



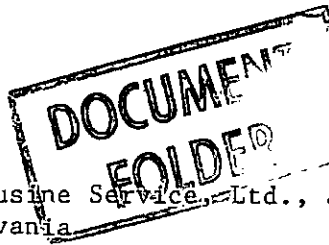
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P. O. BOX 3265, HARRISBURG, Pa. 17120

ISSUED: August 22, 1990

Richard H. Pepper, Esquire
P.O. box 1448
Bethlehem, PA 18016

IN REPLY PLEASE
REFER TO OUR FILE

A-00108173



Application of D's Limousine Service, Ltd., a corporation of the
Commonwealth of Pennsylvania

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Martin R. Fountain. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this Decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17120, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of Exceptions/Reply Exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (Name of Party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

cc:ALJ Fountain/Office of ALJ/Law Bureau/Bureau of Trans./Mr. Bramson/OSA/Chairman/Commissioners/Correspondence/our file

Very truly yours,

Allison K. Turner
Chief Administrative Law Judge

lg
Encls.
Certified Mail
Receipt Requested

Similar letter to: See attached list.

A-00108173 Parties of Record

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCUMENT
FOLDER

Application of D's Limousine Service, Ltd. :
A corporation of the Commonwealth of :
Pennsylvania, for the right to transport, :
as a common carrier, persons, in group :
and party service, between points in the :
counties of Lehigh, Northampton, Bucks :
and Philadelphia. :

A-00108173

INITIAL DECISION

Before
Martin R. Fountain
Administrative Law Judge

DOCKETED
AUG 28 1990

HISTORY OF THE PROCEEDING

D's Limousine, hereinafter applicant, filed an application, on May 25, 1988, for the right to transport, as a common carrier, persons, in group and party service, between points in the counties of Lehigh, Northampton, Bucks and Philadelphia. The application was advertised in the Pennsylvania Bulletin on July 9, 1988 as well as the required local papers. Timely protests were filed by Elite Limo, LoMa, Inc., d/b/a ABE Limo and Bus, AA Limousine, Frank Martz Coach Company, Trans-Bridge Lines, Inc., Starr Transit Co., Inc., all of which were withdrawn based on a restrictive amendment(s), except LoMa, Inc. The Administrative Law Judge (ALJ) examined the authority of the sole protestant at A-00104134, which was granted on April 15, 1983, and finds that it has group and party rights between points

in the counties of Lehigh and Northampton, and from points in said counties to points within an airline distance of sixty (60) statute miles of said counties. That the service authorized is limited to the use of vehicles with a seating capacity of fifteen passengers or less. Thus the application area conflicts with the area of applicant in Northampton and Lehigh Counties, thereby conferring standing on protestant.

Several scheduled hearings were postponed. A hearing scheduled for April 11, 1989 was postponed because applicant's attorney failed to appear without notification. Hearings scheduled for December 12, 1989, January 11, 1989 and February 12, 1989 were also postponed.

The hearing in this matter finally took place on February 21, 1990. The parties appeared by counsel, together with witnesses. The record consists of 84 pages, including seven exhibits.

The application, restrictively amended in final form as of January 16, is as follows:

Right to transport, as a common carrier, persons, in group and party service, between points in the counties of Lehigh, Northampton, Bucks and Philadelphia, provided that no right, power or privilege is granted to perform transportation in vehicles having a seating capacity exceeding 15 persons, excluding the driver.

SUMMARY OF TESTIMONY

Applicant's Testimony

D. E. Newberry, president of applicant, which is located at 14 Kernsville Road, Orefield, Pennsylvania, testified that his wife, Dorothy, is the only other officer of the corporation and is vice-president and secretary/treasurer (N.T. 4, 5).

He stated that he has operated group and party tours for five and one-half years with an Interstate Commerce Certificate (ICC) number MC-176279 (N.T. 5, 10). At the commencement of operations, one car comprised its inventory; however, the company currently has eight vehicles (N.T. 6). Witness further testified that the business has prospered and he would like to expand it (N.T. 6).

Mr. Newberry stated that at present he is not certificated by the PUC, except that he is in the process of purchasing some PUC rights, so far without protest(s) (N.T. 7).

Applicant's equipment consists of the following: four sedans, two stretches and two 15 passenger vans, 1981 and 1986 respectively. He outlined safety procedures his company utilizes. All of the maintenance is contracted out, and safety inspections are conducted every 5,000 miles. All of the drivers have physicals and the ICC written test (N.T. 8). Before each trip, an equipment check is made of lights, brakes, horn and

tires (N.T. 9). The drivers are "roadtested" for knowledge of assigned points (N.T. 9). Currently the company has 14 drivers, part-time and full-time (N.T. 10).

