

(Decision No. R90-577)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE PETITION FOR A)
DECLARATORY ORDER FILED BY BOULDER)
AIRPORTER, INC.; COLORADO PUC)
NO. 191 CORPORATION; FRONT RANGE)
AIRPORTER, INC.; AND SOUTHEAST)
AIRPORTER, INC., TO TERMINATE)
CONTROVERSY AND REMOVE UNCERTAINTY)
AS TO THE MOTOR CARRIER OPERATIONS)
AUTHORIZED BY CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY PUC)
NO. 14641 HELD BY PEOPLES CHOICE)
TRANSPORTATION, INC.)

DOCKET NO. 89A-246CP

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ARTHUR G. STALIWE

April 25, 1990

Appearances: Mark A. Davidson, Esq., Denver, on behalf of
the Applicants;

Jack P. Wolfe, Esq., Longmont, on behalf of
Peoples Choice Transportation.

STATEMENT OF THE CASE

By petition for declaratory order filed April 25, 1989, the four corporate entities listed in the caption seek a definition by this Commission of the term "special bus" found in Certificate of Public Convenience and Necessity PUC No. 14641, owned by Peoples Choice Transportation, Inc. On May 1, 1989, the Commission sent notice to all who might desire to protest, object, or intervene in the petition.

On May 23, 1989, Four Winds, Inc., d/b/a Peoples Choice Transportation, Inc., intervened in this matter. On May 31, 1989, Zone Cab Company, Metro Taxi, Inc., and Yellow Cab Cooperative Association filed their joint intervention. Also on May 31, 1989, Mom & Pop's Limousine, Inc., d/b/a Prince Limousine, Inc., filed its intervention.

The matter came on for oral argument on August 29, 1989. At the conclusion of argument, briefs were authorized to be filed on or before September 15, 1989. Pursuant to § 40-6-109(2), C.R.S., Administrative Law Judge Staliwe now transmits to the Commission the record of this

proceeding, together with a written recommended decision containing limited findings of fact, conclusions, together with a recommended order.

FINDINGS OF FACT

Based upon all the evidence of record, the following is found as fact:

1. On his own motion the administrative law judge takes official notice of this Commission's files on Certificate of Public Convenience and Necessity PUC No. 14641. Gillespie v. Department of Revenue, 41 Colo. App. 561, 592 P.2d 418 (1979); American Trucking Association, Inc. v. Frisco Transportation Co., 358 U.S. 133, 79 S.Ct. 170, 3 L. Ed. 2d 172 (1958). The files of this Commission reveal that on January 17, 1980, Rocky Mountain Charter Coach Company filed its application for a certificate of public convenience and necessity, seeking the following authority:

For a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle, for hire, over irregular routes, for the transportation, in charter and special operations bus service, of passengers and their baggage, between all points in Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, La Plata, Larimer, Mesa, and Weld Counties, Colorado, on the one hand, and, on the other, all points in Colorado.

RESTRICTION:

Restricted against the use of four-wheel drive motor vehicles.

The authority description was modified slightly in the notice that was sent out on January 21, 1980, to provide the following:

For a certificate of public convenience and necessity to operate as a common carrier by motor vehicle for hire for the transportation of passengers and their baggage, in charter and special bus service, between all points located in the area comprised of the Counties of Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, La Plata, Larimer, Mesa, and Weld, State of Colorado, and between said points, on the one hand, and all points in Colorado, on the other hand. Restricted against the use of four-wheel drive vehicles.

2. Pursuant to Decision No. C80-2085, dated October 28, 1980, the Commission granted Rocky Mountain Charter Coach Company PUC No. 14641, as follows:

Transportation -- of

passengers and their baggage, in charter and special bus service, by motor vehicle for hire, over irregular routes,

between all points in the Counties of Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, La Plata, Larimer, Mesa, and Weld Counties, Colorado, and between said points on the one hand and all points in the State of Colorado.

