

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EVERGREEN TRAILS, INC., a)	DOCKET No. TC-900407
Washington corporation,)	
dba Grayline of Seattle,)	
)	
Complainant,)	BRIEF OF COMMISSION
)	COUNSEL
v.)	
)	
SAN JUAN AIRLINES, INC., a)	
Washington corporation,)	
dba Shuttle Express,)	
)	
Respondent.)	
.)	

I. INTRODUCTION

This matter involves a complaint by Evergreen Trails, Inc., d/b/a Grayline of Seattle (Grayline) against San Juan Airlines, Inc., d/b/a Shuttle Express (Shuttle Express). Both of these parties operate auto transportation companies pursuant to Chapter 81.68 RCW.

Grayline alleges that Shuttle Express has violated the "on-call" restriction contained within Shuttle Express' Certificate of Public Convenience and Necessity No. C-975, thereby, resulting in a substantial diversion of Grayline's traffic and revenues over a period of time when overall traffic to and from Seattle-Tacoma International Airport (Sea-Tac) has been increasing. It is alleged that this diversion of traffic has caused and is causing substantial and irreparable harm to Grayline's airporter

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service which, if not alleviated, will cause Grayline to terminate its airporter services. Even if Shuttle Express has not violated the on-call restriction, Grayline submits that that restriction has not been effective in protecting Grayline's airporter services to the extent originally contemplated by the Commission.¹ Under either theory, Grayline requests that the Commission restrict Shuttle Express from providing airporter service between Sea-Tac and the twelve hotels in Seattle currently served by Grayline.

The staff of the Commission did not take a position concerning Grayline's complaint. However, because the outcome of this proceeding may rest upon the Commission's interpretation of "on-call" service, Commission counsel will brief that issue. As will be discussed in greater detail below, we believe that the on-call restriction is not satisfied when a passenger of Shuttle Express utilizes a telephone after he or she has already hailed or walked up to a Shuttle Express van, or been approached by a driver of Shuttle Express who offers ground transportation. Use of telephones placed at curbside at the airport do not, therefore, satisfy the "on-call" restriction. Transportation of passengers utilizing such curbside telephones violates the terms of Shuttle Express' authority and Shuttle Express should be ordered to cease and desist from such activity. Further, if the

¹ See, Order M.V.C. No. 1834, issued August 30, 1989.

evidence demonstrates that Shuttle Express has willfully violated or refused to observe its certificate, the Commission has the authority to revoke, alter, or amend such authority pursuant to RCW 81.68.030 as it deems appropriate.

Should the Commission find that Shuttle Express has not violated its authority, the Commission may still find that the on-call restriction has proven ineffective in protecting Grayline's airporter services to the extent originally intended by the Commission, or that the on-call restriction is not practically enforceable. An appropriate manner by which to remedy such circumstances may, therefore, be to restrict Shuttle Express from providing service to the twelve hotels in downtown Seattle currently served by Grayline. Such restriction would be made pursuant to RCW 81.04.210 which allows the Commission to alter or amend any order which it has previously issued.

II. DEFINITION OF "ON-CALL"

Shuttle Express' existing authority is contained in Exhibit 3 and was granted in Application D-2566.² The Commission's Order M.V.C. No. 1809 in that proceeding, clearly indicates that the "on-call" restriction allows Shuttle Express to transport only those passengers who have made a telephone reservation for

² The Commission's Order M.V.C. No. 1809 granting Application No. D-2566 was issued on April 21, 1989. However, Certificate No. C-975 was not issued until August 30, 1989 and was not served on Shuttle Express until November 22, 1989. Shuttle Express, therefore, did not have authority to provide its airporter service until such authority was actually received.

service prior to boarding a Shuttle Express van. First, in discussing the nature of the proposed services, the Commission noted that "a person traveling through the airport called Shuttle Express at least 24 hours before the approximate time of need" and that "in the past, and currently, persons wanting Shuttle Express service from an airport were required to telephone Shuttle Express from the airport." (See, Order M.V.C. No. 1809, p. 3)

After discussing the evidence received from public witnesses in Application No. D-2566, the Commission concluded that "the applicant had demonstrated that large areas of the unserved market can be served by nonscheduled, reservation only, van service." (See, Order M.V.C. No. 1809, pp. 17-18) Consistent with that demonstration of need, the Commission restricted Shuttle Express' existing certificate to on-call, door-to-door service within the specified territory. The Commission believed that the on-call restriction would ensure that the services offered by Shuttle Express would continue to conform to the market need as demonstrated in that proceeding. (See, Order M.V.C. No. 1809, p. 22)