The company carries \$1.5 million liability insurance coverage as well as physical damage coverage. In its five and one-half years of operation, the company has had no major claims (N.T. 10). All of the cars are equipped with telephones, which can contact its vehicles (N.T. 12).

Witness, testifying as to need, stated that a lot of calls came in for sightseeing in the Poconos, which he could not answer (N.T. 12). He also stated that there is a program in Bethlehem (Pa.), where a big parade is held, but for lack of vans, people are forced to utilize the services of gypsy drivers (N.T. 13). But witness did not log these calls (N.T. 13); however, he believes there is a need for group and party transportation, otherwise he would not waste his money (N.T. 13).

He reiterated that people contact him on a regular basis for transportation to the Poconos, the Bethlehem parade, the flower show in Philadelphia and the airport. But he has to refuse the service for lack of permits (N.T. 14). He stated that he made an investigative inquiry with respect to the services that are currently available for group and party and found that most certificated carriers are booked solid and other companies lacked certification or equipment (N.T. 14).

Mr. Newberry will update the 1987 tax return submitted to the Commission as soon as the 1989 tax return is prepared (N.T. 16).

He feels the business is there; that there is never enough transportation basically, especially in the van end of it (N.T. 17).

On cross-examination, witness admitted that his service with Ryder/PIE as a consultant was for cargo (N.T. 17). That the application for transfer of limousine authority to him from an existing carrier, as mentioned previously, concerns Northampton, Berks, Carbon and Lehigh Counties (N.T. 18, 19). Witness was shown Protestant's Exhibit No. 1, which was represented as five pages containing four separate Public Utility Commission Orders dated February 13, 1986; May 12, 1986; May 26, 1987; and June 16, 1987 (N.T. 20). The PUC Orders related to witness' company. The first one, dated February 1986, shows that a complaint was sustained against D's Limousine, the applicant herein, for illegal transportation contrary to the Code (N.T. 22). Applicant was not PUC certificated at the time. On May 12, 1986 and again on May 26, D's Limousine also was found to have performed transportation from points in Pennsylvania without PUC certification (N.T. 23). Also, in the Order issued on June 16, 1987, applicant was found to have violated the Code by performing illegal transportation.

Witness examined Protestant's Exhibit No. 2, which was identified as copies of Yellow Pages advertising in Lehigh Valley in 1989. The ad, belonging to D's Limousine which speaks for itself, lists service to all airports with the ICC number right underneath (N.T. 26).

The mileage on the two Dodge vans is 90,000 miles and 70,000 miles (N.T. 27).

Witness was apprised of the fact that the Pocono Mountains area, for which he alleged receiving many calls for sight-seeing service, is located in Monroe, Carbon and Pike Counties, rather than Lehigh, Northampton, Bucks or Philadelphia, the latter counties being the proposed application area. Witness, while acknowledging part of the above, believes that if he is granted the authority sought, he will be permitted to pick up in Lehigh County, Northampton or Berks and take the passengers anywhere in the state and drop them off (N.T. 30, 31). The same applies to the Wilkes-Barre/Scranton airport even though this is outside the scope of the proposed application area (N.T. 30).

On redirect, witness claimed there were no other Commission complaints against applicant and blamed applicant's difficulty with the Commission on a family squabble, involving a niece who acted as a secretary and took 'phone calls and kept the books (N.T. 33). Witness laid his difficulty at the door of his secretary because he did not provide for her in his will (N.T.

33). He alleged that the secretary informed the PUC of Code violations (N.T. 38); that he nor any other officer authorized these violations (N.T. 39).

Joan Bramfitt works for applicant as an independent contractor and has driven a limousine for applicant for five years. She stated that applicant runs a professional operation and she feels safe using applicant's equipment because she knows it's checked out (N.T. 40). She stated that the equipment is in very good shape (N.T. 41). Witness is a part-time employee and does volunteer work; she is associated with a lot of organizations and quite often is called and asked about transportation (N.T. 42). She is involved with a country club where there are teams that need transportation. She therefore agrees with applicant that there is need for additional group and party tour service in the area applied for (N.T. 41, 42). Witness also testified that she was associated with a music school where there are fund raisers or children who need to be transported somewhere (N.T. 42). She also has friends who like to take trips together, shopping, whatever, and she gets calls quite often asking about her company (applicant) (N.T. 42). Witness admitted she did not keep logs of requests for transportation previously mentioned (N.T. 45).

Franklin R. Strohl, Jr., a driver for applicant, was at one time married to applicant's former secretary, and also laid

the blame for the previously mentioned difficulty with the Commission at her door. She abused alcohol and drugs. He knows personally of one incident where he borrowed the car and no money was exchanged (N.T. 47). He knows people personally who have [need] for limousine service. He could supply their names but lacks documentation on this (N.T. 49).

