

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

In the Matter of the:

Complaint of Keith Mann Against the Washington Island Ferry Line, Inc. Alleging Unreasonable Rates, Service, and Practices

8302-WC-101

FINAL DECISION

By letters dated July 23 and 30, 2008, Keith Mann filed a complaint with the Office of the Commissioner of Railroads (OCR) against the Washington Island Ferry Line, Inc. (WIFL) alleging unreasonable rates, service, and practices. Mann filed the complaints on behalf of himself as well as Mann's Mercantile, Inc. and Washington Island Shuttle, LLC. The three complainants will be referred to as 'Mann' unless the context dictates otherwise. The OCR has jurisdiction over complaints against water carriers under chapter 195 Stats.

On April 29, 2009, the Commissioner granted summary judgment in favor of WIFL on two of the four issues set forth in the notice of hearing (The issues dismissed were: *Does WIFL provide inadequate service to Mann by denying UPS the ability to deliver packages door-to-door on Washington Island?* and *Does WIFL violate s. 195.08 (11) by charging Mann different rates for different freight classifications?*).

Mann petitioned for judicial review of that summary judgment order. When the OCR issued the summary judgment order, it erroneously attached the Notice to Parties, which sets forth certain appeal rights. Subsequently, the Department of Justice on behalf of the OCR, Mann, and WIFL agreed to dismiss that petition for judicial review on the grounds that the summary judgment order was not a final appealable order subject to judicial review. The parties to the judicial review agreed that the OCR would re-issue the summary judgment ruling without the Notice to the Parties.

The parties to the judicial review further agreed that dismissal of that court case did not constitute a waiver of the right to file a petition for judicial review of the dismissal of those claims. The Honorable Peter Diltz, Branch Two, Circuit Court for Door County, signed the order of dismissal on July 17, 2009.

Pursuant to that the agreement, on August 3, 2009, the Commissioner reissued the summary judgment ruling without the Notice to the Parties. The dismissal of those claims and the reasoning set forth in the April 29, 2009 order is included in this final decision.

Summary Judgment Ruling Restated

On April 8, 2009, the WIFL filed a motion for dismissal. On April 13, 2009, the hearing examiner conducted a telephone conference call with the parties' attorneys and gave Mann until April 22, 2009 to file a reply and WIFL until April 24 to file a response to that reply.

For the reasons set forth below, the Commissioner grants the motion in part and denies it in part.

Authority to consider motions for summary judgment

Mann argues that the OCR lacks authority to grant a motion to dispose of the matter without first holding a hearing. The Commissioner disagrees.

The Wisconsin Court of Appeals ruled in *Balele v. Wisconsin Personnel Commission*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998) that the Personnel Commission can dispose of an appeal to it under s. 230.45 Stats., without a hearing when no material issue of fact exists. (Similar to s. 195.04, the statute under which the Personnel Commission operates provides that it "shall...[c]onduct hearings on appeals under s. 230.44".)

Wisconsin statutes neither explicitly provide for nor preclude the commission's disposition of complaints on summary judgment. Wisconsin's administrative procedure statutes, however, provide that a party to a contested case is entitled to a hearing only when "[t]here is a dispute of material fact." See §227.42(1)(d), Stats. We find no Wisconsin authority on the question of whether this statute, or any other, authorizes state agencies to employ summary judgment procedures in administrative adjudications. We find persuasive, however, the analysis in *Puerto Rico Aqueduct & Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600 (1st Cir. 1994). In that case, the First Circuit concluded that an EPA regulation, which provided for an administrative hearing after a preliminary rejection of a permit only when there were "material issues of fact relevant to the issuance of the permit," authorized the EPA to use summary judgment procedures similar to those used in judicial procedures. See also Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, §8.3 (3d ed. 1994 & Supp. 1998) (in the federal context, oral evidentiary hearings are necessary only to resolve disputed material facts, not questions of law or policy). **We conclude that §227.42(1)(d), Stats., provides authority for state agencies, such as the commission, to develop appropriate summary disposition procedures, where the disposition does not require the resolution of any disputes of material fact, unless such summary procedures are otherwise precluded by statute.**

223 Wis.2d at 745-746, 589 N.W.2d at 421-422. Emphasis added. Footnotes omitted.

The hearing examiner previously reviewed the complaint and determined that four valid claims were presented. See the *MEMORANDUM OF PREHEARING CONFERENCE AND NOTICE OF INVESTIGATION AND HEARING* issued by the OCR on December 16, 2008. The four claims were then set forth as the issues for the hearing.

WIFL calls its motion a motion for dismissal, but WIFL both asserts that the complaints do not set forth a claim for which the OCR can grant relief and that even if there is such a valid claim that no facts support the claim.

