSUANCE OF CERTIFICATES OF CONVENIENCE AND NECESSITY — Applicant petitioned the Interstate Commerce Commission for a certificate of public convenience and necessity to operate a transcontinental bus line, claiming that it offered a distinct type of low-cost service, that by so doing it attracted a portion of the travelling public not served by other carriers, that its through-trip features were a special convenience to its passengers, and that meals en route were included in its fare charges, which were slightly lower than those of existing carriers.¹ The pro-

¹Applicant had been in actual operation for three years prior to the present proceedings and sought a certificate under the "grandfather clause" of the Motor Carrier Act, § 206a, 49 Stat. L. 551 (1935), as amended, 49 U. S. C. (Supp. 1939), § 306. The "grandfather" certificate was denied and the case was considered on the merits as an application for an entirely new service.

testing carriers claimed that existing bus facilities could amply handle all of applicant's traffic, that competition in the motor bus field was not in the public interest, and that applicant's lower rates were due to low wages and inadequate equipment, not to bona fide lower operating costs. The commission found that while there was no through-trip transcontinental bus service available, there were numerous connecting lines which offered practically the same service with only one or two bus changes. Evidence also showed that protesting bus lines had experienced an increase in traffic during the time of applicant's operations. *Held*, Commissioner Eastman dissenting, that applicant is entitled to a certificate of convenience and necessity for its transcontinental operations. *All American Bus Lines, Inc.*, common carrier application, (I. C. C. 1939) 18 M. C. C. 755.

Factors which may induce the Interstate Commerce Commission to grant or refuse new certificates of convenience and necessity under the Motor Carrier Act of 1935² can be conveniently considered in the order of their importance from three points of view: (1) the public need for the proposed service; (2) the effect of new competition on existing carriers; and (3) the qualifications of the applicant. In establishing a public need for the proposed service, the burden of proof is on the applicant to show that the existing service is inadequate or unsatisfactory.³ If the existing service is performed only by railroads, motor carrier applicants can usually prove that public convenience demands a motor service also.⁴ However, if there are other motor carriers in the field, more serious problems are raised. In the latter situation, the commission considers the nature of the proposed service to determine whether or not it could be adequately performed by existing carriers. The commission will grant a certificate if the proposed operations are unique or distinct from any existing service by reason of the applicant's special equipment or experience,⁵ or if the proposed operations serve a public need or class of customers not served by existing carriers.⁶ On the other hand, if applicant's proposed service is the same as that which existing motor carriers offer, a certificate is usually denied.⁷ The rates charged by the applicant have little

² 49 Stat. L. 551 (1935), 49 U. S. C. (Supp. 1939), § 307.

³ J. J. Norton, application, 1 M. C. C. 114 (1936); Bluenose Bus Co., Ltd., application, 1 M. C. C. 173 (1936); Moe Gollock, contract carrier application, 11 M. C. C. 399 (1939). [Where not otherwise stated, "application" refers to a common carrier application.]

⁴ E. A. Bowles, application, 1 M. C. C. 589 (1937); Murphy Transfer Co., application, 9 M. C. C. 361 (1938); Liederbach Bus Co., application, 1 M. C. C. 776 (1937).

⁵ Mercer & Dunbar, application, 13 M. C. C. 683 (1939) (armored truck service); G. F. Wooton, application, 1 M. C. C. 489 (1937) (applicant had special experience in handling and transporting art objects for museums and others).

⁶ Thus in the principal case, applicant's low-cost type of service and the fact that this service appealed to low-income travellers were influential grounds for granting a certificate. 18 M. C. C. at 780. The same reasoning appeared in *Pan-American Bus Lines Operation*, 1 M. C. C. 190 (1936) (a "limited" bus service from New York to Miami via a scenic route attracting a tourist trade which did not appear to use other bus service). See also, *White Circle Line*, application, 16 M. C. C. 516 (1939) (commuters' express service carried on in seven-passenger cars operating on a very flexible schedule).

⁷ J. J. Norton, application, 1 M. C. C. 114 (1936).

weight in application proceedings, as the commission has general power to adjust all motor carrier rates.⁸ However, the commission is strongly influenced by any evidence showing a present demand for applicant's services, especially by the presence or absence of testimony from prospective customers.⁹ The public need for an efficient transportation system leads the commission to consider the possible effects of applicant's competition on existing carriers. The investments of these carriers must be conserved so that their services to the public will be maintained.¹⁰ For this reason, certificates are denied when their issue would mean that traffic would be taken away from carriers already in the field.¹¹ However, if the existing carriers are not hurt so as to impair their operations, a certain amount of competition by new carriers may be allowed, to provide a stimulus for new ideas and better public service.¹² To be sure that the public actually receives the benefits of additional service, the commission considers the applicant's ability to operate successfully. The applicant must have some financial backing and show evidence of immediately available traffic.¹³ If the applicant is an existing carrier seeking to extend his operations, the commission may give weight to the benefits which the new operation might confer on his present

⁸ This was the chief ground for the dissent in the principal case, as Commissioner Eastman argued that including meals in fare charges was merely a device to charge lower fares and hence not a ground for granting a certificate. 18 M. C. C. at 785. See also: *Brown Motor Freight Lines*, application, 2 M. C. C. 667 (1937), where the commission, in granting a certificate, refused to give consideration to the comparative rates of applicants and protesting carriers; *J. J. & E. D. Wellspeak*, application, 1 M. C. C. 712 (1937), where the commission refused a certificate despite the applicant's low rates.