Arthur Joseph Prayner, a part-time dispatcher for applicant, testified that in the eight months he has worked for applicant, he assumes he has booked ICC and PUC trips (N.T. 53). He also stated that in the course of business he has booked 90% interstate and 10% intrastate (N.T. 55). From May to September (the wedding season), there was transportation provided within Pennsylvania around the Lehigh Valley (N.T. 55).

D. E. Newberry was recalled and testified that he performed the intrastate transportation on the basis of purchased rights of Reiss Amusements as testified to by his dispatcher (N.T. 58).

Peter King, a neighbor of applicant's president, testified that there have been occasions when he had a need of group and party service for fall trips to the Poconos and to the Philadelphia Spectrum to see some shows. He was informed that applicant did not possess the necessary authority. He also referred his wife's niece to applicant for transportation for her wedding party, but what the outcome was, he really didn't know

(N.T. 65). He has referred inquiring friends to applicant (N.T. 65).

On cross-examination, he admitted he never used any limousine service, including applicant's (N.T. 67). Also, he has never called another limousine service, nor has he referred any of his inquiring friends to the Yellow Pages. He himself did not consult the Yellow Pages (N.T. 69).

Eilene King, wife of previous witness, agreed with her husband that there is a demand for the applied for service (N.T. 70). She also had inquiries regarding group and party service which she referred to applicant (N.T. 71).

On cross-examination, she admitted that the inquiries directed to her about applicant's service were because they knew she was a neighbor of applicant's president (N.T. 71, 72). The callers did not indicate that they had looked around in any advertising source for any other companies, nor did she herself consult the Yellow Pages (N.T. 72).

Protestant's Testimony

Louis Marano, president of LoMa, Inc., testified he has been in business since 1962 (N.T. 74), and operates a limousine service and group and party in vans (N.T. 75). His firm operates in Lehigh and Northampton Counties to all points in Pennsylvania and vice-versa at A-00104134, Folder 2. He identified five documents as his common carrier right, group and party

utilization form or letter, advertising done by ABE Limo, a brief history of the company and corporation, and a list of vehicles and drivers (N.T. 78). He advertises in the Yellow Pages and in the Donnelly Directory (N.T. 79). One of the exhibits included a survey from logs from 9/89 to 2/15/90. Over 168 days multiplied by six vans totals 1,008 van days available. There is an average of .08 van trips for available vans.

FINDINGS OF FACT

1. The applicant's headquarters and facilities are located in Orefield, Pennsylvania (N.T. 4, 5).

2. The applicant holds operating authority from the ICC at MC-176279 to transport passengers (N.T. 10).

3. The applicant employs 14 drivers, part-time and full-time (N.T. 10).

4. Applicant's equipment consists of the following: four sedans, two stretches and two 15 passenger vans (N.T. 8).

5. The applicant is not certificated by the Pennsylvania Public Utility Commission, except that he is in the process of purchasing some PUC rights.

6. The applicant has a maintenance and safety program. All of the maintenance is contracted out, and safety inspections are conducted every 5,000 miles. All of the drivers have physicals and the ICC test. Before each trip an equipment check is made of lights, brakes, horn and tires (N.T. 9).

7. Applicant carries \$1.5 million liability insurance as well as physical damage coverage, and in the five and one-half years of operation, applicant has had no major claims (N.T. 10).

8. All of the vehicles are equipped with telephones (N.T. 12).

9. PUC Orders of February 13, 1986; May 12, 1986; May 26, 1987; and June 16, 1987 related to illegal transportation provided by applicant and all complaints were sustained (N.T. 20, 22, 23).

10. Applicant, in a somewhat ambiguous advertisement in the Yellow Pages of Lehigh Valley in 1989, lists service to all airports, although the ICC number is right underneath (N.T. 26).

DISCUSSION

Before the Administrative Law Judge for adjudication is an amended application, which reads:

"Right to transport, as a common carrier, persons, in group and party service, between points in the counties of Lehigh, Northampton, Bucks and Philadelphia, provided that no right, power or privilege is granted to perform transportation in vehicles having a seating capacity exceeding 15 persons, excluding the driver."

In the recent case of Application of Bluebird Coach Lines, Inc., A-00088807, F.2, Am-K, the Commission reinterpreted its Transportation Regulatory Policy at 52 Pa. Code §41.14, thus

overruling Re Richard L. Kinard, Inc., 58 Pa. P.U.C. 548 (1984), the discussion in which was devoted to an analysis of subsection 41.14(a), the applicant's "burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need." Inadequacy of service, an integral part of the former tripartite burden of proof of an applicant, was effectively eliminated by the Transportation Regulatory Policy and Kinard, leaving in applicant's bipartite burden of proof. However, the use of "alternatives to inadequacy," as defined in Kinard, was identified by the Commission in Bluebird, as not comporting with its delineated regulatory policy at 52 Pa. Code §41.14. The Commission, in the aforesaid case, offered a simplified interpretation of its policy statement at subsection 41.14(a) regarding the evidentiary requirements for the "need" criteria of 41.14(a):