A summary judgment ruling first requires a determination that a claim has been stated upon which relief can be granted. Claims for which no relief can be granted are dismissed. If a valid claim has been stated, then the presiding officer determines whether a genuine issue exists as to any material fact. If a valid claim has been stated and no genuine issues of fact remain, then summary judgment should be granted.

1. Does WIFL provide inadequate service to Mann by denying UPS the ability to deliver packages door-to-door on Washington Island?

WIFL argues that Mann is asking the OCR to compel the United Parcel Service (UPS) to provide door-to-door service on the island. WIFL argues that UPS has made a business decision not to provide this service. WIFL argues that OCR lacks authority to order UPS to deliver packages door-to-door.

The Commissioner agrees. The OCR has no authority to order UPS to deliver packages door-to-door on the island.

The OCR does have the authority to order WIFL to change discriminatory practices. Based on the deposition testimony of Richard Purinton, President of WIFL, in the past WIFL charged UPS a lower rate than the standard minimum charge set forth in its tariff. Charging a lower minimum rate to UPS than it charged to other customers was a violation of s. 195.11. Mann also states that WIFL has advised UPS that it will now be charged \$5.00 per package, which is the standard minimum charge under WIFL's current tariff. Thus, WIFL has cured its past discriminatory practice.

Mann does not assert that WIFL has refused to allow UPS to ride the ferry to the island and deliver packages door-to-door. Mann asserts UPS did not know it could deliver packages to the island. Even accepting this assertion as true, it would only show that UPS was unaware of an alternative method to deliver packages to the island, but it would not show that WIFL had done anything to stop UPS from doing so.

Mann asserts that WIFL will not guarantee any shipper a space on the ferry on a regular basis. Purinton said there would have to be negotiations to guarantee someone regular space on the ferry. The statement is not necessarily in conflict with the tariff. The tariff simply requests that truckers call and make reservations. The tariff does not guarantee regular space on the ferry to any trucker that does make reservations. More important for the purposes of this ruling, Mann does not assert that WIFL has ever actually refused to allow UPS to make reservations for regular space. Indeed, Mann does not assert that WIFL has in fact ever refused space on the ferry to UPS. Nothing in the record shows that UPS has ever attempted to use the ferry to provide door-to-door service.

Mann asks the OCR to prohibit WIFL from accepting any deliveries from any delivery company, like UPS, that does not deliver door-to-door on the island. Such an order is clearly beyond the scope of the OCR's authority. Such an order would be an attempt to coerce delivery companies to change their policies through the use of the OCR's authority over water carriers. The OCR's public convenience and necessity powers are not general powers that allow the OCR to order anything that the Commissioner believes would promote the general welfare.

Mann's real dispute is with UPS not WIFL. He wants UPS to deliver packages door-to-door on the island. Through Mann's efforts, UPS is well aware of this desire. Mann is attempting to use the OCR's powers to force UPS to deliver packages door-to-door. That remedy is beyond the power of the OCR. If WIFL had done something to stop UPS from traveling to the island, the OCR would have authority to act. Mann has not pointed to any fact that supports such a finding.

Considered in the light most favorable to Mann, there are no facts that support his claim that WIFL has denied UPS the ability to deliver packages door-to-door on the island. The Commissioner dismisses this part of the complaint.

2. Does WIFL discriminate against the Washington Island Shuttle by prohibiting access to the WIFL dock while allowing such access to the Cherry Train Tours?

The OCR conducted a hearing on this complaint. The final decision is set forth below.

3. Does WIFL violate s. 195.08 (11) by charging Mann different rates for different freight classifications?

Mann asserts that this section means WIFL must charge him the same amount to haul gasoline as it does for nails. The section does not require such an absurd result. Water carriers may charge different rates for different types of freight. They have always done so as did railroads when this law applied to them. WIFL could not charge Mann one rate for shipping nails and another person a different rate for shipping nails, but Mann does not allege that he is being charged a different rate from other customers.

Rates and classification of freight are two separate matters. Each type of freight is assigned to a category or class. This assignment process is the classification of freight. The classification of freight determines what rate is applicable for a particular item. Each item within a class will be charged at the same rate. The statute requires that the schedules of classification be uniform for all water carriers. This requirement for uniform classification does *not* require, as Mann urges here, that a single rate be charged for all classes of freight.¹

For example, bakery goods would be one class and building materials would be a separate class. Once items are put into the appropriate classification, then the same rate must be applied by that water carrier to anyone shipping bakery goods. The water carrier could not charge Mann one rate to ship bakery goods and a different rate to someone else to ship bakery goods.

