SERVICE DATE
NOV - 8 1990

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EVERGREEN TRAILS, INC., a Washington corporation, d/b/a Grayline of Seattle, Complainant, SAN JUAN AIRLINES, INC., a Washington corporation, d/b/a Shuttle Express, Respondent.	ORDER M. V. C. NO. 1893 DOCKET NO. TC-900407 COMMISSION ORDER FINDING FOR COMPLAINANT AND AMENDING RESPONDENT'S AUTHORITY

PROCEEDINGS: On April 25, 1990, Evergreen Trails, Inc., d/b/a Grayline of Seattle ("Grayline" or "complainant"), filed a complaint against San Juan Airlines, Inc., d/b/a Shuttle Express ("Shuttle Express" or "respondent"), alleging that Shuttle Express is operating beyond the scope of its authority, and that Grayline is suffering substantial and irreparable harm as a result.

HEARINGS: Hearings were held before Chairman Sharon L. Nelson, Commissioner Richard D. Casad, Commissioner A. J. Pardini, and Administrative Law Judge Steven E. Lundstrom of the Office of Administrative Hearings at Olympia, Washington, on June 27 and 28, 1990.

APPEARANCES: Grayline was represented by Clyde H. MacIver, attorney, Seattle. Shuttle Express was represented by Bruce A. Wolf, attorney, Seattle. Intervenor Everett Airporter Service Enterprises (EASE) was represented by Diane Coombs, president, Everett. Intervenor Suburban Airporter, Inc., (SAI) was represented by Richard Reininger, president, Bellevue. The staff of the Washington Utilities and Transportation Commission was represented by Robert D. Cedarbaum, assistant attorney general, Olympia.

SUMMARY: The record evidence supports a finding by the Commission that the respondent has willfully and repeatedly violated and refused to observe Commission orders establishing and limiting its authority. The respondent's authority should therefore be amended to prohibit service between Seattle-Tacoma International Airport (Sea-Tac) and the Seattle hotels served by the complainant.

MEMORANDUM

I. Background and Complaint

Grayline is an auto transportation company which provides passenger transportation service between Sea-Tac and 12 downtown Seattle hotels pursuant to Certificate No. C-819. Grayline provides scheduled service between most of these hotels and the airport, while some are served on an "on-call", half-hour notice basis. Service is provided with 47 passenger busses. Under its operating agreement with the Port of Seattle, Grayline must provide service from the airport at least every half hour for at least eighteen hours each day. It provides service as often as each fifteen minutes to some downtown hotels, depending upon the season and anticipated traffic volumes, and offers departures as often as each twenty minutes from the airport to other hotels.

Shuttle Express also is an auto transportation company, providing service pursuant to Certificate No. C-975. The certificate authorizes nonscheduled, "on-call" passenger and express airporter service between Sea-Tac airport and points in King and Snohomish counties. Provision of service is expressly limited to use of seven passenger vans. Under its operating agreement with the Port of Seattle, Shuttle Express may send a van, from a holding area at the airport to any one of three designated loading locations adjacent to the passenger baggage pickup area, when a customer who has made a prior reservation is awaiting service. For service to the airport, Shuttle Express is authorized to respond to prior reservations for service made by the travelling public.

In its complaint, Grayline alleged in part that Shuttle Express has failed to observe the restriction in its authority which allows it to provide service on an "on-call" only basis. According to the complaint, these violations occur with such regularity and with such adverse effect on Grayline's passenger count that, unless the respondent's authority to serve some downtown Seattle locations is curtailed, Grayline's airport service will have to be terminated as uneconomical.

Grayline asserted that Shuttle Express drivers regularly solicit passengers in the airporter boarding areas at Sea-Tac. Solicitation efforts, according to Grayline, range from driving vans slowly around the driveway in the pickup area with lights "flashing" to actual solicitation of potential passengers by Shuttle Express drivers. Grayline further alleged that the respondent's main pretence to compliance with the "on-call" restriction has been to install direct dial phones to Shuttle Express dispatchers near its loading areas at the airport. In practice, according to Grayline, these telephones represent a

technique to circumvent the "on-call" restriction because customers who have already been solicited by drivers are asked to make a merely pro forma reservation over the phone.

