

(Decision No. R82-1098)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF	}	APPLICATION NO. 34162
EMPIRE WAREHOUSE, INC., 3141 SOUTH		
PLATTE RIVER DRIVE, ENGLEWOOD,		
COLORADO 80110 FOR A CERTIFICATE		
OF PUBLIC CONVENIENCE AND NECESSITY		
TO OPERATE AS A COMMON CARRIER	}	RECOMMENDED DECISION OF
BY MOTOR VEHICLE FOR HIRE.		EXAMINER THOMAS F. DIXON
		GRANTING MOTIONS TO DISMISS
		AND DENYING APPLICATION

- - - - -
July 29, 1982
- - - - -

Appearances: Donald L. Stern, Esq., Omaha, Nebraska,
and James A. Beckwith, Esq. Denver, Colo-
rado, for Applicant;

John S. Walker, Esq., Denver,
Colorado, for Protestants, Rio
Grande Motorway, Inc.;

Lee E. Lucero, Esq., Denver,
Colorado for Protestants, Eastern
Plains Express, Platte Valley
Freightways, Inc., RAC Transport
Company, Inc., and Star Motor
Freight Lines, Inc.;

Charles Williams, Esq., Charles
Kimball, Esq., Denver, Colorado,
for Protestants, Mile-Hi Express,
Inc., and Miller Brothers, Inc.;
and

David E. Driggers, Esq., Denver,
Colorado, for Protestants, Trans-
western Express, Ltd., North
Eastern Motor Freight, Inc.,
Northwest Transport Service, Inc.,
and Ashton Trucking, Inc.

STATEMENT OF THE CASE

This application was filed by applicant, Empire Warehouse, Inc. on September 11, 1982. Subsequent to notice issued by this Commission on September 28, 1982, protests were filed on behalf of Rio Grande Motorway, Inc. on October 1, 1982, by Eastern Plains Express, Platte Valley Freightways, Inc., Robert A. and Vivian D. Carpenter,

d/b/a RAC Transport Company and Star Motor Freight Lines, Inc. on October 9, 1981, by Mile-Hi Express, Inc. and Miller Brothers, Inc. on October 14, 1981, and by Transwestern Express, Ltd., North Eastern Motor Freight, Inc., Northwest Transport Service, Inc., and Ashton Trucking, Inc. on October 22, 1981. On November 12, 1981 the protests of North Eastern Motor Freight, Inc. and Northwest Transport Service, Inc. were unconditionally withdrawn. On December 9, 1981, the protest filed on behalf of Transwestern Express, Ltd. was unconditionally withdrawn.

On January 21, 1981, this matter was set for hearing on April 26, 1981, at 10:00 A.M., in Denver, Colorado. On February 23, 1982, protestant, Ronald R. Payne, d/b/a Eastern Plains Express, filed a Motion for Substitution of Parties requesting that the Commission substitute the names of Murray A. Pierce and Charles R. Wranosky for the name of Ronald R. Payne on the basis that Pierce and Wranosky had applied to the Commission for transfer of the certificate held in the name of Ronald R. Payne d/b/a Eastern Plains Express. This motion was granted by Decision No. R82-341-I on March 9, 1982.

On April 26, 1982, applicant and protestant, Ashton Trucking Company entered into an agreement whereby applicant agreed to restrict any authority issued in these proceedings against transportation of farm products from Alamosa, Rio Grande, Saguache, Conejos, Hinsdale and Costilla Counties, Colorado. Upon acceptance of the amendment, protestant, Ashton Trucking Company, agreed to withdraw its protest.