RESTRICTIONS:

- (1) Against the use of four-wheel drive motor vehicles;
- (2) Against the transportation of passengers and their baggage to and from the La Plata County Airport, La Plata County, Colorado; and
- (3) Against the transportation of passengers and their baggage between Mesa County, Colorado, and the City of Aspen and Aspen Ski Areas.

In the same decision, the Commission noted that special bus service had been defined as follows:

"Special bus" transportation is that transportation, regardless of the purpose undertaken, afforded generally on weekends, holidays, or other special occasions to a number of passengers whom the carrier on its own initiative has assembled into a travel group through its own promotion and sales to individual members of the group of a ticket covering a particular trip or tour planned or arranged by the carrier.

The Commission went on to note in Decision No. C80-2085 that, "The transportation needs shown in this matter clearly demonstrate a need for 'special bus service' as well as charter service." The record failed to reveal any exceptions or appeal taken by Rocky Mountain Charter Coach Company to the limitation, or description, of the term "special bus service" as noted above. The current holder of PUC No. 14641 is a subsequent purchaser of the authority originally obtained by Rocky Mountain Charter Coach Company.

3. A review of the applicable Colorado statutes fails to reveal any mention of the term "special operations," "special bus

operations," or "special bus service." However, the Federal Motor Carrier Act of 1935 as found in repealed 49 USC § 307 provides:

... That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. ...

Emphasis supplied. Further, repealed 49 USC § 308 pertinently provides:

Transportation of Special or Chartered Parties

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

Emphasis supplied. While the term "special operations" does not exist as a term of art in intrastate regulation, it has a long history in interstate commerce.

DISCUSSION

As noted above, the first mention of "special operations" or "special parties" occurred over 50 years ago in the Motor Carrier Act of 1935.

The first case interpreting the language that this administrative law judge's limited research revealed is Red Star Sightseeing Line, Inc., 7 M.C.C. 521 (1937), wherein the Interstate Commerce Commission noted:

Passengers board and leave applicant's busses on the sidewalk at its office at Broadway and Palmetto Street, Brooklyn, hereinafter called the terminus. Tickets are sold individually in advance for reserved seats for specific round-trip tours, with no pick-up or discharge of passengers en route. Stops are made at various points of interest, with the driver acting as a guide in instances where no guides are on duty. In the past, tours were made on Tuesdays to Asbury Park, N.J., and on Thursdays to Lake Hopatcong, N.J. Other one-days tours were made to points of interest in New Jersey, New York, Connecticut, and Pennsylvania. On many of

these tours passengers were allowed a few hours for recreation at the most distant point on the outward trip. Other tours, ranging in duration from two to nine days, were conducted to points in Virginia, Washington, D.C., and Montreal, Canada. The one-day trips were substantially the same each season and were repeated from time to time, but the longer trips were varied from year to year. The longest tour was of nine days duration, covered approximately 1,400 miles, and extended to Gettysburg, Pa., Luray Caverns, Shenandoah Valley, Blue Ridge Mountains, Natural Bridge, Virginia Beach, Richmond, and Petersburg, Va., and Washington, thence returning to Brooklyn by way of Baltimore, Md., Philadelphia, Pa., and Trenton, New Brunswick, and Newark, N.J. Apparently this tour included some transportation service in West Virginia, but the right to operate therein is not sought. One such trip was made during 1935 with 13 passengers at a rate of \$85 each. The rates charged for tours lasting longer than one day included hotel accommodations, certain meals, admission, sightseeing and guide fees, and boat trips at points of interest.

* * *

We find that the present and future public convenience and necessity require the issuance of a certificate to applicant authorizing it to operate as a common carrier by motor vehicle, in special operations for the transportation in interstate or foreign commerce of passengers and their baggage on round-trip sightseeing or pleasure tours over irregular routes beginning and ending at Broadway and Palmetto Street, Brooklyn, N.Y., with no pick-up or discharge of passengers or baggage at any other point, and extending to points in New Jersey, New York, Connecticut, and Pennsylvania between April 15 and October 15, inclusive, and to points in Delaware, District of Columbia, Maryland, Massachusetts, and Virginia between June 15 and September 15, inclusive; . . .