Shuttle Express denied that it has violated the restrictions in its authority. It maintained that "on-call" service, in the intent of the Commission and in common understanding, allows Shuttle Express to carry a passenger after any request for service, whether the customer "hails the van" at a pickup location, or calls Shuttle Express on the telephone. The respondent asserted, nonetheless, that it accepts the Commission's directive that passengers may be carried only after they have made a telephone request for service, and that no passengers are accepted without such a request. In any event, according to Shuttle Express, no decline in the complainant's business fortunes can be attributed to Shuttle Express operations.

Commission staff took no position on the merits of the complaint. Commission staff did maintain that the use of a direct dial phone, curbside at the airport or in the van itself, by a passenger to formalize a reservation after that passenger had already "hailed" a Shuttle Express van or been personally solicited by a driver, does not satisfy the "on-call" service restriction.

Mr. Richard Reininger, testifying on behalf of intervenor SAI, alleged that it has experienced a declining passenger count since Shuttle Express installed the direct dial phones at the pickup points. Mrs. Diane Coombs, testifying on behalf of intervenor EASE, alleged that Shuttle Express solicits passengers at Sea-Tac, and "skims" passengers at hotels by arriving before EASE and picking up passengers with EASE reservations.

COMMISSION DISCUSSION

As the respondent points out in its brief, its authority to provide airport transportation service "on-call" is unique in the state of Washington. The order granting that authority shows that it was based upon a demonstrated need for "non-scheduled, reservation only van service." (Emphasis added.) Order M. V. C. NO. 1809, pp. 17-18. Order M. V. C. NO. 1834, affirming Order M. V. C. NO. 1809, stated that the "on-call" restriction would protect Grayline from the practice of "skimming" by Shuttle Express, or "pulling up to any of the hotels served by Grayline ahead of Grayline's scheduled stop and picking up passengers who would otherwise have been served by Grayline." Order M. V. C. NO. 1834, p. 3. A November 15, 1989, letter from Secretary Curl to the president of Shuttle Express clearly stated the Commission's conviction that "walk up", "hail

the van", or "opportunity fare" service was not included in the authority granted to Shuttle Express.

It is not necessary to further refine the definition of the "on-call" restriction in the Shuttle Express authority. The Commission orders granting the respondent's authority and the Commission letters of November 15 and December 8, 1989, are clear and unambiguous on this point. A discussion of the development of the "on-call" restriction in Orders M. V. C. NO. 1809 and 1834 should resolve all lingering confusion over the meaning of this restriction. It should also surcease further strained interpretations of respondent's authority in an attempt to expand that authority beyond that granted by the Commission.

Pursuant to RCW 81.68.040, the Commission can grant an applicant authority within territories already served "only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission[.]" In determining whether the territory applied for by Shuttle Express was "territory already served," the Commission considered "the extent of the authority of the intervenors . . . whether or not they are serving to the extent of that authority . . . [and] whether the type of service provided reasonably serves the market." Order M. V. C. NO. 1809, p. 17.

The Commission found that "[w]ithin the limits of the services they have provided in the past, the intervenors [including Grayline] have provided adequate service. They have served scheduled stops in their territories promptly and efficiently." Order M. V. C. NO. 1809, p. 15. The Commission found, however, that given the specific nature of the service provided, "[t]he intervenors have left a substantial portion of the airport transportation market unserved. The applicant has demonstrated that large areas of the unserved market can be served by nonscheduled, reservation-only van service." Order M. V. C. NO. 1809, pp. 17-18. The Commission there clearly identified the portion of the relevant market not currently served and which therefore could be included in a grant of authority to Shuttle Express.