When, through relevant, probative, competent and credible evidence of record, a motor common carrier applicant has shown that applicant's proposed service will satisfy the supporting witnesses' asserted transportation demand/need, the applicant has sustained its burden of proof under subsection 41.14(a) by establishing that "approval of the application will serve a useful public purpose, responsive to a public demand or need." E.g., Seaboard Tank Lines, Inc., 93 Pa. Commonwealth Ct. at 613, 502 A.2d at 768; Re Lenzner Coach Lines, Inc., 63 Pa. P.U.C. 217 (1987); see also Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission (Morgan Drive Away, Inc. II), 16 Pa. Commonwealth Ct. 293, 328 A.2d 194 (1974). This interpretation of subsection 41.14(a) is

consonant with our avowed reason for promulgating the transportation regulatory policy statement at 52 Pa. Code §41.14, namely, to eliminate monopolistic protection of existing motor carriers and to promote healthy competition among motor carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrated public demand/need.

Elaborating on the "need" criteria of 41.14(a), the Commission had this to say:

As explained in the Initial Decision of Commission ALJ John H. Corbett, Jr. in the Application of Pleasant Trucking, Inc., A-00108637 (Initial Decision issued December 5, 1989; final order entered January 8, 1990), "[e]vidence tending to establish a public demand for the proposed service is usually in the form of an expressed and defined desire on the part of some portion of the public for the proposed service." Id. at 22. Public demand/need for an applicant's proposed service has customarily been demonstrated by witnesses' testimony detailing requests for service. E.g., Byerly; Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission, 19 Pa. Commonwealth Ct. 1, 337 A.2d 922 (1975); 52 Pa. Code §3.382(a). "[T]he relevant inquiry is what are the public's needs, and that may be proven by the testimony of shippers or others with knowledge of that subject." Byerly, 440 Pa. at 527, 270 A.2d at 189.

Important to the case at bar and articulated by the Commission in Bluebird is this found at pages 23, 24:

Both appellate court decisions and Commission orders have confirmed that, in the context of subsection 1103(a), a public demand/need for an applicant's proposed transportation service may be proven through witnesses comprising a representative sampling of the public that will use the applicant's proposed

service within the territory encompassed by the application. Purolator Courier Corp. v. Pennsylvania Public Utility Commission (Purolator Courier Corp. II), 51 Pa. Commonwealth Ct. 377, 414 A.2d 450 (1980); Purolator Courier Corp. I; Application of Van Trans, Inc., A-00101053, F.5 (order adopted June 25, 1987, entered July 8, 1987); Re Eagle Courier and Limousine Service, Inc. (Re Eagle Courier), 57 Pa. P.U.C. 404 (1983).

The witnesses supporting a motor common carrier application must be legally competent and credible, e.g., D.F. Bast, Inc.; Merz White Way Tours v. Pennsylvania Public Utility Commission, 204 Pa. Superior Ct. 43, 201 A.2d 446 (1964), and their testimony must be probative and relevant to the application proceeding. E.g., Purolator Courier Corp. I; Dutchland Tours, Inc.; Morgan Drive Away, Inc. II, 66 Pa. C.S. §332(b). The supporting witnesses must articulate a demand/need for the type of service embodied in the application. E.g., Purolator Courier Corp. I; Re Lenzner Coach Lines, Inc.; Re Mobilfone of Northeastern Pennsylvania, Inc.; Re James A. Means, 53 Pa. P.U.C. 216 (1979); Re Hesser Bros., Inc. 52 Pa. P.U.C. 69 (1978). Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of the operating territory specified in the application. E.g., Re Nothstein Bros., Inc., 64 Pa. P.U.C. 411 (1987); Re Purolator Courier Corp., 50 Pa. P.U.C. 308 (1976).

D's Limousine Service Evidence of Public Demand/Need Section 41.14(a)

Applicant adduced testimony of six witnesses to satisfy its burden at 41.14(a). Each witness' testimony will be analyzed as far as practicable.

Leading off for applicant was its president D. E. Newberry who proved to be an inarticulate witness not especially responsive to questions. After testifying relative to his present operation, equipment and personnel, he was asked at N.T. 12:

Q. Mr. Newberry, what is your intention if granted these PUC rights?

A. My intention if granted the PUC rights is to be competitive in the charter market. We find a lot of calls -- in fact, most of the time we can't supply our vans in the peak traffic hours, say, for instance, like, the trees and stuff like this up in the Poconos, wanting to go sight-seeing, we are always getting calls to go up in the Poconos. A lot of people are forced into the situation -- we have a program in Bethlehem, where they have a big parade and everything and we always get calls for this. But there isn't enough vans present for this, so I understand through the channels. And these people are forced to go out and hire anybody off the street to drive a van or they go down and rent one. And there is usually not enough insurance or nothing and it's really a shame this is this way.