¹ The United States Supreme Court discussed classification in *All States Freight, Inc. v. N.Y., N.H. & H. R. Co.*, 379 U.S. 343, 344-345 (1964):

"A general word as to the basic distinction between class rates and commodity rates may be appropriate before proceeding to the specifics of the present case. Class rates were at the foundation of the railroad rate structure at the time of the enactment of the Interstate Commerce Act in 1887. Such rates are applied to traffic through two separate tariffs. One tariff, the "classification," assigns each of the many thousand commodities carried by rail to one of presently some 30 categories or classes, based upon the commodity's particular characteristics. A companion tariff specifies the rate at which each class of freight will be carried." [Footnote omitted]

The statute does not require that the same rate be charged for all items. No claim upon which relief can be granted has been set forth with regard to s. 195.08 (11). The Commissioner dismisses this part of the complaint.

4. Does WIFL provide inadequate facilities and equipment to store and handle Mann's freight?

The OCR conducted a hearing on this complaint. The final decision is set forth below.

Pursuant to due notice, public hearing was held on the two remaining issues in this matter on May 7, 2009 in Sturgeon Bay, Wisconsin with hearing examiner Douglas S. Wood presiding. The remaining issues were:

Does WIFL discriminate against the Washington Island Shuttle by prohibiting access to the WIFL dock while allowing such access to the Cherry Train Tours?

Does WIFL provide inadequate facilities and equipment to store and handle Mann's freight?

**Discussion of Comments on the Proposed Decision
and the Reissued Ruling on Motion for Summary Judgment**

On August 3, 2009, the hearing examiner issued a proposed decision. At the same time the Commissioner reissued the Ruling on Motion for Summary Judgment. The parties were allowed a 30-day comment period. By letters dated September 1, 2009, the WIFL and Mann each filed comments responding to the proposed decision. By letter dated September 2, 2009, Mann filed additional comments responding to WIFL's comments. The thirtieth day of the comment period was September 3.

Mann requested that the Commissioner vacate the Reissued Ruling on Motion for Summary Judgment. There is nothing new in the record to support the request. The Commissioner declines to vacate the ruling. On the contrary, the Commissioner includes the ruling in this final decision.

The proposed decision conditionally granted Mann access to the WIFL depot grounds to provide public taxi service and denied Mann's claim that WIFL provides inadequate facilities and equipment to store and handle Mann's freight.

As an initial matter, WIFL claims that "the use of the media to sway public opinion has clearly been involved in this case *and in this decision.*" (Emphasis added). WIFL does not specify what role it alleges that media coverage or public opinion has played in this decision.² That the local newspaper would report on the proposed decision is completely unsurprising. Public opinion is irrelevant to this decision. By law the decision must be and is based on the law and the evidence in the record. Any suggestion to the contrary is entirely without foundation.

² WIFL ensured that the Commissioner was aware of such media coverage by attaching a copy of an article from the *Door County Advocate* reporting on the proposed decision.

WIFL does not object to the requirement that Mann be allowed access to the depot grounds with his taxi service. WIFL does, however, object to the requirement that Mann be provided with an exclusive spot. WIFL makes no comment with regard to the denial of Mann's freight storage claim.

Mann supports the proposed decision's requirement that WIFL must allow Mann access to the depot grounds and assign him an exclusive taxi stand stall (provided that certain conditions are met). Mann objects to the hearing examiner's conclusion that WIFL provides adequate facilities to store and handle freight shipped by and to Keith Mann, Mann's Mercantile, and other customers on the island.

The crux of the objections is WIFL's request that the order be changed to allow Mann only non-exclusive access to the depot grounds because there may be other potential taxi services that would want to use the depot grounds. There is no evidence in the record to support a finding or conclusion that there are other persons wishing to provide taxi service. In any event, the order does not prevent WIFL from granting another taxi service access to the depot grounds as long as they are not assigned the same taxi stand stall as Mann. Moreover, granting multiple persons non-exclusive access to the same taxi stand stall would create a potential for conflict within the depot grounds between the competing taxi services.

WIFL requests that the Ultimate Conclusions and Order be changed to grant Mann *nonexclusive* use of a taxi stand stall. If the Commissioner orders nonexclusive use, WIFL requests that the requirement for Mann to pay it compensation be dropped. WIFL asserts that requiring exclusive use would be inconsistent with *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 26 S.Ct. 91 (U.S. 1905) and *Peters et al v. Ahnapee & Western Ry. Co.*, 26 Wisconsin Railroad Commission Reports 18, 20 (1921) (Railroad Commission Docket R-2717). WIFL does not develop the argument beyond this bare assertion.