This new authority was granted on the condition that the respondent "may offer only on-call, door to door type service between airports served and any points within the territory served[.] This is consistent with applicant's demonstration of need and other carrier's failure to serve." Order M. V. C. NO. 1809, pp. 21-22. The purpose of this condition was to "help ensure that the services offered by the applicant will continue to conform to the market need as demonstrated in this proceeding. No showing has been made that additional services similar to that provided by the intervenors is required by the public convenience

and necessity." Order M. V. C. NO. 1809, p.22.

Based on an analysis of the markets which were served and the markets which were not served, Shuttle Express was granted carefully delineated authority. This authority does not include service which would substantially duplicate that offered by Grayline. Grayline's service was found unsatisfactory only with respect to its nonservice to some hotels within its authority, not with regard to any aspect of its service to walk-on, nonreservation passengers travelling to and from Sea-Tac and Seattle hotels.

The Commission once again underscored the distinction between the services provided by Grayline and Shuttle Express, in its Order Granting Reconsideration, M. V. C. NO. 1834, stating that "[t]he Commission recognizes that Grayline is particularly vulnerable to an airporter such as Shuttle Express, which could and, according to credible testimony, has skimmed Grayline's traffic by pulling up to any of the hotels served by Grayline ahead of Grayline's scheduled stop and picking up passengers who would otherwise have been served by Grayline. However, the authority granted in the final order limits Shuttle Express to on-call service only; this limitation should offer some protection to Grayline from the complained of practice." Order M.V.C. NO. 1834, p. 3.

The order discussed only "skimming" at hotels, but the limitation does not operate only at the hotel locations. It protects Grayline's scheduled service from that practice whether it occurs at the hotel or at the airport. Service conditions are basically the same at either location.

Despite the explicit definition of the service Shuttle Express was authorized to provide, it became necessary to remind the company, via a Commission letter of November 15, 1989, that it could 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."

Despite these many and repeated admonitions, Shuttle Express has engaged in a pattern of conduct which ignores the restriction placed upon its operating authority. On February 9, 1990, a Ms. Payne travelled from Sea-Tac to the Mayflower Park Hotel in downtown Seattle without a telephone reservation.

On a later date, during a Commission investigation, Motor Carrier Law Enforcement Investigator Gary W. Moss travelled from Sea-Tac to the Westin Hotel in downtown Seattle, and later from the Westin to Sea-Tac, on Shuttle Express without a

telephone reservation.

Dale Lonheim, an employee of an affiliate of Grayline, rode a Shuttle Express van from the Westin Hotel to Sea-Tac and from the Stouffer Madison Hotel to Sea-Tac without a prior reservation and without any telephone contact with Shuttle Express offices.

On February 13, 1990, two passengers who "flagged down" separate Shuttle Express vans were transported from Sea-Tac to the Westin Hotel. The Commission found each of these incidents to be violations of law, and imposed a penalty of $300 upon Shuttle Express for operating beyond the scope of its certificate of public convenience and necessity.

Port of Seattle records show that Shuttle Express was cited by airport authorities for sixty-nine separate violations of its operating agreement with the Port during 1989 and 1990. These violations were all associated with van operations at Sea-Tac, and included ten incidents of soliciting passengers and one incident, on March 10, 1990, of accepting a "hail the van" passenger. Although ten of the violations were later rescinded, Shuttle Express has made an unenviable record of compliance with its operating authority.

These incidents represent the continuation of an ongoing pattern of conduct by Shuttle Express which greatly concerned the Commission when it granted the authority here at issue in Order M. V. C. NO. 1809. The Commission noted numerous violations by Shuttle Express of its Port of Seattle operating agreement. The Commission also noted the failure of Shuttle Express to comply with vehicle registration requirements. Nonetheless, the Commission found credible the assurances that Shuttle Express was at least capable of compliance with law, while observing that it seemed to be improving its rate of compliance with the Port operating agreement. This improvement has not continued.