The hearing began in Denver, Colorado as scheduled on April 26, 1982. As a preliminary matter, the amendment proposed by applicant which had previously been agreed to by Ashton Trucking Company was formally offered as an amendment to the application. This amendment was found to be restrictive in nature, reasonable, and sufficiently clear to advise the public of the authority sought by applicant, and, therefore, was accepted on behalf of the Commission. Protestant, Ashton Trucking Company, was then permitted to withdraw its protest. On April 27, 1982, applicant requested a continuance of the hearing for the purpose of presenting an endorsed witness who had been unable to attend the hearing as scheduled. This motion was not opposed by protestants and was granted. The matter was reset for further hearing on June 8, 1982. The hearing was concluded on June 9, 1982. Subsequent to the continuance, applicant filed a Motion to Amend Application whereby applicant amended its commodity request to the transportation of (1) candy and confectionery, and (2) bakery goods and snack foods when moving with candy and confectionery. In addition, applicant restricted its application to providing service in vehicles equipped with mechanical refrigeration. These amendments were accepted by this Examiner as being restrictive in nature, reasonable, and sufficiently clear so as to advise the public the authority sought.

During the course of the proceedings, Exhibits 1 through 29 were offered and admitted into evidence. Applicant again amended its application and reduced the territorial scope of the application as set forth in Exhibit 13 at the conclusion of its case-in-chief. This amendment was accepted on behalf of the Commission and found to be restrictive in nature, reasonable, and sufficiently clear to advise the public of the authority sought by applicant. At the conclusion of applicant's case-in-chief, the remaining protestants made motions to dismiss which motions were taken under advisement.

Protestants then proceeded to present their cases without, however, waiving the previously made motions to dismiss. At the conclusion of protestants' cases, applicant chose to present no rebuttal case. The parties were allowed to file statements of position by June 21, 1982, and the matter was taken under advisement.

Pursuant to the provisions of C.R.S. 1973, 40-6-109, the Examiner now transmits to the Commission the record and exhibits of said hearing, together with a written Recommended Decision containing findings of fact, discussion, conclusions and order.

FINDINGS OF FACT

Based upon all of the evidence presented by applicant during its case-in-chief, the following is found as fact:

1. Applicant is a corporation with its principal office located at 3141 South Platte River Drive, Englewood, Colorado. Applicant presently holds contract carrier Permit No. B-7597 and Interstate Authority No. 7183-I.

2. Applicant operates a storage and distribution facility which consists of 34,000 square feet of which 17,000 square feet is refrigerated to maintain 65 degrees for the storage of candy and other food products. Applicant has two 1977 International straight trucks equipped with 18 foot refrigerated bodies, four tractors, three trailers, and two tractors which are used as yard hostlers.

3. Applicant's unaudited balance sheet dated December 31, 1981, reflects it has assets totalling \$92,882.00 and total liabilities of \$80,816.00. Four hundred ninety-nine shares of common stock with a par value of \$100 were issued through December 31, 1981, resulting in a retained deficit of \$37,834.00. Shareholder equity was \$12,066.00. Applicant's operations in 1981, which included its warehouse and delivery operations, reflected that applicant sustained a loss \$16,767.00 which when added to other income or deductions produced a net loss of \$24,494.00. In 1980 applicant sustained a loss from the same operations in the amount of \$2,239.00 which when added to other income or deductions resulted in a net loss of \$8,476.00. There was no evidence that applicant had filed a petition in bankruptcy and there is no requirement in the Commission Rules or Regulations or in Public Utilities Law in general that applicant's operations be profitable. Moreover, Mr. Thomas P. Lee, president of applicant and majority stockholder has injected capital into the business as necessary.

4. The application as finally amended by Applicant is as follows:

For a certificate of public convenience and necessity to operate as a common carrier by motor vehicle for hire for the transportation of (1) candy and confectionery, and (2) bakery goods and snack foods, when moving with candy and confectionery -- on schedule -- between all points located within a ten (10) mile radius of the intersection of Colfax Avenue and Broadway in Denver, Colorado, on the one hand, and on the other hand; Sterling, Colorado; Trinidad, Colorado;

Wellington, Colorado; Canon City, Colorado; Grand Junction, Colorado; Estes Park, Colorado, Greeley, Colorado, and Nederland, Colorado; via the following named highways or any combination of said highways: Interstate 25, Interstate 70, Interstate 76; U.S. Highway Nos. 6, 34, 36, 50, 85, 287; and Colorado State Highway Nos. 7, 14, 72, 113, 115, with the right to serve all intermediate points and all off-route points located within ten (10) miles of said highways and the following additional off-route point: Grover, Colorado. Restricted to providing service in vehicles equipped with mechanical refrigeration and restricted against the transportation of fresh and frozen meat.