When asked by the ALJ whether he logged these calls, he answered:

"Per se, no, sir, I have not" (N.T. 13).

Also, when improperly asked whether he believed there was a need for additional group and party transportation, he responded as follows:

A. I most certainly do. I would not be sitting here wasting my money and everything if I didn't believe there was a

need in it. I would not be investing my money for equipment to buy for this if I didn't believe there was a need of it. In fact, I know there is a need of it.

Q. Why so?

A. Because I have people that call me, people that contact me on a regular basis, can you haul me, say, up to the Poconos or up to see the mountains or down to the parade or down to the flower show here in Philadelphia and all this. And I say, well, no, I don't have the permits to do that with. So I don't do it. And this is an on a constant basis. The airport, the same way. If you don't have the permits, you don't run it.

Q. Have you done any research or investigative inquiry with respect to the services that are currently available for group and party?

A. Yes, we have. We have looked into it very closely and during the peak of the seasons, which is usually in the fall wherever you have your, you know, your tours and trips and all this, the buses, most all of them are booked solid and the other limousine companies are either illegal or they don't have the permit or they don't have the equipment to handle it with.

(N.T. 13, 14).

Finally at N.T. 16, 17, witness summarized as follows:

Q. Other than the current year, are there any outstanding taxes, fines or anything else against the company?

A. No.

Q. Is there anything else you would like to add to the testimony that you have offered so far as to why you should be granted these rights?

A. I think we have pretty much covered it. The business is there. I feel it is. I am willing to invest my money into it. Most of the people that we have talked with, they have all said the same thing. There is never enough transportation, basically. Especially in the van end of it.

Upon general review of this testimony, the ALJ finds it bereft of any persuasion, because it constitutes self-serving unsupported conclusions and otherwise incompetent evidence. For instance, at page 12 of the record, Mr. Newberry testified about a lot of calls to see trees up in the Poconos, and about a parade in Bethlehem for which he always gets calls. Such testimony deserves little weight because no logs were kept of these alleged calls. The evidentiary guidelines for transportation applications found at 52 Pa. Code §3.382 provide as follows:

**§3.382. Transportation applications--
evidentiary guidelines.**

(a) *Service request evidence.* Evidence of requests received by an applicant for service may be offered by the applicant in a transportation application proceeding relevant to the existence of public necessity for the proposed service. The credibility and demeanor of a witness offering evidence will be considered in evaluating the evidence. The weight which will be attributed to the evidence will depend upon the extent to which the alleged requests are substantiated by such evidence as the following:

- (1) The date of each request.
- (2) The name, address and phone number of the person or company requesting service.
- (3) The nature of the service requested on each occasion, including the commodities or persons to be transported, and the origin

and destination of the requested transportation.

(4) The disposition of the request, that is, whether the applicant provided the service or, if not, whether the requesting shipper was referred to another carrier and, if there was a referral, to which carrier was the shipper referred.

The aforesaid guidelines were not followed in any manner.

Next, applicant offers the ALJ an unadorned conclusion, i.e., inadequacy of service, with companies lacking equipment in peak seasons or otherwise being booked solid. This statement lacked any supporting facts (N.T. 14).

At another point in his testimony, applicant's president asserted need, stating he wouldn't be sitting here wasting his money if he didn't believe there was a need in it (sic). And he would not be investing his money for equipment to buy for this (sic) if he didn't believe there was a need for it (N.T. 13, 14). This statement represents nothing more than rationalization, and hardly could be considered need evidence.

Taken as a whole, such need testimony as offered by applicant's president was totally unpersuasive.

The next three witnesses, Joan Bramfitt, Franklin R. Strohl, Jr. and Arthur Joseph Prayner, all work for applicant on a part-time basis. The ALJ scrutinized this testimony because, as employees of applicant, their impartiality is open to question.

Joan Bramfitt, who stated she is an independent contractor who has driven a limousine for applicant for five years for "pin money," is involved with a country club where there are teams that need transportation; also, she is associated with a music school where there are fund raisers on children who need to be transported. The ALJ believes that Ms. Bramfitt offers little more than conclusions. She cannot profess need on behalf of the country club or music school without authorization.

Franklin R. Strohl, Jr., who drives for applicant, when asked about "demand," stated as follows:

Q. Mr. Strohl, you heard Mr. Newberry testify with respect to what he believes to be a demand for additional group and party service. Are you familiar with that demand?

