O-J Transport Co. v. United States: Minority Ownership in the Motor Carrier Industry

I. THE CASE

O-J Transport Company is a small Detroit-based firm owned and operated as a minority enterprise by two black businessmen. The company (hereinafter referred to as O-J) filed an application in April of 1973 with the Interstate Commerce Commission for a certificate of public convenience and necessity under the Interstate Commerce Act.[1] O-J sought authority to haul automobile parts between various points in lower Michigan and Chicago, Illinois.

Nine carriers protested the application to carry auto parts. All protestants were considerably larger than O-J, and all carried auto parts over routes affected by this application.[2] The application was supported by Ford Motor Company, American Motors, and five divisions of General Motors.

A hearing on the application was held before an administrative law judge in November of 1973. Protestants, supporters, a representative of the Small Business Administration, and O-J itself all presented evidence. The December 1973 decision granted authority to haul the auto parts after deleting one city in Wisconsin. The judge concluded that the proposed service served a public need without impairing existing carriers' operations.[3] In reaching this decision the administrative law judge did not rely on the fact that O-J was a minority enterprise owned by black businessmen.

Protestants appealed this decision to the ICC. The Commission reversed the administrative law judge's decision by a 2-1 margin in a December 1974 ruling.[4] The ICC, like the administrative law judge, refused to consider miniority ownership in ruling on the application:

> Applicant has introduced evidence concerning its ownership by owners of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier operating authority. Such evidence cannot play any role in a determination as to

1. 49 U.S.C. § 307(a)(1970).

2. O-J Transport Co. Common Carrier Application, 120 M.C.C. 699, 705-06 (1974). *See* Brief for Petitioner at 24-25, O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).

3. Brief for Petitioner at 5, O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).

4. O-J Transport Co. Common Carrier Application, 120 M.C.C. 699 (1974).

> whether a grant of authority should be made herein. This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. It does not provide us with any regulatory authority to favor any one group or individual over another for any such divisive reasons as race, creed, color, sex, or national origin. This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be granted or denied, we will not give consideration to the race, creed, color, sex, or national origin of any of the parties to this proceeding.[5]

This clearly establishes the ICC policy prohibiting the consideration of minority ownership as a factor influencing the decision to grant or deny a certificate of public convenience and necessity.

O-J appealed the ICC denial of its application to the United States Court of Appeals for the Sixth Circuit in *O-J Transport Co. v. United States*.[6] An important part of O-J's argument centered on the ICC's failure to consider the minority status of the applicants. The Sixth Circuit addressed this issue in affirming the ICC denial of the certificate:

> The skills of the Commission's staff are not those required to implement an affirmative action program designed to enlarge the opportunities of minority-owned and operated businesses. The public interest which Congress intended the Interstate Commerce Commission to promote and protect is one related to transportation, not the more general public interest in the sense of the general welfare. While we agree with the dissenting member O'Neal that the language of the majority in the Report of the Commission is too broad if read to mean that evidence of ownership by a particular ethnic group can never play a role in the determination of whether to grant authority, we find it was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public.[7]

The United States Supreme Court has refused to entertain O-J's petition for certiorari of this Sixth Circuit decision.[8]

Although O-J argued that the certificate should be granted even if black ownership is not considered, this note is concerned only with the issue of whether or not the ICC *could* consider minority ownership in acting on an application for a certificate of public convenience and necessity. There are two important concerns in resolving this issue: (1) whether "public convenience and necessity" encompasses consideration of minority status; and (2) whether ICC authority is limited by a narrow interpretation of the Interstate Commerce Act.

II. Public Convenience And Necessity

The Interstate Commerce Act requires a finding of public convenience and necessity before the ICC grants a certificate:

5. *Id.* at 703.
6. O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).
7. *Id.* at 132.
8. 97 S. Ct. 386 (1976).

> [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the *present or future public convenience and necessity*; otherwise such application shall be denied . . . .[9]

O-J's application was denied since it was not found to be required by present or future public convenience and necessity.