WIFL requests several amendments to the Findings of Fact, to the Ultimate Conclusions, and to the Order. WIFL requests that a finding that it has offered access to Mann's taxi service for a fee. WIFL bases its request, however, on Exhibit 4, which was admitted at the hearing, but subsequently excluded from evidence in the proposed decision.

WIFL wants the findings and order limited to a 12-passenger vehicle rather than a 16-passenger van. The proposed findings actually referred to "*under 16-person occupancy*". A Commercial Drivers License (CDL) is required for a vehicle that "is designed to transport or is actually transporting the driver and 15 or more passengers".³ See s. 340.01 (8). Mann testified that his van holds 15 passengers, including the driver. The proposed order did not specify the size of the vehicle. The Commissioner adds a requirement that Mann's vehicle have occupancy for less than sixteen (16) persons, including the driver.

³ **340.01 Words and phrases defined.** In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

.....
(8) "Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property and having one or more of the following characteristics:

.....
(c) The vehicle is designed to transport or is actually transporting the driver and 15 or more passengers. If the vehicle is equipped with bench type seats intended to seat more than one person, the passenger carrying capacity shall be determined under s. 340.01 (31) or, if the vehicle is a school bus, by dividing the total seating space measured in inches by 13.

WIFL requests a finding that Chuck Senna did in fact operate on WIFL property, but removed his operations from the depot when asked him to do so. Mann agrees that Senna was previously allowed to operate from the depot. The findings are amended accordingly.

WIFL requests that the following paragraph be dropped:

During the hearing, the hearing examiner observed that relations between the principal parties are less than entirely cordial. The OCR expects that the parties will implement this order in good faith. Failure to do so may result in modification of the order.

The Commissioner declines to delete that paragraph. Each statement in the paragraph is accurate and pertinent.

WIFL requests that the phrase 'public transportation' be added to the findings. The Commissioner thinks the context of the findings makes that point clear, but agrees to add the phrase to avoid any ambiguity. WIFL also requests that the acronym 'WIFL' be added to the phrase 'hours of operation'. The Commissioner agrees.

The Commissioner adopts the proposed order and requires that WIFL grant Mann a taxi stand stall for his exclusive use. The Commissioner does amend the order to specify that Mann shall use a vehicle that is designed to transport or is actually transporting the driver and 14 or fewer passengers.

Appearances:

Parties

Keith Mann, Mann's Mercantile, Inc. and Washington Island Shuttle, LLC.,
Complainant in person,
And by
Robert A. Mich, Jr., Attorney
Kay & Andersen, S.C.
One Point Place, Suite 201
Madison, WI 53719

In Opposition:

Washington Island Ferry Line, Inc.
by
Randall J. Nesbitt, Attorney
PO Box 89
Sturgeon Bay, WI 54235

Of the Office Staff:

Tom Running, Investigator

Findings of Fact

THE COMMISSIONER FINDS:

Mann complains that the Washington Island Ferry Line, Inc. (WIFL) discriminates against the Washington Island Shuttle, LLC (Shuttle) by prohibiting access to the WIFL dock while allowing such access to the Cherry Train Tours and that WIFL provides inadequate facilities and equipment to store and handle Mann's freight.

Having considered all the evidence in this matter, the **Commissioner** finds that:

1. WIFL has and continues to unreasonably discriminate against the Shuttle and to subject the Shuttle to undue and unreasonable disadvantage by denying access to the WIFL dock and depot grounds while allowing such access to the Cherry Train Tours and that such denial of access is contrary to the public convenience and necessity because the Cherry Train Tours provide only limited transportation service and the Shuttle would supplement the public's transportation options on the island.

2. WIFL provides adequate facilities and equipment to store and handle Mann's and all other freight.

WIFL is a common carrier of freight and passengers between the Detroit Harbor dock on Washington Island and the Northport Pier on the mainland (WIFL also can operate from Gill's Rock as weather conditions require). Private autos are also transported on the ferry. WIFL operates its ferries year-round, seven days per week weather permitting. WIFL operates under a certificate of public convenience and necessity issued by the Public Service Commission of Wisconsin (the OCR is the PSC's successor in water carrier regulation).

Keith Mann operates the Washington Island Shuttle which provides unscheduled passenger ground transportation by motor vehicle around the island. The Shuttle offers 'package' trips to set locations and also allows customers to pick their own destination(s). Transportation is arranged by calling the Shuttle office. The Shuttle's depot is located at Mann's Mercantile in the Town Center (also known as the Downtown). However, potential customers are directed to call and arrange for a pickup at the island's Welcome Center.

The Welcome Center is located on the west side of Lobdell Point Road about 775' (measured from the end of the dock ramp to the front walk of the Welcome center), but around the corner and out of view to passengers on the ferry property.