A. Yes, I am familiar with some of it. And I didn't document anything either because I didn't see any need to document something that I have had people -- and I have talked to Bob a long time ago about that there is a demand for that. I know people personally that have needs for it. I could supply their names. I could do any amount of things. I just didn't document it because it was not necessary. (N.T. 49)

Such testimony, in the opinion of the ALJ, is neither clear nor convincing. On top of that, the ALJ affords little or no credibility to this witness who gratuitously interrupted the testimony of Arthur Joseph Prayner while he apparently was offering testimony detrimental to applicant. Mr. Strohl, at that point in the proceeding and while seated in the audience, stated

to the ALJ: "I don't think Art (the witness) knows the difference [between ICC or PUC booking]" (N.T. 54).

Arthur Joseph Prayner testified he works three days a week as a dispatcher for applicant. When asked whether he was familiar with the demand for additional group and party service, he gave the following answer at N.T. 52:

Q. Mr. Prayner, are you familiar with the demand for additional group and party service?

A. Well, on those days sometimes they do come in, sometimes they don't. As I says, it's Tuesday, Wednesday and Friday and we do have records in the books of all the calls, the bookings are all in our official booking book.

Perhaps the question could have been put differently; however, the answer, as it stands, is neither helpful nor meaningful.

Peter King, a neighbor of applicant's president, testified that there have been occasions when he had a need of group and party service for fall trips to the Poconos and to the Philadelphia Spectrum to see some shows. But the efficacy of his testimony was diluted by his admissions on cross-examination. He never used any limousine service, including applicant's. Also, he has never called another limousine service, nor has he referred any of his inquiring friends to the Yellow Pages. He himself did not consult the Yellow Pages (N.T. 65-69).

Eilene King, wife of Peter King, agreed with her husband that there is a demand for the applied for service. She also had inquiries regarding group and party service which she referred to applicant (N.T. 70, 71).

On cross-examination, she admitted that the inquiries directed to her about applicant's service were because they knew she was a neighbor of applicant's president (N.T. 71, 72). Moreover, the callers did not indicate that they had consulted any advertising service for any other companies, nor did she herself consult the Yellow Pages (N.T. 72).

In evaluating the Kings' testimony, the ALJ concludes their testimony did not provide a representative sampling of the public that will use the applicant's proposed service within the territory encompassed by the application. Purolator Courier Corp. v. Pennsylvania Public Utility Commission. When it comes right down to it, the ALJ believes the Kings were just doing the neighborly thing.

All testimony offered on demand/need fell short of the mark. Witnesses lacked impartiality for the most part, and the evidence was not probative. Therefore, the ALJ finds as a conclusion of law that applicant failed to meet its burden of proof as contemplated by 52 Pa. Code §41.14(a).

D's Limousine Service Evidence
of Fitness, Section 41.14(b)

Subsection 41.14(b) requires a motor carrier applicant to prove its technical and financial ability to provide the proposed service. Additionally, Subsection 41.14(b) states that a motor carrier application may be denied if the record shows that the applicant lacks a propensity to operate safely and legally. The Commission focused on the tripartite definition in Re Perry Hussman, 55 Pa. P.U.C. 661 (1982) as follows:

1. Technical expertise - applicant must have technical capacity to meet the need in a satisfactory fashion Applicant must possess sufficient staff, facilities, and operating skills, to make the proposed service feasible, profitable, and a distinct service to the public
2. Financial capacity - applicant should possess the financial ability to give reliable and respectable service to the public Applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service.
3. Propensity to operate safely and legally - in this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the Public Utility Law and the commission's orders and regulations . . .; and by violations in matters affecting the safety of operations

Currently, applicant holds operating authority from the ICC at MC-176279 to transport passengers (N.T. 10). In its operation, applicant employs 14 drivers, part-time and full-time

(N.T. 10). Applicant's equipment consists of four sedans, two stretchers and two 15 passenger vans (N.T. 8). Applicant's president started the business five and a half years ago with one car. The company has prospered and now has eight vehicles, and applicant would like to expand the business (N.T. 6). Applicant has a maintenance and safety program with safety inspections conducted every 5,000 miles. Before each trip an equipment check is made of lights, brakes, horn and tires (N.T. 9).

Applicant's president has a background in the transportation business and, all factors considered, the ALJ believes he could probably conduct a profitable and feasible operation, if granted the requested authority. Accordingly, the applicant satisfies the requirements of technical and financial fitness.

However, there is documentary evidence which raises a serious question as to whether applicant possesses a propensity to operate safely and legally without showing a persistent disregard for, flouting, or defiance of the Public Utility Law and the Commission's orders and regulations.

Protestant's Exhibit 1 contains four separate Commission Orders dated February 13, 1986; May 12, 1986; May 26, 1987 and June 16, 1987 (N.T. 20). All of these Orders relate to applicant. The first Order shows a complaint was sustained for illegal transportation contrary to the Code (N.T. 22). Applicant

was not PUC certificated at the time. On May 12, 1986 and again on May 26, 1987, D's Limousine also was found to have performed transportation from points in Pennsylvania without PUC certification (N.T. 23). Also, in the Order issued on June 16, 1987, applicant was found to have violated the Code by performing illegal transportation.

