

**OPINION
67-172**

November 1, 1967 (OPINION)

Mr. Elmer Olson

Secretary

Public Service Commission

RE: Public Service Commission - Motor Carriers - Certificate for

School Bus Operator

As Secretary of the Public Service Commission you have asked for an opinion upon the question whether a school bus operator-owner who has contracted with a school district for the transportation of its pupils to and from school is required to obtain a certificate from the Public Service Commission in the case where he is requested by the school district to transport pupils to and from school activities such as athletic events.

As further factual background you advise that in the case under consideration the school bus operator, in addition to carrying students to and from school, has been requested by the district to transport some of the pupils to and from certain school activities, such as athletic events, band concerts, etc., which are held in other school districts and cities. You state that in such instances the school bus operator is, or is to be, compensated by the school district out of its school activities fund and that the individual pupil passengers do not directly pay the school bus operator. You further state that every factor, such as the time and place of departure and return, the routes of travel, and the number and frequency of such trips is supervised, directed, and controlled by the school district officials.

The powers and duties of the Public Service Commission, according to section 83 of the Constitution, "shall be prescribed by law."

Chapter 49-18 of the North Dakota Century Code entitled "Motor Carriers" is the legislative act investing the Public Service Commission with specific powers and duties with reference to the regulation of carriers engaged in the transportation by motor vehicle of persons for hire.

Generally speaking, it is held that a regulatory agency, such as the Public Service Commission, must require a permit or certificate of any person who holds himself out to the public as willing to undertake, for hire, to transport passengers by motor vehicle, and in this regard, the dominant or controlling factor in determining the jurisdiction or ability of the Commission to require such a license, permit, or certificate is whether the person is engaged in the rendering of a public service, as distinguished from a private service. In the former case the Public Service Commission must require a compliance with the Motor Carriers Act on the part of the person, and in such instances the term "common carrier" can be

properly applied.

Chapter 49-18 also provides for the Commission's regulation of "Contract motor carrier of passengers" which is defined in section 49-18-01(10) as "any person engaged in the transportation by motor vehicle of persons for hire and not included in the term 'common motor carrier of passengers.'" It seems that the Commission is empowered to issue a permit approving the contract between the person and a carrier where in the first instance such person could rightly engage in the business of transportation of his own commodities, passengers, etc. without coming under the jurisdiction of the Commission, but who chooses to contract with another for the performance of such transportation, subject to certain limitations.

Section 49-18-04 provides that the Motor Carrier Act "shall not apply to contract motor carriers of property or passengers operating exclusively in the transportation of children to or from school."

Applying the given facts to the mentioned statutes, it is obvious, in our opinion, that the school bus operator in this instance cannot be required to obtain a certificate as a common carrier primarily because he is engaged in transportation by virtue of his contract with the school district. His business is not impressed with public service nor does he hold himself out to the public to provide transportation services.

Nor can he, in our opinion, be required to submit to the jurisdiction of the Commission as a contract carrier for two reasons: the first being that his contract with the school district is for the transportation of children to or from school, and such a contract is specifically excluded from Commission jurisdiction under section 49-18-04, above mentioned; and the second reason is that the request on the part of the school district to the school bus operator that he transport some of the children to and from school activities appears to be secondary and incidental to the primary purpose of the contract.

It follows that in such cases the courts have held that one who is engaged in isolated, occasional, or incidental transportation of persons is not bound to comply with the statutory provisions requiring permits, licenses, etc. *Strickler v. Schaaf* (1939) 91 P. 2d. 1007, 123 A.L.R. 226 (annotation).

It is our opinion that the Public Service Commission has not the power or duty to require a school bus operator, in the case where he has contracted with a school district primarily for the transportation of pupils to or from school, to obtain a certificate or permit for the transportation of some of the pupils to occasional school activities held outside of the school district, although the school bus operator is compensated therefor by the district.

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