Mr. Sherrell, president of Shuttle Express, testified forcefully that Shuttle Express does not transport passengers without prior telephone reservations. He pointed to driver instruction and policy manual materials prohibiting the practice. Yet, the evidence overwhelmingly supports a conclusion that Shuttle Express does in fact transport passengers without prior telephone reservations.

The evidence does not show that drivers are specifically instructed to carry passengers without telephone reservations despite policy publications to the contrary. The evidence does not show that Shuttle Express management either knows of or approves of the practice. But drivers are paid on a

commission basis that strongly encourages them to capture passengers by use of any means. The record does not provide a basis for a finding that Shuttle Express management instructs it employees to ignore the restrictions on its operating authority. But considering the many warnings from this Commission and the longstanding pattern of transportation related port agreement violations, the ongoing and blatant violations of the "on-call" restriction are at least the result of management negligence amounting to wilfulness. It is appropriate to conclude that Shuttle Express wilfully violates and refuses to observe Commission orders establishing and interpreting the scope of its operating authority.

When authority was granted to Shuttle Express to serve downtown Seattle, it was apparent that the scheduled service provided by Grayline to limited, high passenger count locations made it particularly vulnerable to competition from a non-scheduled van service. The "on-call" limitation was expected to provide some protection. But that protection depends on effective compliance by Shuttle Express with its authority restrictions. Shuttle Express has not effectively complied. Consequently, the "on-call service" protective mechanism has not worked. The result is that a needed high volume airport transportation provider is in danger of financial failure.

Shuttle Express has been repeatedly cautioned that this Commission would expect strict compliance with law and the restrictions on its authority. The evidence in this proceeding shows that these admonitions have been ineffective. In order to ensure that the public receives satisfactory service in all segments of the airport transportation market, no alternative remains but to further limit the authority of Shuttle Express. Authority to serve between Sea-Tac and the downtown Seattle hotels served by Grayline will be deleted from the Shuttle Express certificate.

The violations of operating authority specifically proven in this proceeding relate only to the service provided by Grayline. While these are the type of violations which are considered in determining the fitness of Shuttle Express to hold authority, they do not show that Shuttle Express is unfit to hold its remaining authority or that it has committed violations which adversely affect other services sufficient to require further limitations.

Of great concern to this Commission is the ongoing propensity of Shuttle Express to act in accordance with its own definition of regulatory requirements regardless of the clear directives of this Commission and the requirements of laws and regulations. Tortured definitions of "on-call" service which are inconsistent with Commission orders are but an example of this

activity. The evidence overwhelmingly indicates an unwillingness or inability of Shuttle Express to comply with even this limited level of restriction on its operating authority. This is not the type of "candid and forthcoming" dealing with this Commission that was contemplated in Order M. V. C. NO. 1809, and it will not be tolerated in the future.

Having discussed the evidence in detail, the Commission enters the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On April 25, 1990, Evergreen Trails, Inc., d/b/a Grayline of Seattle, filed a complaint against San Juan Airlines, Inc., d/b/a Shuttle Express. Evergreen Trails holds Certificate No. C-819 authorizing "transportation of airline passengers and flight crews between Sea-Tac and hotels and airlines offices in Seattle."

2. Shuttle Express holds Certificate No. C-975 authorizing passenger and express airporter service between Sea-Tac and points within the Seattle commercial zone, including Seattle.

3. Shuttle Express's authority is limited to "on-call" service. The Commission has defined this service as requiring a prior reservation by telephone. The limitation was clearly expressed in the order granting authority and was reiterated in correspondence from the Commission to the respondent.

4. Shuttle Express has continued to violate its operating agreement with the Port of Seattle regarding service to Sea-Tac, having been cited for sixty-nine separate incidents during 1989 and 1990. These violations include solicitation of passengers and other activities alleged in this complaint.