5. Applicant is financially fit to conduct the proposed operations. Applicant will comply with the rules and regulations of this Commission if the authority sought is granted; however, applicant has conducted unauthorized operations in Colorado intrastate commerce. Since applicant presently holds authority with this Commission; it is apparent that applicant knew these operations were unauthorized and in violation of the rules and regulations of this Commission. However, the applicant conducted these unauthorized operations in March and April of 1981, and has since operated its business in compliance with the rules and regulations of this Commission and has discontinued unauthorized transportation. Therefore, it has demonstrated that it will comply with those rules and regulations in the future. Accordingly, the conduct of these unauthorized operations will not affect the granting or denial of the authority sought.

6. Mr. Lee was virtually unable to provide schedules which applicant will institute in the event the authority sought is granted. Applicant will generally commingle intrastate traffic with the present interstate traffic it moves on a scheduled basis. However, there was no testimony by Mr. Lee, or any other witness, as to the amount of intrastate traffic which will be tendered to applicant to specific locations. There was no evidence that the traffic tendered by any shipper will coincide with any particular schedules. At this point in time, any schedules which the applicant might institute are purely speculative. Moreover, the schedules which applicant will institute will be based on the revenue and tonnage derived which has yet to be determined by applicant. The only evidence of scheduling which applicant proposed which is now relevant to the amended application included the following:

If this application is granted the first thing we would do would be to offer intrastate service to the same counties we are authorized to serve under our Sub No. 3X (Denver, Arapahoe, Boulder, Weld, Larimer, Douglas, Jefferson, El Paso, Pueblo, Fremont, Clear Creek and Gilpin Counties, State of Colorado)....We would then initiate regularly scheduled services as follows: (1) between Denver and Julesburg over Interstate 76; (2) between Denver and Burlington over Interstate 70; (3) between Denver and Trinidad over Interstate 25; and (4) between Denver and Grand Junction over Interstate 70. (Verified Statement. Thomas P. Lee, Page 5.)

Since the time that this testimony was prepared, applicant has restricted its application as to schedule (1) to read between Denver and Sterling over Interstate 76 and eliminated its request to serve Burlington via Interstate 70.

Mr. Lee continued:

...The decision as to which operations will begin first would depend upon the volume of traffic available. Initially, we will set schedules based upon operations one day per week, the day of the week again depending upon our customers' needs, the volume of freight, and the distance to be traveled. As the demands of our customers increase, so will the number and length of our schedules. (Verified Statement. Thomas P. Lee, Pages 5-6).

7. Mr. Lee sought this authority on behalf of the applicant based upon his experience in handling less than truckload traffic in interstate commerce. He believes that the expansion into the handling of intrastate Colorado traffic is a natural adjunct to that operation and that the addition of this intrastate operation would enhance the economic feasibility of both operations because Colorado is the "hub" of applicant's Sub 4 operation. Applicant will have no terminals other than that located at Empire Warehouse, Inc., 3141 South Platte River Drive, Englewood, Colorado.

