

PROVINCE OF NEW BRUNSWICK

IN THE MATTER of the Motor Vehicle
Transport Act, 1987

- and -

IN THE MATTER of the Application of JOE
GALE AND LISA GALE, doing business as
"Direct Shuffle" to the NEW BRUNSWICK
BOARD OF COMMISSIONERS OF PUBLIC
UTILITIES

An application was made by Joe and Lisa Gale (Gale) of the Town of
Oromocto for a charter authority and read as follows:

"Class - Bus

*Carriage of passengers and their baggage as a charter operation only, from the
Fredericton and Oromocto area over all highways to all points in the Province with the
right to extend into other jurisdictions as authorized and return."*

The application was amended at the hearing to read as follows:

"Class: Bus

*For the carriage of passengers and their baggage, as a charter operation only, from the
Fredericton and Oromocto area over New Brunswick Highway Number #2 to the Nova
Scotia / New Brunswick border only for furtherance into other jurisdictions as authorized
thereby and return, but without the right to pick-up passengers en route in either
direction."*

The grant of the application was opposed by S.M.T. (Eastern) Ltd., which is
the major provider of both scheduled and charter bus services in the
Province.

Lisa Gale testified that the proposed service would be provided using an eight
passenger van, which would be capable of transporting seven passengers
plus a driver. It is interesting to note that a "taxi cab", defined in the Motor

Carrier Act, R.S.N.B. 1973 Chapter M-1 6 (the Act) as being capable of carrying six persons, exclusive of the driver, is exempted from regulation by this Board. She indicated that passengers would be picked up in the Fredericton / Oromocto area and driven to the City of Halifax in Nova Scotia. A passenger could be dropped off while en route but no pick ups would be made.

The applicant had made arrangements to pick up their return passengers at the Halifax Inn and again the proposal was that they would be dropped off at any spot on the return trip to Fredericton / Oromocto but no en route pickup of passengers would occur.

Ms. Gale testified that the run would be made each day provided at least one passenger had indicated on the previous evening that they would be making the outbound trip to Halifax or the return trip from Halifax to Fredericton / Oromocto. If no passengers had contacted the office by a specified time in the evening, the following day's trip would not be made.

Section 3 (1) of the Act reads as follows:

*"The Board may grant to any person a license to operate or cause to be operated public motor buses over specified routes or in respect of specified points or geographic areas or generally throughout the Province, either as a **regular service** or an **irregular service**."*

Counsel for S.M.T. argued that the term "charter" was synonymous with that of "irregular" service and "scheduled" with that of "regular" service. He maintained that, if this were correct, the applicant had applied for a charter or irregular operation when the facts disclosed that they planned to operate a regular or scheduled service. Therefore, the application should be denied. He further argued that, if the Board were to find that the applicant wished to operate a "regular" service, then they must comply with the provisions of the Act. In particular, the sections on abandonment as well as those which require compliance with the published schedule whether or not any

passengers are present at departure time.

Counsel for the applicant argued that it would not be a scheduled or regular service as the bus would only make the trips if a passenger came forth and “chartered” a seat for the next day’s run. The applicant, therefore, maintained it was not obliged to comply with the sections of the Act or regulations thereunder dealing with adherence to schedules or applying to the Board to change or abandon a service.

The words “charter” and “scheduled” do not appear in the Act or any regulations thereunder. It is useful to highlight that from 1927 through 1952 the regulation of public motor buses in New Brunswick was consistent in that:

1. the Motor Carrier Act defined a public motor bus, whose operations were regulated by the Board, as one that carried passengers at separate fares;
2. public motor buses were licensed over specified routes or between specified points;
3. buses hired for a one way trip or a return trip were not regulated; and,
4. in the 1927 statute, these one trip hirings could not be over the same routes as a licensed carrier and in the 1937 and 1952 statutes they could only be hired under a single contract and by running them they would not acquire any rights to a regular service.

In 1957, Section 3 was amended to read as follows:

“The Board may grant to any person a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points or generally throughout the Province.” (Emphasis added.)

A complete review of all the reports of the Motor Carrier Board to the Legislative Assembly from 1928 to 1959 disclosed that all Public Motor Bus

Licenses issued were over specified routes and between specific points and as well the reports indicated the license would normally be issued upon the filing of a schedule and tariff of fees. The first non-scheduled license was issued to Guy D'Anjou of Mont Joli, Quebec, to operate scenic tours from Fredericton, Saint John and Moncton to other provinces on April 16, 1959.

In the 1960-61 sitting of the Legislative Assembly, Section 3 was revised and having been renumbered in 1959 it read as follows:

3 (1) *"The Board may grant to any person a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points or generally throughout the Province either as regular routes or as irregular routes."*
(Emphasis added.)