1 M.C.C. at 522, 526.

A year later in Blue & Grey Sight Seeing Tours, Inc., 8 M.C.C. 124 (1938) the ICC distinguished between "special operations" and scheduled "regular route" operations:

Applicant also, since its incorporation, has conducted special round-trip sightseeing tours from Washington to various other historic places in Delaware, Maryland, New Jersey, Pennsylvania, and Virginia, provided 15 passengers were available. These tours have been made for special or charter parties. Numerous organizations hold annual conventions in Washington. Members of the respective organizations frequently desire to avail themselves of applicant's sightseeing facilities. In many instances, such members do not desire to undertake the formation of parties for charter service, and applicant sells individual tickets to the respective members of such groups and makes the trip, provided 15 passengers purchase tickets. These tours are similar to the regular-route tours to Annapolis, Arlington National Cemetery, Mount Vernon, and New Market. Except that they are not made with the same frequency, the minimum number of passengers required is not the same, and frequently only members of a particular organization are transported. Applicant's charges include the entrance fees to the historic places visited and the cost of the guides; and some of the tours require several days to complete. An exhibit shows that prior to June 1, 1935, applicant made 25 round-trip tours of this character to points in the States named.

* * *

We have described applicant's service in detail. It consists principally of sightseeing operations in which tickets generally are sold to individual passengers. Applicant also engages in charter operations in which parties are transported for a lump sum and are entitled to the exclusive occupancy of the vehicle or vehicles furnished. Some of its sightseeing operations for individual passengers are over regular routes and the others are over irregular ones. Section 207(a), which authorizes issuance of certificates, contains the following provision:

Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Applicant's sight-seeing operations for individual passengers over irregular routes are similar to those considered in Red Star Sightseeing Line, Inc., Com. Car. Application, 1 M.C.C. 521, which we found to be special operations within the meaning of that term as used in the provision of section 207 (a) quoted above. We reach the same conclusion as to the irregular-route sightseeing operations for individual passengers here considered. As pointed out above, this applicant's regular-route sightseeing operations, aside from the use therein of regular routes, differ from its irregular route ones for individual passengers only as to frequency of service, the minimum number of passengers required, and the fact that frequently only members of a particular organization are carrier in the irregular-route operations. These regular-route differ materially from the usual operations of the ordinary common carrier of passengers over regular routes. The latter are designed to meet the needs of persons primarily interested in getting from one place to another. Applicant's regular route operations are designed to meet the needs of sightseers and would not serve the purposes of persons desiring expeditious transportation between points. Consequently, we conclude that applicant's regular-route operations are designed to meet the needs of sightseers and would not serve the purposes of persons desiring expeditious transportation between points. Consequently, we conclude that applicant's regular-route sightseeing operations are special operations within the meaning of the provision of section 207 (a) quoted above. The act does not require that we prescribe regular routes for special operations, and there appears to be no need for doing so in h instant case. Omission of such prescription will make the operations flexible and enable their adaptation to the

varying demands for service. The certificate, which we shall grant, will, therefore, authorize the performance of all of applicant's special operations over irregular routes.

In Peninsula Transit Corp. Common Carrier Application, 1 M.C.C. 440, we found that a certificate authorizing special or charter operations, or both, granted under section 207 (a), did not carry with it the incidental right to transport special or charter parties to any place in the United States as provided in section 208 (c) of the act. Applicant is entitled to continue to conduct only the special and charter operations conducted on June 1, 1935, and continuously since, and our findings will be limited accordingly.

8 M.C.C. at 126-128.

The bellwether case in this area is Fordham Bus Corporation, 29 M.C.C. 293 (1941), wherein the ICC stated:

In the report of the examiner, applicant's operation was described as follows:

Applicant has engaged in operating passenger busses for hire since 1926, when the corporation was formed. At the time of the hearing, it owned and operated 22 busses, ranging in capacity from 20 to 37 passenger. Since prior to June 1, 1935, applicant has solicited special or charter parties at New York City for trips to points of interest in nearby States. Applicant's president testified that such transportation was performed only as the result of special arrangements with groups for a particular trip or tour, and return. The equipment was chartered by a representative of the group for the trip, who paid for the bus or busses chartered. There was no sale of individual tickets for such trips. All the charter parties transported originated in New York City and the passengers were carried back to that point. No pick-ups were made en route and only the party or group and their personal baggage were carried.
[Emphasis added.]