5. Shuttle Express's driver compensation plan provides a commission to drivers based upon the number of passengers served. The plan encourages drivers to accept passengers who have not made prior reservations.

6. A number of specific incidents of transportation in violation of the carrier's permit was proven on the record. These include transportation of two separate passengers on February 13, 1990; transportation of Commission enforcement agent Gary W. Moss twice without a telephone reservation; and, transportation of Dale Lonheim twice on June 11, 1990. There is no evidence on this record of any person being refused transportation outside the authority contained in the

respondent's permit.

7. Respondent's management generally knew that illegal transportation was being performed and knew or should have known about each specific instance of a violation by its drivers/agents, both because of its responsibilities regarding its operations and because the revenues and passenger counts exceeded "on-call" reservations. Management failed to take effective steps to end the illegal operations. Management's unwillingness or inability to cease illegal operations constitutes a continuing violation of the respondent's authority.

8. The Shuttle Express practice of soliciting and accepting passengers without prior telephone reservations is a direct violation of its present authority and poses a direct economic threat to the survival of the scheduled, high volume, low cost service provided by Grayline. Limitation of Shuttle Express's authority to "on-call" service and repeated admonitions to respondent to comply have not removed that threat.

9. The hotels within the City of Seattle presently served by Grayline are the Stouffer Madison Hotel, Crowne Plaza Hotel, Four Seasons Olympic Hotel, Seattle Hilton Hotel, Seattle Sheraton Hotel, Westin Hotel, Warwick Hotel, Loyal Inn, Quality Inn, Day's Inn, Downtown TraveLodge, and Best Western Executive Inn.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject of and the parties to this proceeding.

2. The respondent has willfully and repeatedly violated and refused to observe Commission orders establishing and limiting its operating authority.

3. The respondent's Certificate No. C-975 should be amended pursuant to RCW 81.68.030 expressly to prohibit service between Sea-Tac and the hotels presently served by the complainant, viz., the Stouffer Madison Hotel, Crowne Plaza Hotel, Four Seasons Olympic Hotel, Seattle Hilton Hotel, Seattle Sheraton Hotel, Westin Hotel, Warwick Hotel, Loyal Inn, Quality Inn, Day's Inn, Downtown TraveLodge, and Best Western Executive Inn.

O R D E R

IT IS HEREBY ORDERED That, Certificate No. C-975, issued to San Juan Airlines, Inc., d/b/a Shuttle Express, is amended expressly to prohibit service between Seattle-Tacoma

International Airport and the Seattle hotels presently served by Evergreen Trails, Inc., d/b/a Grayline of Seattle, and that Certificate No. C-975 be revised and reissued as set out in Appendix A, attached hereto and by this reference made a part hereof.

DATED at Olympia, Washington, and effective this 6th day of November, 1990.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD D. CASAD, Commissioner

A. J. PARDINI, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

APPENDIX A

PASSENGER AND EXPRESS AIRPORTER SERVICE.

Between: The Seattle-Tacoma International Airport, Boeing Field, Renton Airport, and Paine Field and points within the Seattle Commercial Zone in King and Snohomish Counties and excluding points in Kitsap and Pierce Counties, described as follows:

(a) the municipality of Seattle; excluding service to or from the following hotel and/or motels

> The Stouffer Madison Hotel, Crown Plaza, Four Seasons Olympic, Seattle Hilton, Seattle Sheraton, Westin, Warwick, Loyal Inn, Quality Inn, Days Inn, Downtown TraveLodge and Best Western Executive Inn.

(b) all points within a line drawn fifteen miles beyond the municipal line of Seattle;

(c) those points in King County which are not within the area described in (b) of this subsection and which are west of a line beginning at the intersection of the line described in (b) of this subsection and Washington Highway 18, thence northerly along Washington Highway 18 to junction of Interstate Highway 90, thence westerly along Interstate Highway 90 to junction of Washington Highway 203, thence northerly along Washington Highway 203 to the King County line; and those points in Snohomish County, which are not within the area described in (b) of this subsection and which are west of Washington Highway 9.