Mann desires to operate his shuttle service within the depot or terminal area of WIFL. He desires to place one vehicle at a time, typically a passenger van (under 16-person occupancy), in a parking stall within the depot or terminal area. The Shuttle would pick up and drop off passengers traveling between Washington Island and the mainland aboard a WIFL ferry. WIFL has refused to allow Mann to use its grounds for this purpose (except for infirm passengers). Depending on business demand, Mann would operate up to three vehicles, but only one would be located within the WIFL grounds at a time.

During the hearing, Mann first stated he wanted to use the WIFL terminal without charge. He later stated he was willing to pay a fee to WIFL for services. Mann also stated he seeks damage from WIFL for his loss of business in 2008. The OCR lacks authority to order an award of such

damages. Even if the OCR did have such authority, Mann did not present sufficient credible evidence to determine the amount of damages or that WIFL's actions caused the damages.

The Cherry Train Tour (CTT) has operated out of the WIFL terminal since 1963. The WIFL recently purchased CTT from the long-time owners Ed and Missy Livingston. The CTT is a narrated tour of the island on a fixed route. The CTT makes selected stops along the route. The CTT does not stop at Mann's Mercantile or at any location in the Town Center. The CTT does not deviate from its established route. The CTT consists of motorized vehicle pulling one or more open air trams.

Prior to its acquisition by WIFL, the CTT had entered into a contractual relationship with WIFL. Under the contract (titled a Memorandum of Understanding), CTT was allowed to use WIFL property, including designated parking for its tour vehicle when loading, unloading, and waiting for passengers. WIFL also allowed CTT to use a 15' by 15' building on the dock property for CTT's office with one parking stall adjacent to this building. The contract included a 'hold harmless' provision in favor of WIFL, required that CTT maintain comprehensive public liability insurance with WIFL as a named insured.

CTT undertook to provide daily tours of the island on a seasonal basis that would promote the island in a positive manner, but retained to itself the determination of the tour route and stops. WIFL and CTT also agreed to cross-promote their respective businesses, including joint sale of tickets.

WIFL undertook to "not permit other narrated tours to operate for the same CTT day traffic customers by allowing positioning of their vehicle from the Island ferry Dock adjacent to the Cherry Train without first obtaining agreement from CTT."

CTT paid WIFL a "lease fee" of \$675 per month from May through October for a total of \$4,050 in 2007. Paragraph 6 of the agreement states, "This fee is for use and ongoing maintenance of WIFL buildings and facilities and business areas..." However, paragraph 8, "Guarantee", states that "The individual signing this Memorandum of Understanding acknowledges that WIFL would not enter into this Memorandum of Understanding without said individual's guarantee of CTT performance of *all* obligations." (Emphasis added). In other words, the contract must be taken as a whole. The lease fee is part of the total exchange of consideration between the parties and cannot be separated from the rest of the agreement.

In the past a number of other businesses provided various transportation services on the island. As far as the record shows, only one of these services, "Vi's Taxi", had enough success to remain in operation. Vi's Taxi was a one-driver, one-car taxi fleet operated by Vi Luellen (phonetic). WIFL allowed Vi's Taxi to operate from the terminal area without charge. WIFL assigned Vi's Taxi a specific parking spot within the dock terminal area. Vi's Taxi provided point-to-point taxi service. This service ended with Vi's death several years ago.

Chuck Senna (phonetic) operated a taxi service on the island for about two years from 2005-2007, but that service ended due to the owner's poor health. Chuck Senna also operated on WIFL property for some time. WIFL states that Senna removed his operations from the depot when asked to do so.

Bicycles and mopeds may also be rented on the island at a business not located within the ferry dock area.

Travelers to the island on WIFL may also bring along their private vehicle to drive around the island as they please.

Keith Mann previously operated a shuttle about ten years ago. He did not have access to the WIFL terminal. The service lasted one year. Mann started the Shuttle in 2007. Mann at times operated his Shuttle on the WIFL grounds without permission in 2007 and continued to do so after being told not to use the dock for that purpose. In 2007, Mann entered the WIFL dock using the Viking Train in addition to his own Shuttle. The Viking Train is a direct competitor of the CTT.⁴

Ed Livingston (former co-owner of CTT) testified that he considered operating a shuttle service in addition to the CTT, but decided not to because 1) he felt he would be competing against himself, i.e. taking away customers from the CTT; and 2) he did not think there would be enough separate business (i.e. customers who would not have otherwise taken the CTT) to make it profitable.