8. In support of its application, applicant called four witnesses who represented three shippers.

9. Mr. Atchisson Scott is the Director of Distribution for M & M Mars. Mars generally permits the public warehouses to arrange the transportation of its commodities in Colorado intrastate commerce. Mars ships candy products in Colorado intrastate commerce. These products are generally boxed, wrapped, and loaded on pallets. The commodities require proper temperature control; Mars prefers that its candies be shipped in refrigerated equipment. Mr. Scott was unaware of the specific tonnage shipped in Colorado intrastate commerce by Mars. However, Michael Dzamba, Regional Distribution Manager for Mars, provided information in this regard. In 1981, Mars shipped 6,464,451 pounds of its products in Colorado intrastate commerce. Of these shipments, 2,805,689 pounds moved outside the Denver commercial zone and the remainder moved inside the Denver commercial zone. There were 3,445 individual customer orders shipped in Colorado in 1981 by Mars. Their products are initially delivered to a public warehouse and then are distributed in Colorado intrastate commerce to various customers. Generally, Mars ships its products to Imperial Distribution, a public warehouse in Denver, Colorado. Mars supported the application because its products require strict temperature control, and, Mars prefers scheduled service rather than on-call-and-demand service so its customers can plan on deliveries. Mars ships its products to all cities and towns encompassed in the application as now restricted.

10. Robert W. Pettigrew is the General Traffic Manager for Hershey Chocolates, Hershey, Pennsylvania. Hershey ships chocolates and cocoa products to Imperial Distribution for distribution in Colorado intrastate commerce. Hershey prefers scheduled service which allows it to better control its inventory at Imperial Distribution. Hershey also requires strict temperature control when its products are shipped and requires mechanical refrigeration. Hershey shipped 3.2 million pounds of its products in Colorado intrastate commerce in 1981 and expects a six percent

increase in 1982. For the first 3 months of 1982, Mr. Pettigrew provided the volume of freight sent to various cities in Colorado as handled by all carriers known and used by Hershey. However, these figures do not represent the volume and frequency of traffic which Hershey expects to tender in Colorado intrastate commerce since the months of January, February, and March, 1982, represented a slow sales period. Hershey experiences a peak sales period during the months from July through November. If the authority sought is granted, Hershey will not divert traffic from Mile-Hi Express and several other carriers. Accordingly, Mr. Pettigrew was unable to advise how much traffic would be tendered to the applicant in the event the authority sought is granted. Hershey does ship its commodities to every city encompassed in applicant's restricted application.

11. Louis E. Zobel is a Branch Manager of Whitman's Chocolates, Philadelphia, Pennsylvania. Whitman ships chocolates to Empire Warehouse from Philadelphia, Pennsylvania. These chocolates are then shipped to customers throughout Colorado and require protective service. Whitman prefers that its products be shipped in mechanically refrigerated vehicles. In 1981, Whitman shipped 163,000 pounds of its products in Colorado intrastate commerce. Whitman expects the Colorado intrastate traffic to increase by five percent in 1982. Whitman prefers scheduled service to better coordinate shipments with customer demand. Whitman's traffic travels within various holiday periods approximately 70 percent of the time. If the authority sought is granted, Whitman will divert traffic from Mile-Hi Express to Empire whenever possible. Mr. Zobel provided no evidence of the volume of traffic shipped to particular towns or cities or evidence of the frequency such traffic moves to these cities. In the event the authority sought is granted, Whitman would divert virtually all of its traffic in Colorado intrastate commerce to applicant whenever its authority would permit since the carriers presently used by Whitman generally do not offer mechanically refrigerated service with the exception of Mile-Hi Express.

DISCUSSION

From the outset, it is important to note that this application began as a request for common carrier authority to transport food and food stuffs (except fresh and frozen meat) between Denver, Colorado and points within a ten mile radius thereof and virtually every major city in Colorado over most major highways. Indeed, the shipper witnesses looked upon the authority sought as statewide authority. After a substantial portion of the applicant's evidence was received, this application was amended and the commodities to be shipped were limited to candy and confectionery and bakery goods and snack goods when moving with candy and confectionery. Further, the application was restricted to providing service in vehicles equipped with mechanical refrigeration. Finally, the application was restricted territorially to fewer highways and cities than originally sought.

This application also proposes scheduled service for the limited commodities on the specific highways between Denver (10 mile radius) and various other towns or cities.

The transportation of property is governed by the doctrine of regulated competition. C.R.S. 1973, 40-10-105(2). In determining whether to grant a certificate of public convenience and necessity, the controlling factors are the public interest and the possibility that a new carrier may create destructive competition.