When confronted by this evidence on cross-examination, applicant's president readily shifted the blame to a niece who acted as a secretary, took 'phone calls and kept the books (N.T. 33). He stated that she acted contrary to his interest because he did not provide for her in his will (N.T. 33). He alleged that the secretary informed the PUC of Code violations (N.T. 38); that he nor any other officer authorized these violations (N.T. 39).

Franklin R. Strohl, Jr., a driver for applicant, at one time married to applicant's former secretary, was also quick to assign the blame for the violations to his former wife even though the ALJ warned the parties that he was not interested in retrying a divorce case. Nevertheless, he cited his former wife's substance abuse without connecting it in a definite way to the Code violations. The ALJ does not believe Mr. Strohl is a credible witness. At one point in the proceeding when Arthur Joseph Prayner, a part-time dispatcher for applicant, was testifying regarding ICC and PUC trips of applicant, some of the

testimony was adverse to applicant's interest. Whereupon, Mr. Strohl took it upon himself to gratuitously state from the audience that he did not think Art (the witness) knows the difference between [PUC and ICC] trips (N.T. 54). However, Mr. Prayner offered information that, while 90% of applicant's business was ICC trips, the other 10% was intrastate, including trips to Philadelphia. Also, during May to September, weddings are serviced (N.T. 55).

Applicant's president also attempted to explain the violations by asserting that PUC authorization for operating intrastate stemmed from his purchase of the rights of Reiss Amusements (N.T. 59). But it was never proved to the ALJ's satisfaction that applicant did indeed possess such rights.

In weighing the evidence to determine if applicant has met its burden of proof under Section 41.14(b), specifically as to whether it has the propensity to operate safely and legally, the ALJ does not believe that applicant's president offered persuasive testimony to offset or mitigate the Commission's sustained complaints of February 13 and May 12 of 1986 and May 26 and June 16, 1987, of illegal transportation. The ALJ just cannot swallow the explanation that it was all the fault of his niece who was his secretary because he was omitting her from his will. His testimony divulged an eagerness to evade the principles of Respondeat Superior. If anything, the testimony of

Franklin R. Strohl, Jr., ex-husband of applicant's secretary who branded his ex-wife a substance abuser responsible for applicant's predicament, militated against applicant because he went to extremes. His officiousness in interjecting himself gratuitously into the proceeding by attempting to rehabilitate the testimony of applicant's dispatcher, Arthur Joseph Prayner, from the audience earned him zero credibility.

If the ALJ accepted the explanation that the blame for these sustained complaints was attributable to applicant's secretary, this does not absolve applicant from the charge of illegal transportation in light of the fact that applicant's own dispatcher testified that 10% of applicant's business were intrastate trips (N.T. 55).

Under all of the evidence, the ALJ finds as a conclusion of law that applicant has failed to meet its burden of proof under Section 41.14(b), as it has not sufficiently demonstrated a propensity to operate lawfully.

Protestant LoMa, Inc.'s Evidence under Section 41.14(c)
Adverse Impact Contrary to the Public Interest

The standard set forth in the Regulations is that the Commission will grant a motor common carrier authority "unless it is established that entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent that, on balance, the granting of authority would be contrary to the public interest." 52 Pa. Code §41.14(c).

Louis Marano, President of LoMa, Inc., the sole protestant in this matter, has rights which conflict with the proposed application area at A-00104134, F.2. The authority conflicts with the authority sought by applicant in that it comprises Lehigh and Northampton Counties specifically, all of Bucks County by extension, and most if not all of Philadelphia County by extension, as attested to by protestant's late-filed exhibit.

Mr. Marano operates a limousine service and group and party in vans (N.T. 74, 75). Mr. Marano has been in business since 1962. He identified five documents as his common carrier right, group and party utilization form or letter, advertising done by ABE Limo, a brief history of the company, and a list of vehicles and drivers (N.T. 78).

In attempting to meet his burden of proof imposed by Section 41.14(c), Mr. Marano relied mainly on alleged underutilization of his van equipment (Protestant's Exhibit 7). This Exhibit included a survey from logs from 9/89 to 2/15/90, a period of 168 days, which when multiplied by protestant's six vans totals 1,008 van days available. Thus there is an average of .08 van trips for available vans.

Mr. Marano's evidence strongly suggests a pre Bluebird, pre Kinard mindset, and falls short of the mark in meeting the burden of proof imposed by Section 41.14(c). Protestant has not

demonstrated, by a preponderance of the evidence, any adverse impact contrary to the public interest attributable to equipment underutilization. The burden of proof is heavy, and protestant would do well if it recognized that this defense is an outmoded concept.