In the October 1962 sittings of the Board, a license was granted to one Varley E. Bishop of Wolfville, Nova Scotia, as follows:

"To operate a public motor bus when engaged under charter by the Governors of Acadia University, Wolfville, Nova Scotia, to carry charter parties from Wolfville, Nova Scotia, to educational institutions in the Province of New Brunswick, and return." MCB 1962
pg. 113.

Finally, in 1972, the definition section in the Motor Carrier Act dealing with the definition of public motor bus was reworded as follows:

"'public motor bus' means a motor vehicle operated by or on behalf of a person carrying on upon any highway the business of a public carrier of passengers, or passengers and freight for gain"

From the New Brunswick Act of 1937 until the amendments of 1972, the definitions of public motor bus contained the expression "passengers at separate fares". Furthermore, from 1927 until the amendment of 1963, charter or irregular services were not regulated and from 1937 until 1963, the exemption section contained a definition of exempted charter service which clearly fits within the U.S. definition or any set forth in Canadian jurisprudence. See *Re Penitang-Midland Coach Lines Ltd.* and *Ontario*

Highway Transport Board (1977), 160. R. (2d) 586 (Ont. Div. Ct.).

Therefore, as a result of the amendments of 1957 through 1963 to the Act, this Board entered upon the regulation of "irregular" or "chartered" passenger carriage.

The terms "regular" and "irregular" are not defined in the Act. Further, the issue of regular/scheduled versus irregular/charter has not been dealt with by the Board in any previous decision. The Board, therefore, reserved its decision in this matter and requested counsel to file briefs dealing with this question of interpretation.

While counsel were able to provide some Canadian case reports touching upon the proper interpretation of regular and irregular service, relatively few Canadian decisions are on point. There are many decisions on point reported in United States digests located in the Board's library.

In *Brady Transfer & Storage Company v. United States et al* (6 Federal Carriers Cases ¶ 80, 521) the United States District Court, Southern District of Iowa, Central Division dealt with an appeal from an Interstate Commerce Commission (ICC) ruling. This decision was later affirmed by the United States Supreme Court. The original decision of the ICC is reported in 6 Federal Carriers Cases ¶ 31, 249. Although the decision dealt specifically with the transportation of property and not passengers, the ICC laid down seven practices which were characteristics indicative of "regular" route operations:

1. Predetermined Plan
2. Character of Traffic
3. Solicitation
4. Terminals and Call Stations
5. Fixed Routes
6. Fixed Termini

7. Periodicity of Service

In affirming the ICC ruling, the District Court stated at page 2605;

“We deem it adequate to observe that there is, as the Commission found, a clear distinction in type between the indiscriminate, coincidental, non-scheduled, unperiodical, itinerant, ambulatory service of an irregular route carrier and the operation of a regular route certificate holder over a carefully specified route to only specifically authorized points on that route on schedules published and filed, with the obligation on the part of the carrier to give, and the responsibility on the part of the Commission to compel, the carrying out of that operation to such an extent as the convenience and necessity of the public justified.”

To reiterate, although this decision dealt only with carriage of property, the characteristics fully discussed in the ICC decision and in the final paragraph in the quote from the decision of the District Court clearly set out the difference between a regular” and “irregular” route carrier. As the ICC concluded, the Commission had to decide each application on its own merits having reference to these characteristics.

The Supreme Court of the United States dealt with the clause “the territory within which” in its interpretation of an irregular route in the case *United States of America and Interstate Commerce Commission v. Dan E. Maher*. I Federal Carrier Cases ¶ 9541 @ page 667 as follows:

“The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the ‘route or routes’ for which an application under the ‘grandfather clause’ is made as against operations ‘within the territory’, Congress plainly adopted the familiar distinction between ‘anywhere-for-hire’ bus operations over irregular routes and regular route bus operations between fixed termini.”

The service that would be offered, if approved, would be point-to-point at regular times and dates and involve solicitation of individual fare-paying customers. This Board, therefore, finds that the service proposed by Gale is not a charter or irregular operation as applied for but is a regular or, to use the common expression attached to it by the industry, scheduled service.

The application is, therefore, denied.

The Board, after receipt of briefs by counsel, decided that the proposed service would be a regular/scheduled service and not an irregular/charter service as applied for. Because of time constraints, a decision was made to inform the parties of this and that written reasons would follow. The Board further decided that a charter authority would be granted on the understanding that it would not be used to provide the proposed service. A letter to this effect was sent to the parties on August 30, 1996. The decision to grant the charter authority as stated in the letter was based upon handwritten notes taken at the hearing, which were in error as to the positions of the parties. Upon review of the tapes of the hearing in preparing this written decision, the error was discovered. The Board apologizes to the applicant for any inconvenience caused by this error.

Dated at Saint John, New Brunswick, this 29th day of October, 1996.

A handwritten signature in black ink, appearing to be 'L. Légère', with a long horizontal flourish extending to the right.

Lorraine Légère
Assistant Secretary