The applicant bears the burden of proof of showing the public interest requires its service. While it is not necessary to show the proposed service is indispensable, it is necessary for the applicant to demonstrate that the proposed service is reasonably necessary for accommodation of the public. Ordinarily, the protestants bear the burden of proof of showing that the proposed service will have a detrimental effect within the industry, thereby resulting in destructive competition since the impact of the proposed service upon protestant's operation is uniquely within the protestant's knowledge. Arrow Transportation Company vs. Hill, 236 Or. 174, 387 P.2d 559 (1963).

In order to withstand a motion to dismiss at the close of the applicant's case, applicant must have demonstrated that the proposed service is reasonably necessary for accommodation of the public when its evidence is viewed in its most favorable light.

In Morey vs. PUC, _____ Colo. _____, 629 P.2d 1061 (1981), Justice Dubofsky speaking for a unanimous court stated:

... '(P)ublic need' is broader than the individual needs and preferences of an applicant's customers, ...the Commission may consider the impact additional competition may have, not only on the conflicting economic interests of competing carriers,...but also on the ability of existing carriers to provide their customers and the public generally with safe, efficient and economical transportation services....The obligation to safeguard the general public against the impaired services and/or higher rates accompanying destructive or excessive competition is at the heart of the policy of regulated competition:...

Nowhere in our earlier cases construing Section 40-10-105(2) have we suggested that 'public need' under the doctrine of 'regulated competition' is to be measured solely or exclusively by the needs or the preferences of an applicant's customers.... That their needs and preferences are probative of a 'public need' for competitive services is indisputable. They are not, however, conclusive evidence of a 'public need'.

* * *

If certificates of public convenience and necessity were made available, as a matter of right, to any applicant who could prove that one or more customers needed or preferred its proposed services, the statutory mandate to regulate competition would be illusory. 'Regulated competition' is not synonymous with deregulation.

...The policy of regulated competition endorsed by Section 40-10-105(2) reflects a legislative determination some restraints on inter-carrier competition are necessary to protect the public interest. 629 P.2d at page 1066.

Since the burden of proof for showing destructive competition will result if the authority sought is granted is upon protestants, that portion of the public need requirement is not part of applicant's case in chief, but becomes a part of its rebuttal case. Absent a showing of destructive competition, applicant's request for authority will generally be determined by the needs or preferences of its customers. Therefore, applicant's burden in its case-in-chief is to demonstrate public need by showing the needs or preferences of its customers who require the proposed service.

In this respect, applicant must describe with particularity the service it proposes to provide. Although not specifically enunciated in the Public Utility Commission Rules of Practice and Procedure or the statutes governing motor vehicle carriers for hire, Appendix H to the Rules of Practice and Procedure clearly suggests what should be described in an application when authority is sought.

Appendix H provides in pertinent part:

- I. GENERALLY. The application shall state all the pertinent facts upon which the applicant relies to support his application. The instructions currently supplied pursuant to Rule 29 (sic) are shown below and indicate the types of information that should be included in the application and/or testimony and exhibits introduced at the hearing.
- II. MOTOR VEHICLE CARRIERS FOR HIRE (COMMON AND CONTRACT).
 - A. Initial Application for Authority to Operate as a Common or Contract Motor Vehicle Carrier for Hire.

When application is made for authority to operate as a common or contract motor vehicle carrier for hire, the applicant, in addition to complying with the rules applicable to all pleadings, particularly Rules 11 and 13, shall submit the following data either in the application or as exhibits.

1. The name and complete address (street, city, state, and zip code) of applicant, and the name under which the operation shall be conducted. If the applicant is a corporation, a statement to that fact; the name of the state in which it is incorporated; location of its principal office, if any, in this State; the name of its directors and officers; and its Colorado agent for service. A corporation shall file with the Commission a certified copy of its Articles of Incorporation or Charter.