(d) All of any municipality any part of which is within the limits of the combined areas defined in (b) and (c) of this subsection; and

(e) all of any municipality wholly surrounded, or so surrounded except for a water boundary, by the municipality of Seattle or by any other municipality included under the terms of (d) of this subsection. Between: The Seattle-Tacoma International Airport, Boeing Field, Renton Airport and Paine Field and points within a 25 mile radius of these airports, excluding points in Kitsap and Pierce Counties.

RESTRICTIONS:

1) This authority may not be transferred for three years from the date of issue.

2) The carrier may offer only on-call, door to door type service between airports served and any points within the territory served including residences, hotels and businesses.

3) Service may be provided in vehicles no larger than a seven passenger van.

Separate Opinion

Chairman Sharon L. Nelson (concurring in part and dissenting in part) -- The majority is undoubtedly correct in its interpretation of the statutory scheme, prior precedents, and Commission practice and traditions. RCW 81.68.040 requires any new entrant into the auto transportation market to prove that the public convenience and necessity so requires. In our long legal history regulating transportation companies, such an entry requirement typically means that incumbents are entitled to remain comfortable in their grant of a quasi-monopoly franchise unless the new entrant can prove that the incumbent already serving the territory is not performing to the "satisfaction of the Commission. . . ."

The tortuous history of this new entrant, Shuttle Express, in regulatory proceedings before this Commission and the Interstate Commerce Commission, is not one to inspire confidence in the applicant's willingness to play the regulatory game according to Commission rules. Entrepreneurs are often not so inclined. However, setting aside one's opinions of the applicant's veracity and trustworthiness, it is quite clear the applicant is providing a service that the travelling public has found convenient, and if not necessary, attractive. The record establishes that transportation consumers at Sea-Tac Airport now have at least five options to reach their ultimate destination: their own vehicles, rental cars, taxicabs, airporters, and Shuttle Express. Each option varies in terms of convenience, waiting time, and price. Thus, I question whether the policy of the law which requires the majority to take the decision that it does, namely to restrict where one competitor may serve, is an appropriate outcome.

It appears to me that the complaint statute, RCW 81.04.110, affords the Commission an opportunity to exercise substantially more discretion than the typical "public convenience and necessity" entry standard usually allows. This statute seems to suggest that in a complaint proceeding involving two or more public service corporations engaging in competition, the Commission can arbitrate the dispute and set uniform rate charges, rules, regulations or practices which would tend to "encourage competition. . . ." Thus, it appears that this Commission order may have the effect of discouraging competition to the detriment of consumers and contrary to the statutory intent.

It is, of course, Grayline's theory of the case that Shuttle Express is the entity which is discouraging competition by attempting to drive Grayline out of the market. However, each of the three Commissioners at various points in the proceedings asked what a more appropriate competitive response on the part of the complaining incumbent might be with respect to the new entrant. It appears to me that the consumer, armed with truthful advertising and appropriate

disclosures, is the best person to select among the various competitors. Instead, the Commission has substituted its decision for the consumer's. This decision will undoubtedly help one competitor, Grayline, but may undermine the kind of robust competition that the complaint statute seems to contemplate. I suspect that this order will prompt similar complaints and similar requests for curtailment of the operations of companies such as Shuttle Express. I have grave doubts whether any such litigation is in the public interest.

Nevertheless, while the complaint statute seems to allow considerably more discretion to the Commission than does the entry statute, the intent of the Legislature with respect to this factual situation is difficult to discern. The underlying economic assumptions of the two statutes appear mutually contradictory. Indeed, this case invites legislative policy makers to examine our entire economic regulatory scheme for transportation companies in light of modern economic thought.

DATED at Olympia, Washington, and effective this 6th day of November, 1990.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Sharon L Nelson

SHARON L. NELSON, Chairman