3981

BUS SERVICE — PERIODIC OPERATION, NOT AVAILABLE TO GENERAL PUBLIC, CONDUCTED BETWEEN FIXED TERMINI, OVER REGULAR ROUTE, COMPENSATION PAID BY SOMEONE OTHER THAN PASSENGERS, IS "CONTRACT CARRIAGE" — NOT A CHARTER SERVICE — SECTION 614-103a G.C.

SYLLABUS:

The operation of a periodic bus service, which is not available to the general public but which is conducted between fixed termini, over a regular route and for an agreed compensation paid by someone other than the passengers, is contract carriage within the definition of Section 614-103 *(a), General Code, and is not a charter service exempt therefrom.*

Columbus, Ohio, July 11, 1941.

Hon. George C. McConnaughey, Public Utilities Commission of Ohio, Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion upon the following facts contained in your letter of recent date:

> "There is an operation being conducted from Akron, Ohio, to the Arrow Club by the Penn-Ohio Coach Lines. Our investigation indicates that the Penn Company operates what they call a charter bus service from Akron to the Arrow Club, which Club is located in Geauga County and return from the Arrow Club to the Akron Bus Terminal.
>
> Our investigation further shows that this operation is conducted daily, averaging possibly from six to eight trips per day, leaving at twelve o'clock noon, at 1:45 p.m., then periodically from 6:00 to 8:00 p.m., all leaving Akron. No fare is charged by the Company to those riding in the bus. Announcement is made in the terminal before each bus leaves that the bus is loading to go to the Arrow Club. We understand that the Penn-Ohio Coach Lines is paid for these trips by the Arrow Club.

We would appreciate your advising us at your earliest convenience if this is charter service as defined in the Motor Transportation Act. The Penn-Ohio Coach Lines is operating the service as charter and paying emergency fees to this Commission pursuant to charter operation.

The Penn-Ohio Coach Lines is a regular certificated operator duly authorized to operate regularly from Akron to Cleveland. The service which they are performing to the Arrow Club leaves their regular route after leaving Akron. The bus is marked charter and does not stop to pick up passengers after leaving the bus terminal at Akron. It is our information that passengers are not picked up or discharged except at both terminals."

Since the operation in question must fall into one of three categories, common carriage, private carriage or charter carriage, by motor vehicle, it is necessary to consider all the pertinent sections of the statutory law of Ohio relating to motor carriers. Section 614-84 of the General Code contains the definition of common carriers by motor vehicle as thereafter used in the Motor Transportation Act. Originally passed in 1923 (110 O.L. 211, 213), this section has been frequently amended but its component parts have remained basically unchanged. It provides that:

"Section 614-84. (a) The term "motor transportation company," or "common carrier by motor vehicle," when used in this chapter, shall include, and all provisions of law regulating the business of motor transportation, the context thereof notwithstanding, shall apply to every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, legal or personal representatives, trustees, receivers or trustees appointed by any court whatsoever, when engaged, or proposing to engage, in the business of transporting persons or property, or both, or of providing or furnishing such transportation service, *for hire,* whether directly or by lease or other arrangement, *for the public in general,* in or by motor propelled vehicles of any kind whatsoever, including trailers, over any public highway in this state; * * * " (Emphasis the writer's.)

The statute then exempts such companies as may be

(1) "Engaged, or proposing to engage, as a private motor carrier as defined by section 614-103 of the General Code; * * * "

Although there are six other exemptions none of them is applicable to the situation under consideration, and they are consequently not considered here; the first exemption, quoted above, will be discussed later herein.

Subsequent to the original passage of this Act relating to common carriers by motor vehicles came such cases as Hissem vs. Guran, 112 O.S. 59; Craig vs. Public Utilities Commission, 115 O.S. 512; Breuer vs. Public Utilities Commission, 118 O.S. 95; Affiliated Service Corp. vs. Public Utilities Commission, 127 O.S. 47; Public Utilities Commission vs. Holdern, 34 O. App. 416 and Public Utilities Commission vs. Farmers Exchange, 40 O. App. 395. Dealing entirely with the differences between common and private carriage, these authorities clearly indicate that whatever else it may be, Penn-Ohio's operation herein is not common carriage because it is statedly and obviously not made available "for hire" to "the public in general."