This statement is quoted without criticism in applicant's petition, and examination of the record indicates that it is accurate. In its original application, applicant described its operations as "chartered work only," and in its supplemental application, stated that it undertook to transport "for the general public for hire." At the hearing, witnesses for applicant testified that its busses were chartered to corporations or individuals on the basis of an agreed compensation for each trip. Busses were available to anyone who wished to use them if there was compliance with applicant's conditions with respect to compensation and operating details.

* * *

There remains for consideration applicant's second contention that both special and charter operations should have been authorized. The terms "charter" and "special" operations as applied to motor carriers of passengers under part II of the act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier. In Red Star Sight-seeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, and in Blue and Grey Sight Seeing Tours, Inc., Com. Car. Applic., 8 M.C.C. 124, the distinction between charter and special operations is clearly recognized, and in each case authority is granted to conduct exclusively special operations in round-trip

sight-seeing or pleasure tours. The same distinction has been consistently observed in numerous subsequent cases, of which the following are typical. Smoky Mountain Tours Co. Common Carrier Application, 10 M.C.C. 127, Burbridge Common Carrier Application, 14 M.C.C. 412, Huff Common Carrier Application, 27 M.C.C. 643, Condon Common Carrier Application, 21 M.C.C. 448, Nudelman Common Carrier Application, 22 M.C.C. 275, Bowen Motor Coaches Common Carrier Application, 22 M.C.C. 691, Rawding Lines, Inc., Common Carrier Application, 23 M.C.C. 447, Truman Extension -- Washington and California, 26 M.C.C. 106, Newman Common Carrier Application, 27 M.C.C. 381.

The record leaves no doubt that the parties at the hearing herein fully appreciated the distinction between "special" and "charter" operations. It is also clear with respect to the character of service actually rendered by applicant on and prior to the statutory date. As already pointed out, the application covered "chartered work only."

29 M.C.C. at 296-298.

The distinctions between "special operations" and "charter parties" was upheld in Public Service Interstate Transportation Company, 42 M.C.C. (1943), wherein the ICC held that, "There are snow and ice carnivals at Greenwood Lake during the winter, and it has been applicant's practice, when conditions are favorable for skating and ice boating, to advertise that fact 'and then run a trip.' . . . it appears that the trips were operated by applicant on its own initiative and that individual tickets were sold to each passenger. We conclude that such trips were special operations . . ." See also Michaud's Bus Line, Inc., 67 M.C.C. 711 (1956).

And, in at least one instance the ICC allowed operations of a seasonal nature to be conducted, apparently of a scheduled nature, between towns and a cannery operating during the "canning season". See George Washington Ricketts, 71 M.C.C. 761 (1957).

As noted by the ICC in its various decisions, the critical elements of "special service" have always included:

- A. Sales of individual seats to groups of travelers assembled by the carrier,
- B. For specific events, or for a limited period (i.e., canning season).

Fordham Bus Company, 29 M.C.C. at 297. Further, "special operations" do not include the ordinary transportation of passengers who are traveling simply to get from one place to another. Blue & Grey Sight Seeing Tours, Inc., 8 M.C.C. at 128. The ICC has always tied the term(s) to "... week-ends, holidays, or other special occasions . . .," (emphasis supplied) as defined.

PUC INTERPRETATIONS

In 1960 this Commission went through rulemaking in Case No. 5180 to define certain terms, to include "special bus authority." By Decision No. 57386, dated October 23, 1961, the Commission in a three-way split¹ purported to define "special bus service" two ways:

- A. In the "statement" of the decision the majority (of one) defined the term thusly:

That Special Bus Service is:

the transportation of passengers by bus wherein a special service is required, either by groups or individuals, where the use of the bus is not exclusive to any group or individual;

- B. Later, in the order portion of the decision the Commission used different, and circular, language:

RULE 3

"Special Bus Authority" means the transportation of passengers by a special bus in the nature of a special bus or taxicab service, where passengers are transported by individual tickets on such rates as are approved by this Commission.