There is no precise statutory definition of public convenience and necessity. A significant ICC definition is found in *Pan-American Bus Lines Operation*.[10] That case involved an application to carry passengers along the East Coast. The applicant was offering a unique service in that its buses would follow historically interesting routes which varied geographically from those already existing, it would not involve bus transfers as other carriers required, and it would provide, without charge, some services which other carriers charged for, such as pillows and porter service. The ICC was able to find that this service was required by public convenience and necessity:

> The words 'convenience' and 'necessity' are used conjunctively, and we have found that they are not synonymous but must be given separate and distinct meaning . . . . Yet it is clear that the word 'necessity' must be somewhat liberally construed, for there are comparatively few things in life which can be regarded as an absolute 'necessity', and it was surely not the intent of Congress to use the word in so strict and narrow a sense.[11]

The Commission noted that there was no evidence of harm to the protestants, that the Interstate Commerce Act does not prohibit competition, and that this new type of service could be viewed as an experiment. It went on to say that more than the adequacy of existing service should be considered in evaluating public convenience and necessity:

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.[12]

This test is often cited and was used by the ICC in *O-J*.[13]

The ICC has considered many factors other than adequacy of existing service in determining public convenience and necessity. *Norfolk Southern Bus Corp. v. United States*[14] pointed out that a specific finding of inadequacy of existing service is not necessary. The court upheld a grant of authority to a new public carrier where there was an overlap with existing

9. 49 U.S.C. § 307(a)(1970) (emphasis added).
10. 1 M.C.C. 190 (1936).
11. *Id*. at 202.
12. *Id*. at 203.
13. O-J Transport Co. Common Carrier Application, 120 M.C.C. 699, 702 (1974).
14. 96 F. Supp. 756 (E.D.Va. 1950), *aff'd per curiam*, 340 U.S. 802 (1950).

service. "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition . . . . Even though the resulting competition causes a decrease of revenue for one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to the new competitor."[15] Witnesses for O-J testified before the administrative law judge that they favored increased competition to help improve the service they were receiving.[16]

In *Nashua Motor Express, Inc. v. United States*[17] the court specifically overruled an ICC decision that inadequacy of existing service is a necessary prerequisite to granting a certificate. The court noted that, "other elements of importance appear to be the desirability of competition, the desirability of different kinds of service, and the desirability of improved service."[18] The court favored a broader understanding of public convenience and necessity stating that, "it appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a strait jacket upon the process of determining the *broader interests* of public convenience and necessity in the effectuation of the National Transportation Policy."[19]

In *National Bus Traffic Association v. United States*[20] the court considered an application for limousine service in nine-passenger cars from El Paso, Texas, to Los Angeles, California. Existing service was available but the applicant employed Spanish-speaking drivers. The Commission considered several factors in approving the application—including the fact that employment of minority drivers who speak Spanish would make travel easier for Spanish-speaking passengers. The Association, in opposing the application, contended that this was not a proper ground for issuing the certificate. The court disagreed saying, "We hold only that the Commissioner's action here was within his statutory power . . . ."[21]

Patterson Extension - York[22] followed *Nashua*. The Commission noted that public interest and the national transportation policy require consideration of the effect of denial of an application on the applicant as well as the effect of approval on protestants. The court agreed stating that, "even though the resulting competition from the institution of a newly authorized service will cause a decrease in revenue from a carrier presently providing service, the public interest and the national transportation policy may best

15. 96 F. Supp. 756, 761 (E.D.Va. 1950).
16. Brief for Petitioner at 16, O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).
17. 230 F. Supp. 646 (D.N.H. 1964).
18. *Id.* at 652.
19. *Id.* at 653 (emphasis added).
20. 284 F. Supp. 270 (N.D. Ill. 1967), *aff'd per curiam*, 391 U.S. 468 (1968).
21. *Id.* at 272.
22. 111 M.C.C. 645 (1970).

be served . . . by the issuance of new operating authority."[23] There was ample evidence presented by O-J at the administrative hearing to indicate that granting the certificate would have a minimal effect on the operations of existing carriers and yet would be critical to the existence and growth of O-J.[24]

The ICC has continued to recognize that existing carriers are not immune from future competition. In *Onley Refrigerated Transportation, Inc. - Food Stuffs and Drugs*[25] the Commission said that a "major question . . . is whether the advantages to the public that would use the proposed service outweigh the disadvantages, real or potential, that may result upon existing services (and those who depend upon them)."[26] The advantage to the public in *Onley* was that additional refrigerated trucks would be made available on existing routes.

Thus, the preceding cases demonstrate that public convenience and necessity is an expansive concept. Its expansiveness is seen in several ways: (1) inadequacy of existing service is not a mandatory predicate to finding public convenience and necessity; (2) certificates are not a guarantee against future competition; (3) the granting of certificates should be responsive to public demand or need; (4) ethnic considerations can affect public convenience and necessity; and (5) the materiality of the adverse effect on protestants should be weighed against benefits to the applicant.

Although it acknowledges these cases, the court in *O-J* goes on to say that the "public interest" to be served by granting certificates is not a general public interest, but rather the public's specific interest in transportation. The court then states that the ICC "is primarily concerned with insuring that the public has available for its use systems of transportation which are safe, adequate, economical and efficient."[27] *National Bus Traffic Association* is then cited by the court to show that non-transportation considerations such as minority status do affect public convenience and necessity. The court distinguishes the situation in *O-J* and *National Bus* by saying that the ethnic status in *National Bus* benefited users while ethnic status would benefit only the applicant in *O-J*.