Mann believes he loses some shuttle customers to the CTT because he cannot station his vehicle within the terminal dock. He believes that at least some of these customers would prefer not to ride the CTT, but do not realize that other transportation options are available while they are on the dock.

He also believes he loses other customers, who do not take the CTT, whom he could capture if he was allowed to station his vehicle within terminal grounds. It is unclear why he could not capture these customers by stationing his vehicle at the Welcome Center.

Common Carrier Obligations

By their very nature, common carriers are subject to reasonable government control and regulation. “[A] corporation engaged, under legislative authority, in the transportation of passengers and freight over navigable waters [is] in the exercise of a sort of public office, and has public duties to perform...” *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 292, 26 S.Ct. 91, 94 (U.S. 1905) (Internal citation omitted). Common carriers may make reasonable rules for the use of its property consistent with its duties to serve the public as a common carrier.

Although [the common carrier’s] functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves.

⁴ The Viking Train is a 90-minute narrated tour similar to the CTT. It uses a motorized vehicle to pull open air tram cars. The stops on the Viking Train are not identical to the CTT. The Viking Train is operated from the Island Clipper dock. The Island Clipper is a seasonal passenger-only ferry that operates between Gill’s Rock and Detroit Harbor. The Island Clipper dock is roughly 200 yards north of the WIFL dock measured along the shore.

Id. at 199 US at 294, 26 S.Ct. at 94.

The duty of a common carrier “does not cease the moment the passenger alights from the carrier’s vehicles but continues until the passenger has a reasonable opportunity to leave the carrier’s premises.” *Peters et al v. Ahnapee & Western Ry. Co.*, 26 Wisconsin Railroad Commission Reports 18, 20 (1921) (Railroad Commission Docket R-2717). In that case, the common carrier railroad had entered into an exclusive contract with a taxi company for use of a space adjacent to its passenger platform and on the railroad’s depot grounds. Other cab companies were excluded from using that highly favored and desirable space by that contract.

In *Peters*, the Railroad Commission (a predecessor agency to the OCR) concluded that railroad could enter into such an exclusive contract *provided* that such an arrangement served the “public convenience of those using the station grounds for transportation purposes.” *Peters*, 26 WRRC at 25. The Railroad Commission further concluded that if the exclusive arrangements did not meet the transportation needs of its passengers, then it had jurisdiction to enter a corrective order. Id. The interests of the traveling public, not the taxi company (here, the Shuttle), are the key to the issue.

Water carriers stand in the same regulatory position as railroads did before the federal government preempted the state’s authority to regulate railroads’ rates and services. The WIFL dock terminal is its depot and station grounds. Depot grounds are part of the water carrier. As the Railroad Commission noted in *Peters*, the relationship of passenger and carrier does not end the moment the passenger lands on the island, but continues until the passenger has a reasonable opportunity to leave the carrier’s grounds. Id. at 20.

Thus, the crux of the matter is this: Does WIFL’s contract with the CTT and its related refusal to allow Mann’s Shuttle to operate from WIFL’s dock terminal reasonably and adequately meet the transportation needs of WIFL’s passengers? If the OCR determines that WIFL has made arrangements that adequately meet these transportation needs, then no remedy is needed. If the OCR determines that WIFL’s arrangements do not meet these needs, then a remedy must be fashioned.

The CTT does not provide a full range of transportation services. It only serves those persons wishing to take a guided tour of selected spots on the island located along a defined route. No doubt this tour is a valuable service to many visitors, but it is actually *not* ‘transportation’. Transportation is “the act or business of carrying somebody or something from one place to another, usually in a vehicle.” Encarta® World English Dictionary [North American Edition] © & (P)2009 Microsoft Corporation. CTT provides an excursion tour around the island, not transportation.

Persons wishing to travel to points of their own choosing are not served by CTT. Persons wishing only to travel from the terminal to another specific place on the island are not served by CTT unless that destination happens to be on a CTT tour stop. And even if their destination happens to also be a CTT tour stop, they may only use the CTT to get to their destination by purchasing a ticket for the full excursion.

Based on the testimony in the record some passengers arrive at the island without having first determined what transportation options exist on the island. Some of these ferry passengers walk off the ferry, immediately see the CTT, and following the path of least resistance buy a ticket without realizing that other options exist. If other, non-tour options were as readily available, passengers would benefit from the greater choices. The mere fact that WIFL

leverages its state-authorized common carrier status to boost the business of the CTT (which it now owns) does not violate any duty it owes to the traveling public, but WIFL currently excludes anyone providing transportation on the island from its grounds. That exclusion falls short of serving the “public convenience of those using the station grounds for transportation purposes.” *Peters* at 25.

The downtown area of the island is about three miles from the WIFL dock, which is farther from the dock than most visitors want to walk.