If an out-of-state corporation, a certified copy of the authority qualifying it to do business in the State of Colorado, certified to by the Secretary of State of Colorado, must be attached to the Articles of Incorporation. If the applicant is a partnership, set forth the names and addresses of all partners.

2. The name and address of applicant's representative, if any, to whom all inquiries should be made.
3. A statement of the type of transportation service which applicant intends to render, i.e., whether common or contract carriage.
4. A statement indicating the transportation service which the applicant intends to render, i.e., transportation of passengers or property.
5. A statement of the area, route or routes, or the points to be served, and proposed time schedule if any, which shall be set forth in an exhibit attached thereto.
6. A description of the equipment to be operated in the proposed operation.
7. A financial statement showing applicant's ability and resources and all pertinent details which may serve to indicate the permanency of the business to be established by the applicant.
8. Omitted--(relates to contract carriers).
9. Omitted--(furnished upon request of Commission).
10. A statement describing in detail the extent to which applicant, or any carrier affiliated with applicant, holds authority duplicating in any respect the authority sought. Further, whether any application previously filed with the Commission and still pending, or any application filed simultaneously, requests authority duplicating the authority sought by applicant. A map may be used to show any duplication in area or route.
11. Omitted--(relates to location of hearing).
12. A statement indicating that the applicant understands that the mere filing of the application does not, in itself, constitute authority to operate.
13. Omitted--(relates to signatures).
14. A statement showing the facts and circumstances which the applicant relies upon to establish that the proposed operation is required by public convenience and necessity, if the application is for common carriage authority, ...(remainder omitted--relates to contract carrier authority).

15. A statement that if the authority as herein sought is granted, the applicant (1) will have his insurance agent file the required certificate of insurance with the Commission, (2) will file the necessary tariffs, (3) will operate in accordance with all Commission Rules and Regulations Governing Common or Contract Carriers by Motor Vehicle for Hire, and (4) will file with the Secretary of the Commission the designation of agent for services of notices, orders and process.

16. Omitted--(relates to unopposed applications).

Additionally, an application for temporary authority to operate as a common or contract carrier by motor vehicle for hire requires shipper support as follows:

C. Application for Temporary Authority to Operate as a Common or Contract Carrier by Motor Vehicle for Hire.

- j. Attach to the application letter or letters indicating shipper support containing the following information:

- (1) An accurate description of commodity; quantity; frequency of shipments; and the consequences if the application should be denied.
- (2) The statement indicating whether there is or is not any carrier service available (rail, air or motor carriers) either single line or interline between the points or area involved. If service is available, indicate to what extent it has been used; what effort has been made to utilize it; whether the carrier with the appropriate authority has refused to furnish such service; the manner and extent that existing carrier service, if any, is inadequate; and the detailed reasons why additional service is needed. If shipper support is based upon alleged failure of existing carriers to provide service, the names and addresses of such carriers must be stated.
- (3) Omitted--(relates to shippers support in prior applications by applicant.)

Since applicant is seeking permanent authority, evidence of shipper support should certainly be no less detailed or important than that required for temporary authority. Accordingly, the criteria for shipper support in a request for temporary authority are relevant in a request for permanent authority.

These provisions within Appendix H set forth the requirements necessary for an applicant to demonstrate a prima facie case and Paragraph I so advises prospective applicants. Moreover, these requirements are not unlike those enunciated in John Novak-Contract Carrier Application, 103 MCC 555 (1967) at page 558 which has been followed by the Interstate Commerce Commission for a number of years.

It is with these criteria in mind that applicant's case will be reviewed, and the motions to dismiss considered.

Applicant has complied with the following paragraphs set forth in Appendix H without further discussion Paragraphs II.A. 1, 2, 3, 4, 6, 7, 10, 12, and 15.