Decision No. 57386 at pp. 7,12. The above purports to convey something unique of the vehicle itself, rather than the purpose for the trip, as the ICC held.

As noted in finding number two, above, the Commission has subsequently adopted the ICC definition of "special bus" in Decision No. C80-2085, dated October 28, 1980. More importantly, the 1980 adoption of the ICC definition was certainly specific to this authority; there can be no question as to which definition applies to PUC No. 14641.

1. Given the three separate, disparate opinions issued by the three Commissioners, there is a significant question in this administrative law judge's mind whether Decision No. 57386 is a legally complete order. The internal inconsistencies render the order unintelligible, and likely unenforceable.

However, there is one part of Decision C80-2085 that is potentially erroneous as matter of law, and that is the holding that, " . . . weekends, holidays, or other special occasions . . . are not limitations." C80-2085 at pg 5. Such is not the case; the existence of some unique or limited activity is a sine qua non of "special bus service." Without it, there is no functional distinction between "special bus service" and any other sale by-the-seat bus service, to include conventional scheduled commuting service where the passenger merely travels from one point to another on a daily basis, such as to work and return home.

Indeed, it can be argued that by the later language, ". . . the term 'special occasions' has changed with the availability of additional leisure time and special occasions. . . ." (emphasis supplied) the Commission merely stated that special bus service was not limited to Saturdays, Sundays, and legal holidays, but could be provided Mondays through Fridays if there was some special event occurring then. If so, this is consistent with the federal cases interpreting the federal law from which the term originated. This appears to be a more logical interpretation, and is certainly consistent with existing law.

ORDER

THE COMMISSION ORDERS THAT:

1. The term "special bus transportation" means that transportation rendered generally on weekends, holidays, or other special occasions to a number of passengers whom the carrier on its own initiative has assembled into a travel group through its own promotion and sale of individual tickets for a trip or tour planned by the carrier.

2. "Special bus transportation" does not mean the ordinary scheduled transportation of passengers primarily interested in getting from one place to another.

3. "Special bus transportation" does not include the call-and-demand transportation of passengers, either individually (e.g., taxi service) or in groups (e.g., charter service). By definition, the promotion and sale of a trip planned by the carrier contemplates scheduled service of some kind, albeit not continuous service with no fixed termination date.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- a. IF NO EXCEPTIONS ARE FILED WITHIN 20 DAYS AFTER SERVICE OR WITHIN ANY EXTENDED PERIOD OF TIME AUTHORIZED, OR UNLESS THE DECISION

IS STAYED BY THE COMMISSION UPON ITS OWN MOTION, THE RECOMMENDED DECISION SHALL BECOME THE DECISION OF THE COMMISSION AND SUBJECT TO THE PROVISIONS OF § 40-6-114, C.R.S.

- b. IF A PARTY SEEKS TO AMEND, MODIFY, ANNUL, OR REVERSE BASIC FINDINGS OF FACT IN ITS EXCEPTIONS, THAT PARTY MUST REQUEST AND PAY FOR A TRANSCRIPT TO BE FILED, OR THE PARTIES MAY STIPULATE TO PORTIONS OF THE TRANSCRIPT ACCORDING TO THE PROCEDURE STATED IN § 40-6-113, C.R.S. IF NO TRANSCRIPT OR STIPULATION IS FILED, THE COMMISSION IS BOUND BY THE FACTS SET OUT BY THE ADMINISTRATIVE LAW JUDGE AND THE PARTIES CANNOT CHALLENGE THESE FACTS. THIS WILL LIMIT WHAT THE COMMISSION CAN REVIEW IF EXCEPTIONS ARE FILED.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO


Administrative Law Judge

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