Had Shuttle Express misunderstood the on-call restriction in its existing certificate, no such misunderstanding could have existed after November 15, 1989. On that date, the Commission mailed a letter (Exhibit 1) to Shuttle Express which concerned

the definition of "on-call."³ The Commission's November 15, 1989 letter states as follows:

One of the conditions which the Commission established was that Shuttle Express could provide only "on-call" service within the designated geographic territory. The Commission Order M.V.C. No. 1809 in that docket clearly indicated that the on-call restriction allowed Shuttle Express to transport, on an unscheduled basis, only those passengers who have made a telephone request for service prior to boarding a Shuttle Express motor vehicle. Thus, "walk-up," "hail-the-van," or "opportunity fare" service was not included in the authority granted to Shuttle Express. The Commission believed that the on-call restriction accurately characterized the record as to public need, the existing carrier's failure to serve, and the operations maintained and proposed by Shuttle Express. The on-call restriction was also a significant factor in the Commission's denial of a Petition for Reconsideration submitted by Evergreen Trails, Inc., dba Grayline of Seattle in Docket No. D-2566. Grayline's petition was based, in part, on its concern that Shuttle Express was "skimming" Grayline's passengers from downtown Seattle hotels. The Commission believed that the on-call restriction contained in your authority would provide some protection to Grayline against such activity by Shuttle Express (Order M.V.C. No. 1834).

Shuttle Express, responded to the Commission's November 15, 1989 letter, disputing the Commission's explanation of the on-

³ This letter has been characterized both as the Commission's "interpretation" of the on-call restriction or an "additional limitation" to the authority already granted to Shuttle Express in Certificate No. C-975. (Exhibit 1, letter of December 11, 1989) Both of these characterizations are incorrect. The Commission's letter was motivated due to information received by the Commission that Shuttle Express intended to violate the on-call restriction already contained in its existing authority. The Commission's letter, therefore, merely explained the nature and extent of authority previously granted by Commission order and advised Shuttle Express that its intended operations would not fall within the scope of that authority granted in Docket No. D-2566.

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call restriction and stating its opinion that on-call service includes all unscheduled transportation whether or not passengers have made a telephone request for service prior to boarding the Shuttle Express van. (Exhibit 1, letter of November 21, 1989) It should be noted, however, that the only argument presented by Shuttle Express concerns statements by its own operating witness in Application No. D-2566 that a proposed agreement with the Port of Seattle would allow Shuttle Express to transport passengers who have not made a prior telephone call request for service.⁴ Such statements by Shuttle Express' operating witness are irrelevant as to the nature and extent of on-call transportation contained within Certificate No. C-975. First, the agreement discussed by Shuttle Express' operating witness was merely a proposed and not yet effective contract. Second, the terms of the agreement would be irrelevant even if the agreement was effective. The Port of Seattle and this Commission are separate entities which have independent authority to regulate the

⁴ At page 3 of the Commission's Order M.V.C. No. 1809, the Commission stated that "if the current operation agreement between Shuttle Express and the Port of Seattle is superceded by the currently proposed agreement, passengers will be able to hail the vans without telephone calls." The Commission's Order, therefore, recognized the distinction between the company's then existing agreement with the Port of Seattle which did not allow walk-up service and a proposed, not yet effective agreement which would allow walk-up service. Indeed, Shuttle Express agreed that all references to transportation of passengers who have not made a prior telephone request for service concern an agreement with the Port of Seattle that was not effective when Mr. Sherrill testified in Application No. D-2566. (Tr. 170-171)

services maintained by Shuttle Express. Port of Seattle v. WUTC, 92 Wn.2d 789, 597 Pacific 2d. 383 (1979). While the Port of Seattle may have a policy to conform its concession agreements to the operating authorities of its concessionaires (Tr. 301-302), the Port may nevertheless negotiate whatever agreement it desires with its concessionaires without impacting the meaning and nature of authority granted by this Commission. Third, and most importantly, the nature and extent of authority granted to any applicant is not determined by statements of intent by an operating witness. The nature and extent of authority granted by this Commission is determined primarily by an applicant's demonstration of public need and other carrier's failure to serve. In Application D-2566, the Commission found that the only evidence of public need was for a nonscheduled, reservation-only van service. Indeed, a review of the Commission's Order M.V.C. No. 1809 reveals that none of the public witnesses who supported the prior application described the need for a nonreservation, or "walk-up" service.⁵ The on-call restriction, therefore, ensured that the services offered by Shuttle Express would conform to the market need as demonstrated in that proceeding.