With respect to the remaining paragraphs in Appendix H, the following is noted. Applicant described the routes and points to be served in Exhibit 13. However, applicant has only generally described time schedules as follows: Applicant will first offer intrastate service to the same counties it is authorized to serve in its sub 3X (Denver, Arapahoe, Boulder, Weld, Larimer, Douglas, Jefferson, El Paso, Pueblo, Fremont, Clear Creek and Gilpin Counties, State of Colorado). Then it will initiate regularly scheduled service

- (1) Between Denver and Julesburg over I-76;
- (2) Between Denver and Burlington over I-70;
- (3) Between Denver and Trinidad over I-25; and
- (4) Between Denver and Grand Junction over I-70.

Schedules will be based upon operations one day per week; the day of the week depends upon customer needs, volume of freight, and the distance to be traveled. As the demands of customers increase, so will the number and length of applicant's schedules.

In Exhibit 13, applicant eliminated the request to serve Denver to Burlington via I-70 and also eliminated service to Julesburg via I-76, and only proposed to transport shipments as far as Sterling via I-76. Therefore, at best, the only schedules described that applicant would use related to Denver to Grand Junction, Denver to Trinidad and Denver to Sterling. No other schedules were proposed by applicant relative to Denver to Wellington, Canon City, Estes Park, Greeley and Nederland or to any intermediate or off-route points, or over any highways sought other than portions of I-70, I-76 and I-25. Since there were no proposed schedules relative to these latter cities and towns for intrastate shipments, obviously, there was no evidence of the frequency they would be served. Although applicant proposes to serve the counties listed in its sub 3X, the only schedules provided as to these counties in Exhibit 1 relate to interstate shipments and there is no evidence that these schedules will be established or necessary for intrastate shipments. If anything, Mr. Lee's testimony indicates applicant is not certain what schedules will be used and that they will be dependent on the volume of freight and the revenues derived. Mr. Lee indicated that he has no idea what the schedules would be and had none set up at present, but that he would require revenue of \$1.20 per mile in order to serve a particular area. He stated that applicant would serve particular areas when such operations were profitable and convenient for the applicant.

The evidence concerning schedules is far short of that required to establish scheduled service. In effect, applicant will establish schedules as public need dictates. However, if public need does not dictate scheduled service at the time of this hearing, then the granting of the authority sought would be based upon speculation as to what public need will be in the future. If applicant expects the Commission to grant authority based on future public need, then applicant must demonstrate with reasonable certainty what that need will be.

Since Mr. Lee is unable to determine what schedules will be needed, or if they will be needed for certain points at all, this Commission does not have sufficient evidence to determine what the schedules should be.

Thus, applicant has failed to meet the criteria set forth in Paragraph II.A.5. (For an excellent discussion relating to the requirements of scheduled service, see Decision R81-12).

Applicant has described the facts and circumstances upon which it believes that common carrier authority is required. Specifically, it based its request on interstate shipments of similar commodities and its belief that Colorado would be the "hub" of its sub 4 operation. Thus, by combining intrastate traffic with interstate traffic it presently moves, it believes the combination would enhance the feasibility of both operations.

The support provided by the shipper witnesses who testified on behalf of Mars provided no evidence of what volume of traffic moves to particular cities or the frequency of such traffic. The witness representing Hershey Chocolates did provide evidence of the volume of freight sent to various cities in Colorado handled by all carriers used and known by Hershey. However this witness did not know how much of this traffic would be given to Empire since it was not Hershey's intention to divert traffic from Mile-Hi Express or any other carrier operating refrigerated equipment. The witness on behalf of Whitman's Chocolates provided no evidence of the volume of traffic shipped to particular cities and no evidence of the frequency such traffic moves to such cities. Applicant's evidence therefore, fails to comply with Paragraph II.C.2.(j)(1).

Using the pertinent criteria set forth in Appendix H, it is apparent that applicant failed to present sufficient evidence to establish a prima facie case when its evidence is viewed in its most favorable light. Applicant failed to provide complete, representative time schedules to the areas it proposed to serve, and failed to demonstrate the volume of traffic and frequency of traffic to particular representative cities and town from shipper witnesses, with the exception of Hershey.