This distinction seems significant at first. Yet, Spanish-speaking drivers do not make transportation more safe, economical, or efficient. If these drivers make transportation better, it is better only for a very small number of users. Thus, this court allows consideration of minority status when it affects a small number of users, while denying such consideration to a minority applicant with significant personal interest. This is inconsistent with *Nashua* and *Patterson Extension* where "public interest" was found to require consideration of effect of denial on the applicant.

23. *Id.* at 650.
24. Brief for Petitioner at 17, O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).
25. 118 M.C.C. 715 (1973).
26. *Id.* at 721-22.
27. O-J Transport Co. v. United States, 536 F.2d 126, 131 (6th Cir. 1976).

The court continues this line of thought saying that, "[T]here is no showing in the present case that the transportation needs of the public as opposed to the general public welfare would be served by the entry of minority-owned carriers . . . ."[28] This does not deny that transportation needs of the public may be fulfilled in some way by minority ownership of carriers. A significant need is not required as was seen in *National Bus*. Indeed, it is possible that black ownership and operation might facilitate more effective carriage. One of the shippers, Ford Motor Company, has an active program, the Minority Group Supplier Program, to encourage the establishment and growth of minority-owned businesses by increasing the amount of business that Ford does with minority-owned companies.[29] Yet, the Sixth Circuit chose not to make a statement favoring the consideration of minority status.

The issue is one of degree. O-J did not assert that the certificate must be granted because of its minority status; it merely claimed that such status was a factor to be weighed in the balance when determining public convenience and necessity. Thus, while public convenience and necessity is intended to serve the public interest, it is not limited by it. The Sixth Circuit focused on public interest and transportation needs of the public instead of on public convenience and necessity itself.

The criteria for public convenience and necessity have been well established by the ICC, beginning with *Pan-American*. Yet, factors affecting these criteria are expanding. Inadequacy of existing service is not a mandatory prerequisite. Competition and improved service are factors to be encouraged. Minority status has already been acknowledged as a factor when directed at user interests. The common thread running through the various factors concerns their effect on determining public convenience and necessity.

Public convenience and necessity is a concept broader than either public interest or the transportation needs of the public. Public interest and transportation needs are merely additional factors which are part of public convenience and necessity. The cases clearly indicate that the inadequacy of existing service is not a mandatory element of public convenience and necessity. If this is true, then the concept of public convenience and necessity cannot be strictly limited by the concept of "transportation needs of the public." If existing service is adequate, then the transportation needs are definitionally fulfilled. It is the other factors, then, that facilitate a Commission finding of public convenience and necessity. O-J claimed that minority ownership was one of these other factors. Consideration of minority ownership does not guarantee that public convenience and necessity will be established, but it does insure that each application will be evaluated in the broadest and fairest manner possible.

28. *Id*. at 132.

29. Brief for Petitioner at 15-18, O-J Transport Co. v. United States, 536 F.2d 126 (6th Cir. 1976).

III. Scope of ICC Authority

The Sixth Circuit also rejected minority ownership as a consideration in determining public convenience and necessity on the grounds that ICC authority is limited to specific provisions of the Interstate Commerce Act. This argument was presented in two ways: (1) that the ICC's expertise is related to transportation and not to solving racial problems, citing *NAACP v. Federal Power Commission*;[30] and (2) that the consideration of minority ownership is not consistent with our national transportation policy.[31] This section will consider both of these arguments.

A. *NAACP v. Federal Power Commission*

In *NAACP v. Federal Power Commission* the NAACP and other parties petitioned the Federal Power Commission (hereinafter FPC) for the issuance of a rule requiring equal employment opportunity and non-discrimination in the employment policies of businesses regulated by the FPC. The FPC refused to issue such a rule claiming that it had no jurisdiction. The court in *O-J* cited the following language from *NAACP:*

> Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's [(FPC)] principle task of passing on statutorily specified license and rate applications is prodigious. To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.[32]

Although it is true that ICC expertise is concentrated in the transportation area, this argument is inappropriate for two reasons.

First, in the *NAACP* case itself, the court acknowledges that the FPC may have some jurisdiction to consider employment discrimination by the people it regulates. The court said that the FPC has sufficient authority to consider any relevant evidence to decide if the regulatee has incurred illegitimate costs resulting from racially discriminatory employment practices.[33] Thus, *NAACP* does not stand for the proposition that federal regulatory agencies cannot consider factors outside their expert decisions.[34] The

30. 520 F.2d 432 (D.C. Cir. 1975), *aff'd*, 432 U.S. 890 (1976).