SUMMARY

On balance, the ALJ finds that applicant failed to adduce sufficient probative evidence to meet its burden of proof under §§41.14(a)(b). Likewise, protestant failed to meet its burden under §41.14(c).

However, the ALJ is disinclined to discourage an applicant who has demonstrated entrepreneurial skills. The Commission Regulations, 52 Pa. Code §3.381(j), specifically provide:

(j) New applications: conditions for reconsideration. Applications filed within 6 months of the date of an order refusing or dismissing, on the merits, an application for the same rights filed by the same party shall set forth any new facts or changed conditions not previously presented to the Commission for consideration. The Commission may, in its administrative discretion, either accept or refuse the filing of the application.

For the foregoing reasons, the application will be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties in this proceeding.
2. Applicant has not met its burden under 52 Pa. Code §41.14(a).
3. Applicant has not met its burden under 52 Pa. Code §41.14(b) in that it has not demonstrated a propensity to operate lawfully.
4. Protestant has not met its burden under 52 Pa. Code §41.14(c).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Application of D's Limousine Service, Ltd., at Docket Number A-00108173, be and the same is hereby dismissed without prejudice.
2. That the record be marked closed.

7/19/90

Date

Martin R. Fountain

MARTIN R. FOUNTAIN
Administrative Law Judge

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check boxes for additional services requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to:
A-108173 ID
Kevin J. Kelleher,
Cap

4. Article Number
044638

Type of Service:
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
X

6. Signature - Agent
C. Kelleher

7. Date of Delivery
8/24/90

8. Addressee's Address (ONLY if requested and fee paid)
A

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check boxes for additional services requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to:
A-108173 ID
S. Bruce Smith, Cap

4. Article Number
044639

Type of Service:
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
X

6. Signature - Agent
X

7. Date of Delivery
Aug 23 1990

8. Addressee's Address (ONLY if requested and fee paid)
A

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4. Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check boxes for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to:
 A-108173 ID
 Richard J. Mulcahey,
 Richard J. Mulcahey, Esq.

4. Article Number
 044640

Type of Service:
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
 X

6. Signature - Agent
 X *R. J. Mulcahey*

7. Date of Delivery
 8/24/90

8. Addressee's Address (ONLY if requested and fee paid)
 A

PS Form 3811, Apr. 1989 * U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4. Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check boxes for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3. Article Addressed to:
 A-108173 ID
 David N. Radloff, Esq.

4. Article Number
 044641

Type of Service:
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
 X

6. Signature - Agent
 X *D. N. Radloff*

7. Date of Delivery
 8/22-90

8. Addressee's Address (ONLY if requested and fee paid)
 A

PS Form 3811, Apr. 1989 * U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

Case Identification:

A-00108173; Application of D's
Limousine Service, Ltd., a
corporation of the Commonwealth
of Pennsylvania

Initial Decision By:

ALJ Martin R. Fountain

Deadline for Return to OSA:

September 5, 1990

This decision has not been reviewed by OSA.

DOCUMENT
FOLDER

DOCKETED
SEP 07 1990

* * * * *

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Wm H. Smith

Commissioner

9-4-90

Date

ACT 294

Case Identification:

A-00108173; Application of D's
Limousine Service, Ltd., a
corporation of the Commonwealth
of Pennsylvania

Initial Decision By:

ALJ Martin R. Fountain

Deadline for Return to OSA:

September 5, 1990

This decision has not been reviewed by OSA.

* * * * *

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Joseph P. Rucker, Jr.
Commissioner

9/5/90
Date

ACT 294

Case Identification:

A-00108173; Application of D's
Limousine Service, Ltd., a
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of Pennsylvania

Initial Decision By:

ALJ Martin R. Fountain

Deadline for Return to OSA:

September 5, 1990

This decision has not been reviewed by OSA.

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I want full Commission review of this decision.

Commissioner

Date

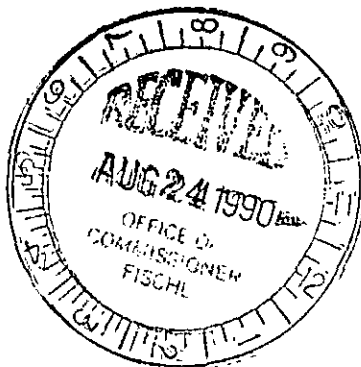
I do not want full Commission review of this decision.

Frank Fischl

Commissioner

9-5-90

Date



ACT 294

Case Identification: A-00108173; Application of D's
Limousine Service, Ltd., a
corporation of the Commonwealth
of Pennsylvania

Initial Decision By: ALJ Martin R. Fountain

Deadline for Return to OSA: September 5, 1990

This decision has not been reviewed by OSA.

* * * * *

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.



Commissioner



Date

RECEIVED

AUG 25 1990

COMMISSIONER ROLKA'S OFFICE