Regarding Hershey, Mr. Pettigrew did not know how much traffic would be tendered to applicant, since Hershey would continue to use other carriers including Mile-Hi Express. Therefore, the volume and frequency of traffic that would be tendered to Empire by Hershey is still unknown.

Without the volume and frequency of traffic neither applicant nor this Commission can determine if the proposed service is within the public interest. Applicant demonstrates this by its inability to provide schedules which it will not determine until tonnage and revenue justify certain schedules. This is speculative at best and insufficient for the granting of the authority sought. If the authority is granted, scheduled service must be established and adhered to whether tonnage and revenue warrant it. Obviously, applicant is hesitant to commit to schedules since they would be so speculative at present.

It has been argued that the application must fail since applicant presented three shipper witnesses to support this application. The number of witnesses who testify to public need is not controlling. Kuboske v. PUC, 187 Colo. 38, 528 P.2d 249 (1974). While the Town of Montague v. U.S. (D.C. Mass.) 306 F.Supp. 1227 (1969) questions whether the needs of one or two shipper witnesses can ever rise to the dignity of public convenience and necessity, if one or two shippers can establish the fact their needs are so substantial that the traffic tendered to a proposed carrier would represent a substantial portion of the total traffic available to transport, a certificate of public convenience and necessity might be issued even though the number of shipper witnesses was only one or two. However, Empire has failed to show that their shipper witnesses transport such a large quantity of candy that their needs do, indeed, represent a substantial portion of the public need. There was no evidence that the Mars, Hershey, and Whitman traffic represents any particular percentage of the total candy and confectionery traffic passing in Colorado intrastate commerce, let alone a substantial portion of such traffic.

Conversely, a large number of customers do not assure an applicant that the authority sought will be granted. In Morey v. PUC, *supra*, Star Motor Freight did have a large number of customers yet did not receive all the authority it sought. Therefore, to reiterate, the number of shipper witnesses is not determinative of public need. Rather, it is the quality of the competent evidence presented that governs, not the quantity.

It has finally been argued that applicant presented evidence which, at best, might justify the issuance of a contract carrier permit. Applicant continuously amended its application to tailor the service it proposed to offer to meet the needs of its three shipper witnesses, which might be more indicative of contract carrier activity. However, applicant has not sought such a permit. Moreover, without adequate schedules or without the volume or frequency of traffic to be tendered, and without a showing that the service is distinctly different or superior, the evidence would still be insufficient to support the granting of a contract carrier permit.

CONCLUSIONS

1. Pursuant to C.R.S. 1973, 40-10-104, and Rule 8, Public Utility Commission Rules of Practice and Procedure, the Commission has jurisdiction over both the subject matter and the parties in this matter.

2. Applicant's evidence, viewed in the best possible light, fails to prove that public convenience and necessity requires the proposed service. Accordingly, the Motions to Dismiss should be granted.

3. Pursuant to C.R.S. 1973, 40-6-109, it is recommended by the Examiner that the Commission enter the following order.

ORDER

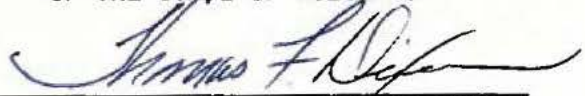
THE COMMISSION ORDERS THAT:

1. The Motions to Dismiss the application of Empire Warehouse, Inc. made by the remaining protestants are hereby granted and the application denied.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if such be the case, and is entered as of the date hereinabove set out.

3. As provided by 40-6-109, C.R.S. 1973, copies of this Recommended Decision shall be served upon the parties, who may file exceptions thereto; but if no exceptions are filed within twenty (20) days after service upon the parties or within such extended period of time as the Commission may authorize in writing (copies of any such extension to be served upon the parties), or unless such Decision is stayed within such time by the Commission upon its own motion, such Recommended Decision shall become the Decision of the Commission and subject to the provisions of 40-6-114, C.R.S. 1973.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO


Examiner