31. 49 U.S.C. preceding § 1 (1970).

32. O-J Transport Co. v. United States, 536 F.2d 126, 132 (6th Cir. 1976) (footnote omitted).

33. 423 U.S. 890 (1976).

34. It is important to note that there is federal policy encouraging equal employment opportunity and support for minority business enterprises. Exec. Order No. 11, 246 establishes a policy of nondiscrimination in employment by government contractors. Exec. Order No. 11,625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," establishes a national policy to encourage and actively promote the growth of minority owned businesses. Exec. Order No. 11,246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000(e) (1970); Exec. Order No. 11,625, 3 C.F.R. 616 (1971-1975 Compilation), *reprinted in* 15 U.S.C.A. § 631 (1974).

court in *NAACP* recognized that dealing with constitutional obligations is a primary responsibility of the administrative agency.[35]

The second reason that reliance on *NAACP* is somewhat misplaced is that the racial considerations are not parallel with those in *O-J*. *NAACP* involves direct agency control over the employment practices of its regulatees. *O-J*, however, involves an assessment of public convenience and necessity as to a specific license application. The issue in *NAACP* is whether race can be a factor in FPC determinations. But the ICC, unlike the FPC, is not being asked to monitor its regulatees' employment practices. In short, the scope of the action that the ICC is being asked to take in *O-J* is much broader than is implied by the Sixth Circuit's decision.

B. National Transportation Policy

The National Transportation Policy is stated at the beginning of the Interstate Commerce Act:

> It is hereby declared to be the national transportation policy of the Congress to provide fair and impartial regulation of all modes of transportation subject to the provisions of this act; . . . to promote safe, adequate, economical, and efficient service and *foster sound economic conditions in transportation and among the several carriers*; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive practices*; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions all to the end of developing, coordinating, and preserving a national transportation system . . . .[36]

The Sixth Circuit cites *Elegante Tours, Inc.—Broker Application*[37] for the proposition that the national transportation policy precludes ethnic or racial considerations. This appears to be contrary to the plain meaning of the language. It may be reasonably asserted that black-owned carriers can help "foster sound economic conditions in transportation." Shippers may favor using a certain number of black carriers as a means of promoting the good will of their businesses. Existing carriers cannot fulfill this need, partly because the Act contains a grandfather clause[38] which provides that those carriers legitimately in existence at the inception of the Act received certificates without an independent showing of public convenience and necessity. Social conditions in our country in 1935 precluded most black persons from participating in the motor transit market place in an ownership capacity. Thereafter, this trend of non-black ownership has persisted, such that a characterization of "unfair or destructive competitive practices" is also appropriate.

35. 520 F.2d 432, 447 (D.C.Cir. 1975).
36. 49 U.S.C. preceding § 1 (1970).
37. 113 M.C.C. 156 (1971).
38. 49 U.S.C. § 306(a)(1970) (emphasis added).

In any case, the national transportation policy is not narrow conceptually. Its primary objective is clearly to enhance transportation services in this country, but it encourages accomplishment of this goal through fair competitive practices. Therefore, objective consideration of minority ownership in determining public convenience and necessity tends to promote, rather than hinder, the national transportation policy.

CONCLUSION

It is clear that the ICC is not prevented by either prior decisions or its specific statutory authority from considering black ownership of a business as a factor in determining public convenience and necessity. The court in *O-J* chose to focus on the narrow concept of the public's transportation interest and declined to consider minority status without a specific legislative mandate. While the timidness of the court is understandable, the reluctance of the ICC to construe public convenience and necessity in its broadest national terms is not.[39] Ever since *Pan-American*, public convenience and necessity has been a broadly-based concept. Also, it is clear that the ICC's statutory authority in no way precludes consideration of minority status. The problem is circular and it appears that the ICC is the only appropriate party to clarify the situation. If the ICC decides to consider minority ownership in determining public convenience and necessity, then it will tacitly acknowledge that minority ownership can serve the transportation needs of the public. Once this is done, the primary objection of the Sixth Circuit will be nullified. Minority ownership should not guarantee a finding of public convenience and necessity, but consideration of that factor by the ICC will help insure that our nation's broad national transportation policy is carried out effectively.

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39. *See* Shippers Truck Service, Inc. Extension—19 States, 125 M.C.C. 323 (1976). The ICC reaffirmed its policy of considering minority status as a factor in determining public convenience and necessity only when framed in terms of users' needs. This policy does not preclude consideration of minority status when a creative argument shows that such status will serve users' transportation needs, but it ignores ICC responsibility to encourage the growth of minority owned business in this country.