The facts in State ex rel. vs. Nelson, 65 Utah 457; 238 Pac. 237; 42 A.L.R. 849, 853 furnish an interesting analogy to the situation under consideration. In the Nelson case, an eleemosynary camp, located on a national forest, hired Nelson for a set sum per day to haul guests and camp employees from Salt Lake City to the camp, 25 to 30 miles distant. Nelson's bus made two round trips daily between the camp and a suitable station in the city. The passengers paid no fare to Nelson, that charge being included in the fee which they paid to the camp authorities. Nelson held no certificate or permit from the Utah Commission and sought none under the statute of that state which is not dissimilar to our Motor Transportation Act. In holding that the operation was contract carriage rather than common carriage, the Court called attention to the fact that Nelson did not hold himself out to serve any or all who sought transportation along the route, and said:

> "It is clear that defendant did not hold himself out to carry, nor was he engaged in carrying, any or all persons who desired to travel up and down the canyon or go from place to place, or property of all persons indifferently. No one except guests of the camp or connected with it and holding a ticket from the association had a right to demand of the defendant transportation either of person or property. We, therefore, think that the court was right in holding that the defendant was not a common carrier nor operating as a public utility."

This is in accord with the second syllabus of United States vs. L. & P. RR., 234 U.S., 1; 58 L. Ed. 1185, which held that the right of the public to demand service rather than the amount of business done is the test of a common carrier. Clearly, the operation being conducted by Penn-Ohio is not common carriage, and it is necessary, by elimination, to turn

instead to the private carriage and charter carriage sections of the Motor Transportation Act referred to in exemption (1), supra, to obtain an answer to your inquiry.

In 1933 there was enacted by the Ohio Legislature what is generally known as the Private or Contract Carrier Law (115 O.L. 254; 115 O.L. Pt. 2, 96), the pertinent portions of which are:

> "Section 614-103. The following words and terms when used in this chapter, unless the same are inconsistent with the text, shall be construed as follows:
>
> (a) The term "private motor carrier" or "contract carrier by motor vehicle" shall include every corporation, company, association, joint stock association, person, firm or copartnership, their lessees, legal or personal representatives, trustees, receivers, or trustees appointed by any court whatsoever, not included in the definition under section 614-84 of the General Code, when engaged in the business of private carriage of persons or property, or both, or of providing, or furnishing such transportation service, for hire, in or by motor propelled vehicles of any kind whatsoever, including trailers, over any public highway in this state, but shall not include any corporation, company, association, joint stock association, person, firm or copartnership, their lessees, legal or personal representatives, trustees, receivers or trustees appointed by any court whatsoever: * * *"

and exemption (5) therefrom which excludes any such company operating

> "(5) As a motor transportation company holding a certificate of public convenience and necessity for the transportation of persons, in the carriage of persons in emergency motor vehicles under a special contract for the entire vehicle for each trip, to or from any point on the route of such motor transportation company, and provided that such use of such emergency motor vehicle shall be reported and the tax paid as prescribed by the commission by general rule or temporary order; * * * "

This latter paragraph is the one which is familiarly known as the charter bus exemption and was obviously inserted in the law for the purpose of allowing duly certificated Ohio bus operators to render a type of occasional charter service and receive an income therefrom that would not otherwise be available. It is apparently under this paragraph that Penn-Ohio is attempting to conduct the operation in question, not only because the given facts of your inquiry so indicate but also because Penn-

Ohio being a duly certificated Ohio bus operator, it is not permitted to engage in contract carriage or obtain from your Commission a contract permit. See Mahoning Express Co. vs. Public Utilities Commission, 128 O.S. 369.

The only question then is whether Penn-Ohio's operation is a charter service permitted it under (5), supra, or is a contract carriage within the contemplation of Section 614-103(a), supra. The wording and arrangement of the statute are not fortunate. Although paragraph (5) is fairly obviously a limited permission to indulge in charter operations, such operations are not clearly defined nor is the word "charter" used anywhere as a clear indication of the purpose of the paragraph. Furthermore, the paragraph, which is a permission to common carriers by bus, is injected not into the common carrier sections of the Motor Transportation Act but into the Private Carrier Law which deals with a different type of service as essentially contractual in nature as is that of the charter operations of common carriers.