⁹ Testimony of prospective customers received favorable comment and was influential in causing certificates to be granted in the following cases: *Brown Motor Freight Lines*, application, 2 M. C. C. 667 (1937); *N. I. Snyder*, application, 7 M. C. C. 500 (1938); *Moe Gollock*, contract carrier application, 11 M. C. C. 399 (1939). The absence of prospective customers' testimony received comment and certificates were denied in the following cases: *F. C. Whipple*, contract carrier application, 2 M. C. C. 59 at 61 (1937); *L. L. Crumpacker*, application, 4 M. C. C. 264 (1938); *G. E. Jackson*, application, 7 M. C. C. 656 (1938).

¹⁰ *Z. O. Clark*, application, 1 M. C. C. 445 (1937); *Cater's Motor Freight System*, extension, 10 M. C. C. 292 (1938).

¹¹ Where existing carriers have built up business, and can handle the traffic, they are preferred to new applicants. See: *C. & D. Oil Co.*, contract carrier application, 1 M. C. C. 329 (1936), which has been cited with approval in subsequent common carrier application proceedings. *J. J. & E. D. Wellspeak*, application, 1 M. C. C. 712 (1937).

¹² *Pan-American Bus Lines Operation*, 1 M. C. C. 190 (1936). This policy was reiterated in the principal case, 18 M. C. C. at 780, 781.

¹³ *L. L. Crumpacker*, application, 4 M. C. C. 264 (1938) (certificate denied, partly because of applicant's poor financial condition); *G. Mattingly*, contract carrier application, 2 M. C. C. 663 (1937) (permit denied; no showing that applicant could obtain sufficient traffic for profitable operation); *G. K. Werner*, extension, 9 M. C. C. 267 (1938) (permit denied; no showing that business could be secured if it were granted).

service,¹⁴ but in most cases, the benefit of a certificate to the applicant is not a factor to be considered.¹⁵ Applicant's experience in providing motor carrier service is influential.¹⁶ A special case arises when a railroad seeks to establish a coordinating truck service. Certificates are granted in this situation on the grounds that the proposed operation is not that of a new carrier, but an attempt by an existing carrier to render more convenient and efficient service.¹⁷ When an existing carrier is consolidated, merged or purchased, a certificate is not required, as these situations are provided for in another section of the act.¹⁸ In deciding that public convenience and necessity would be served by the granting of a common carrier certificate in the principal case, the commission stressed the facts that the applicant offered a distinct type of service, that this service would attract customers not adequately served by existing carriers, that applicant's competition would not impair the operations of existing carriers and that applicant itself was well qualified to operate successfully. Under the circumstances, this decision would seem to indicate that the commission considers that the motor carrier industry is still expanding and that leeway for experimentation will be allowed, if existing services are not thereby impaired.

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¹⁴ Leiderbach Bus Co., application, 1 M. C. C. 776 (1937).

¹⁵ E. T. Merritt, application, 1 M. C. C. 336 (1936) (certificate denied); C. & D. Oil Co., contract carrier application, 1 M. C. C. 329 (1936) (permit denied).

¹⁶ N. I. Snyder, application, 7 M. C. C. 500 (1938); G. F. Wooton, application, 1 M. C. C. 489 (1937).

¹⁷ Certificates issued to railroads for coordinating truck service are conditioned so as to keep the motor service auxiliary or supplemental to the rail service. Chicago, R. I. & P. Ry., extension, 19 M. C. C. 702 (1939); Gulf, Mobile & Northern Ry., application, 18 M. C. C. 721 (1939); Kansas City Southern Transport Co., application, 10 M. C. C. 221 (1938).

¹⁸ 49 Stat. L. 555 (1935), as amended, 49 U. S. C. (Supp. 1939), § 313. Under this section of the act, the commission's approval is granted when the proposed transaction will result in better use of existing facilities and thus benefit the public. Public convenience and necessity do not have to be shown and no commission approval is required unless more than 20 vehicles are involved. Illinois Greyhound Lines, purchase, 15 M. C. C. 86 (1938) (purchase allowed; consolidation of terminals and coordination of schedules would result); Houston & N. Texas Motor Freight Lines, purchase, 5 M. C. C. 487 (1938) (purchase allowed; delay in transit and extra handling of goods eliminated); Transamerican Freight Lines, purchase, 5 M. C. C. 712 (1938) (purchase allowed; vendor's line coordinated with a larger system). In view of the burden of proof required to obtain a certificate of convenience and necessity, this section of the act may provide a good alternative method for an existing carrier to extend its operations or for a new entrepreneur to enter the field.