History suggests that a presence within the dock terminal is vital to the business success of motor vehicle transportation services. The only two transportation services on the island that have lasted for long are the CTT and Vi’s Taxi. Each of these has or had immediate access to passengers as they exited the ferries upon arrival on Washington Island.⁵

If Mann’s Shuttle simply duplicated the CTT service, then there would be no justification to require WIFL to allow the Shuttle to operate from its premises. The record establishes that the Shuttle provides a different range of services than the CTT. The Shuttle will transport passengers to any location on the island.

The order requires the WIFL to provide Mann’s Shuttle with reasonable access *for public transportation* to the depot grounds. The order sets forth minimum requirements. The parties will need to fill in the details. If the parties are unable to reach an agreement, then the OCR will do so. “Reasonable access” means the exclusive use of one taxi stand stall within the depot grounds during normal hours of *WIFL* operation. The stall should be located so that it can be readily viewed by passengers after they have disembarked from the ferry.

Such use need not interfere with the orderly and efficient operation of the ferry. WIFL previously allowed access to the depot grounds and provided a parking space to a local taxi service for many years without interfering with the ferry’s passenger and freight operation.

The order requires that the Shuttle shall provide proof of adequate insurance, including but not limited to workers compensation, comprehensive general liability (CGL), and automobile liability. The WIFL shall be a named insured on the CGL policy. The order does not set specific insurance limits, but relies upon the parties to reach agreement. The parties may wish to review the current minimum insurance limits that apply to vendors doing business with the State of Wisconsin.⁶

⁵ The Viking Train may be a third instance, but the record is unclear how long the Viking Train has operated. The Viking Train has direct access to passengers at the Island Clipper dock.

⁶ From the Wisconsin Department of Administration’s procurement manual:

State Procurement Manual

Number PRO-D-34

Effective 3-1-97

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APPENDIX A -- INSURANCE COVERAGE LIMITS REQUIREMENTS

The following minimum insurance limits apply to vendors doing business with the State of Wisconsin. The “Standard Insurance Limits” apply to all procurements except high risk service procurements. The specific requirements for vendors providing high risk services supersede the Standard Insurance Limits.

Link: <http://vendornet.state.wi.us/vendornet/procman/doc/prod341a.doc>

The Shuttle shall pay reasonable compensation to WIFL for the use of its property. WIFL owns the property upon which its dock and terminal are located. Although its common carrier status cloaks the WIFL with public responsibilities, nonetheless its property "...cannot be appropriated in whole or part except upon the payment of compensation." *Donovan v. Pennsylvania Co.*, 199 U.S. at 294, 26 S.Ct. at 94. Again, the order does not set the specific compensation due.

The Shuttle shall use the taxi stand so as not to interfere with the WIFL operations. In order to promote the safe and efficient movement of pedestrian and vehicular traffic, the Shuttle shall promptly obey all WIFL directives with regard to the movement of the Shuttle's vehicle, even if such directives require the Shuttle to temporarily vacate its taxi stand.

The Shuttle shall comply with all other applicable laws, including but not limited to those governing vehicle equipment and appropriate drivers licensure.

Presumably the parties will enter into some type of written contract that memorializes the terms of the Shuttle's use of the WIFL facilities, perhaps including the length of such agreement in addition to compensation and insurance requirements.

All policies must be issued with a 60 day cancellation notice, by an insurance company licensed to do business in the State of Wisconsin, with a minimum AM Best rating of A-, and signed by an authorized agent.

I. Standard Insurance Limits

Workers Compensation (WC):	Statutory Limits
Each Accident	\$ 100,000
Disease - Policy Limit	\$ 500,000
Disease - Each Employee	\$ 100,000

Commercial General Liability (CGL):	
General Aggregate including	
Products & Completed Operations	\$ 1,000,000
Each Occurrence	\$ 1,000,000

Automobile Liability:	
Combined Single Limit	\$ 1,000,000

Transportation: *This service applies primarily to the transportation of people.*

Workers Compensation (WC): Required for all Contracts
NO EXEMPTIONS

Commercial General Liability (CGL):	
General Aggregate including	
Products & Completed Operations	\$ 1,000,000
Each Occurrence	\$ 1,000,000

Automobile Liability - in-state	
Combined Single Limit	\$ 2,000,000

The record does not contain adequate evidence to determine the appropriate amount of either insurance limits or compensation for use of the WIFL property. If the parties fail to reach an accord, then one or both of them will need to request that the OCR conduct another hearing to take evidence sufficient to resolve these matters.