Charter operations had their origin in maritime transportation and were based on a specific contract for the let or use of a vessel, or part thereof, for a given purpose or trip. See 58 Corpus Juris, 106, Sec. 149. Coming down from that source to present day motor vehicle operations, both the contractual feature and also the idea of a single or casual trip have been retained as distinguishing marks or badges of charter bus transportation. In this respect charter bus operations are obviously much more casual and irregular than, for example, the operations contemplated in Section 614-103 (a), General Code, supra, or even the operation of sight-seeing busses or vacation tours between given points or over a regular route or circuit. A more fitting illustration of charter operation is the use of busses to carry a clearly defined group of people to or from a football game, picnic or convention under a special contract.

Two cases in point are North Bend Stage Lines vs. Schaaf, 199 Wash. 621; 92 Pac. (2nd) 702, 704 and Baltimore and A. R. R. Co. vs. Lichtenberg, 176 Md. 383; 4 Atl. (2nd) 734, 736, both of which were decided in 1939. In the Schaaf case, there was no mention of a private carrier law but there was in effect at the time a motor transportation statute similar to that in Ohio and a rule of the Public Service Commission

of Washington confining charter bus operations by duly certificated bus operators to their regular routes. In discussing the jurisdiction of that Commission and the nature of charter operations, the Washington Supreme Court said on page 702 of the Pacific Report:

> "It appears that there is no statutory definition of charter service as the term is applied to the facts of this case, but clearly it means the hiring of an individual or a group of persons of the exclusive service of a motor vehicle and its driver for a certain designated journey."

And again on page 704:

> "Operations under private charter are not conducted between fixed termini nor upon any regular schedule. Each contract results from an agreement between the parties covering one particular journey."

In the Lichtenberg case, defendants rented their trucks and drivers for a set daily sum to haul employees on a federal building project near Annapolis. The trucks made one round trip daily from a central point in Baltimore to several points where the work was going on and no one except such workmen were carried. The Maryland statute gave the Public Service Commission jurisdiction over all motor vehicles operating for hire on regular schedules and between fixed termini except that the public duties of a common carrier should not thereby be imposed on the owner of any such vehicle not actually engaged in public transportation. The Court held that the statute covered contract as well as common carriers and that defendants must comply with the law before they might commence operations under their contract with the Federal Government. On page 736 of the Atlantic Report, the Court said:

> "That the appellees have been acting as independent private contract carriers seems to the Court to be plain. Besides owning the trucks and equipping and insuring them as owners, they have had their own employees driving them. The facts that the operation is for the benefit and convenience of the Government exclusively and that the Government has fixed the times of movement and the extent of the journey did not alter the fact of the independence of the contractors."

Militating against the theory that Penn-Ohio, in the instant case, is operating charter busses are the facts that mere designation of the operation as such, the corresponding marking of busses, the use of emergency or additional equipment and the payment of emergency fees are

self-serving and beg the issue. The remaining facts stated, such as the probable existence of a compensatory contract between Penn-Ohio and the Arrow Club or someone interested therein or connected therewith, the regularity of the time and route schedule (without any tender of service to the public), the improbability of the existence of a separate contract for each and every trip, the lack of stops en route and the steady making of trips entirely off Penn-Ohio's regular Cleveland-Akron route, point more directly to the contract service of Sec. 614-103 (a), supra, than to the charter service exemption of paragraph (5), supra, which statedly contemplates "a special contract for the entire vehicle *for each trip.*" The fact that what corresponds to the fare is paid through the Arrow Club instead of by the passenger themselves is unimportant. See Short Lines, Inc. vs. Quinn, 298 Mass. 360; 10 N. E. (2nd) 112.

Nor can the matter be made to turn on the asserted fact that one contract covers all of the operations in question of Penn-Ohio. As pointed out above, the furnishing of this service by Penn-Ohio under a single contract indicates the type of transportation falling clearly within the purview of Section 614-103 (a) i.e., contract carriage. If, on the other hand, the same service were offered under separate contracts for each and every such trip, nothing more would be indicated than a devise intended to lend color to the theory of charter operation when every other material feature of the operation brings it directly within the contract carrier definition of the law cited just above.

None of the facts contained in your inquiry point conclusively or even definitely to charter bus operation. On the contrary, and in view of both the specific wording of the Ohio Private Motor Carrier Act and also of the decisions cited herein, the facts set out in your inquiry indicate that the operation of Penn-Ohio is one of private contract carriage coming under Section 614-103 (2), supra, of the General Code.

Specifically answering your inquiry, it is my opinion that the operation of the Penn-Ohio Coach Lines, described in your inquiry, is private contract carriage and should be terminated accordingly.

Respectfully,

THOMAS J. HERBERT,

Attorney General.