We also note that the Commission specifically rejected Shuttle Express' contention that on-call service includes

⁵ In the instant proceeding, Mr. Sherrill confirmed that no public testimony was offered in Application No. D-2566 expressing a need for walk-up or hail-the-van service. (Tr. 41)

transportation which is not preceded by a telephone call. On December 8, 1989, the Commission advised Shuttle Express that the Commission had not changed the position stated in its letter of November 15, 1989 and that any operations performed by Shuttle Express contrary to the terms of its certificate as explained in that letter would be performed at the peril of Shuttle Express. (Ex. 1)

In summary, the Commission has clearly defined "on-call" service as service which requires passengers to make a telephone request for service prior to boarding a Shuttle Express van. Walk-up, hail-the-van, or on-demand service, therefore, are not included within the term "on-call."

However, this case presents a new wrinkle to the on-call issue. Shuttle Express has installed telephones outside of the baggage claim area and directly at the curbside at Sea-Tac. These are direct dial phones to Shuttle Express' dispatch office and may be utilized by prospective passengers immediately prior to boarding a van. Such passengers typically have no prior reservation and, indeed, may actually "walk up" or "hail a van" before being instructed to use the curbside phone. (Tr. 84-85) Shuttle Express drivers may actually pick up the curbside phone, make a "reservation" for a prospective passenger, and then pass the telephone to that passenger merely for confirmation of the reservation. (Exhibit 2; Tr. 74, 97, 158) For the reasons set forth below, we believe that the on-call restriction in Shuttle

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Express' authority is not satisfied through the use of the direct dial, curbside phones at Sea-Tac.⁶

First, the scope of the on-call restriction must be determined within the context of the application in which Shuttle Express' authority was originally granted. Mr. Sherrill admitted that the service which Shuttle Express originally proposed was specifically designed to be prearranged ground transportation by advance reservation. (Tr. 30-31, 33) Mr. Sherrill admitted that Shuttle Express requested 24-hour advance reservations (Tr. 36) and that dispatch routing occurred at least one day prior to travel. (Tr. 27-28) Mr. Sherrill also admitted that, at the time he testified in support of Shuttle Express' original authority, he had no intention of changing the manner or method of operation. (Tr. 32) Furthermore, the Commission's order granting Application No. D-2566, as previously mentioned, noted that a person traveling through the airport called Shuttle Express at least 24 hours before the approximate time of need. (Order M.V.C. No. 1809, p. 3)

The evidence of record, therefore, demonstrates that on-call service as proposed by Shuttle Express and granted by the Commission requires a Shuttle Express passenger to make an advance reservation by telephone before the passenger first makes

⁶ We reach the same conclusion, for the same reasons, when passengers utilize radio phones in a Shuttle Express van to make their "reservation" for service. (Tr. 88)

contact with a Shuttle Express driver. Hailing a van, or walking up to a driver who offers his or her service, and then making a telephone call at curbside immediately prior to boarding a van does not satisfy the on-call restriction of Shuttle Express' certificate.

Second, to conclude that the use of a direct dial, curbside telephone constitutes on-call service would make a mockery of the on-call restriction. The evidence demonstrates that passengers who utilize the curbside telephones do so only after they have already engaged a Shuttle Express driver either by hailing a van or by approaching a driver who is standing on the curb. (Exhibits 6 through 12; Tr. 185-191) Some of these passengers do not even make the telephone call themselves. Instead, the driver actually makes the call, makes a "reservation" for the passenger, then hands the telephone to the passenger only to confirm those arrangements. (Ex. 2) The telephone call may be made seconds before the passenger boards a Shuttle Express van. The commitment to transport that passenger, however, is made when the driver and passenger first make contact. The telephone call is a mere formality. To conclude otherwise would eliminate the distinction between on-call service, and walk-up or hail-the-van service. Such a result was clearly not intended by the Commission.

For the reasons set forth above, we believe that the use of a telephone, whether at curbside or on board a van, does not

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satisfy the on-call restriction of Shuttle Express' Certificate C-975. While on-call service requires a telephone call, that call must be made before a passenger first walks up to or hails a Shuttle Express van and driver.

Respectfully submitted,

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Attorney General

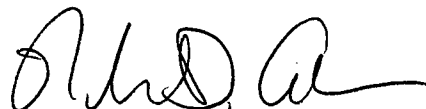


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each known party of record in this proceeding by mailing a copy thereof properly addressed to each such party by first class mail, postage prepaid.



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