During the hearing, the hearing examiner observed that relations between the principal parties are less than entirely cordial. The OCR expects that the parties will implement this order in good faith. Failure to do so may result in modification of the order.

Does WIFL provide inadequate facilities and equipment to store and handle Mann's freight?

The Commissioner finds that WIFL provides adequate facilities to store and handle freight shipped by and to Keith Mann, Mann's Mercantile, and other customers on the island. WIFL stores freight delivered to it for delivery to and from the island in secure sheds, one on the island and one on the mainland. WIFL also has forklifts at each location to move freight as necessary. Freight is moved by carts from the ferry to the shed and vice versa. WIFL secures and covers the freight with a tarp while it is onboard the ferry.

These facilities and services provide adequate service for freight shipments.

Evidentiary ruling. Over Mann's objection, the hearing examiner admitted two exhibits (4 and 5) that related to discussions of settlement of the claims at stake in this proceeding. The hearing examiner subsequently concluded and the Commissioner agrees that those documents should not have been admitted. Neither the hearing examiner nor the Commissioner relied upon anything in those exhibits in reaching their respective decisions. Wisconsin Rule of Evidence 904.08 excludes evidence of compromise or settlement negotiations for the purpose of proving or disproving a claim. While the rules of evidence do not strictly apply to administrative proceedings (s. 227.45), the same underlying principles suggest that evidence from settlement negotiations should be excluded from evidence in administrative proceedings as well.

Ultimate Conclusions on the Issues

THE COMMISSIONER CONCLUDES:

1. That Washington Island Ferry Line, Inc. has and continues to unreasonably discriminate against the Washington Island Shuttle, LLC and to subject the Washington Island Shuttle, LLC to undue and unreasonable disadvantage by denying access to its depot grounds while allowing such access to the Cherry Train Tours and that such practices harm the public convenience and impairs service to the general public.

2. That in order to halt the discriminatory practices and to promote the public convenience Washington Island Ferry Line, Inc. shall allow the Washington Island Shuttle, LLC access to its depot grounds in order to provide ground transportation to the general public, subject to reasonable rules and regulations.

3. That Washington Island Ferry Line, Inc. provides adequate facilities and equipment to store and handle Mann's and all other freight.

Conclusion of Law

THE COMMISSIONER CONCLUDES:

That the jurisdiction of the Office of the Commissioner of Railroads under §§195.05, 195.08, 195.11, 195.12, and 195.19, Stats., extends to this matter. Accordingly, the Office enters an order consistent with the findings of fact.

Order

THE COMMISSIONER ORDERS:

1. That the **Washington Island Ferry Line, Inc.** shall allow **Washington Island Shuttle, LLC** reasonable access, as defined below, to its depot grounds on Washington Island in the Town of Washington, Door County provided the conditions set forth in Paragraphs 2-4 are met. 'Reasonable access' means that the **Washington Island Ferry Line, Inc.** shall provide the **Washington Island Shuttle, LLC** with one taxi stand stall for its exclusive use within the depot grounds during WIFL's normal hours of operation. The **Washington Island Shuttle, LLC** shall use a vehicle that is designed to transport or is actually transporting the driver and 14 or fewer passengers.

2. That **Washington Island Shuttle, LLC** shall provide proof of Workers Compensation, Commercial General Liability (CGL), and Automobile Liability insurance coverage. The **Washington Island Ferry Line, Inc.** shall be a named insured on the CGL policy.

3. That in order to promote efficient and safe vehicular and pedestrian movement, the **Washington Island Shuttle, LLC** shall comply with all directives of the **Washington Island Ferry Line, Inc.** regarding the movement of its vehicles within the dock area.

4. That **Washington Island Shuttle, LLC** shall pay reasonable compensation to the **Washington Island Ferry Line, Inc.** for the use of the ferry line's property.

5. That the complaint that the **Washington Island Ferry Line, Inc.** provides inadequate facilities and equipment to store and handle Mann's and all other freight is **dismissed**.

6. That the complaint that the **Washington Island Ferry Line, Inc.** provides inadequate service to Mann by denying UPS the ability to deliver packages door-to-door on Washington Island is **dismissed**.

7. That the complaint that the **Washington Island Ferry Line, Inc.** violates s. 195.08 (11) by charging Mann different rates for different freight classifications is **dismissed**.

8. That the **Washington Island Ferry Line, Inc.** shall pay any cost assessed to the water carrier pursuant to §195.60, Stats., for the investigation of this matter by the Office. The water carrier shall not pass on those assessment costs either directly or indirectly.

9. That jurisdiction is retained.

Dated at Madison, Wisconsin, OCT 15 2009.

By the Office of the Commissioner of Railroads.



Roger Breske
Commissioner of Railroads

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