

CARSON AMBULANCE SERVICE

IBLA 72-208

Decided December 29, 1972,

Appeal from the decision of the Nevada State Office of the Bureau of Land Management holding for rejection appellant's right-of-way application N-4431 if advance rental and payment for unauthorized use was not tendered within the prescribed time.

Affirmed.

HEADNOTES:

Rights-of-way: Applications -- Rights-of-Way: Act of March 4, 1911

Where an applicant for a right-of-way to be used as a communications site claims exemption from payment of all service fees and charges for use and occupancy of the land for the reason that the ambulance service operated by the applicant receives a municipal subsidy, the exemption will be denied if appellant does not show that the project is "municipally operated", or it is exclusively a non-profit project, or that the use and occupancy will be exclusively for a municipally operated project.

Rights-of-way: Applications -- Rights-of-Way: Act of March 4, 1911

Where governmental criteria are established for the conduct of a particular business, the expense of meeting those criteria are a necessary cost of doing business and the absence of any profit to be derived from such expenditures does not entitle the proprietor to the free use of public land which he needs to meet the standard imposed.

APPEARANCES: Robert A. Grayson, Esq., Carson City, Nevada, for appellant.

OPINIONBY: STUEBING

OPINION BY MR. STUEBING

On August 20, 1970, Warren Barber, doing business as Carson Ambulance service, applied for a right-of-way pursuant to the Act of March 4, 1911, as amended, (36 Stat. 1253, 43 U.S.C. 961 (1970)), to construct and maintain a communications site for the transmission by radio of emergency ambulance service calls.

Considerable delay in perfecting the application was experienced. This was attributable to the applicant's failure to submit timely the proper supporting documents required by the regulations in 43 CFR Subpart 2800 (formerly 43 CFR 2234 (1970)), particularly the maps showing the location of the requested right-of-way. 1/

On August 25, 1970, long prior to the perfection of the application, the applicant requested advance permission to construct a radio tower and a six foot by six foot block building on the site. While this request was pending appellant entered the site and constructed the improvements without authorization.

A field examination and appraisal by Bureau personnel resulted in a determination that the right-of-way application should be approved, and that the fair market value of the site required a rental of \$ 300 per annum. In addition, it was determined that the applicant should pay for the period of unauthorized use of the site from January 1, 1971, which at that time amounted to \$ 225.

This was explained to the applicant in a letter dated September 13, 1971, sent by certified mail and received by the appellant the following day, as evinced by the return receipt card. The letter informed the applicant that his use of the site was in trespass and requested immediate payment of \$ 225 rental covering past use and \$ 300 advance rental for the first year of use to be authorized. The applicant did not submit the rental or respond to the letter in any way.

Accordingly, by its decision of November 17, 1971, the Nevada State Office held the application for rejection, and it is from that decision that this appeal is taken.

Appellant first contends that the ambulance service is subsidized to the extent of \$ 1,000 per month by the consolidated municipality of Carson City, Nevada, for the reason that the community has

1/ Our review indicates additional discrepancies in the submission and handling of the application which are not referred to in the record. There seems to be no showing of individual qualifications by the applicant as required by 43 CFR 2802.1-4. A formal protest against the use of the site by Carson Ambulance Service was lodged by Washoe Empire, a television broadcasting firm with transmission facilities on this same hill. No disposition of this protest appears in the record. A recommendation by the District Manager that the applicant be required to submit a bond in the amount of \$1,000 apparently received no attention.

an insufficient population to support an independent profit oriented emergency ambulance service. By reason of this subsidy, appellant argues, Carson Ambulance Service is a quasi-municipal project and is therefore exempt from the payment of rentals and fees under the provisions of 43 CFR 2802.1-7(c)(1) (1972).

In pertinent part, that regulation provides:

No charge shall be made for the use and occupancy of lands under the regulations of this part * * * where the use and occupancy are exclusively for * * * municipally operated projects, or nonprofit * * * projects. (Emphasis added.)

No showing has been made by appellant that the service is municipally operated, or that it is a non-profit venture, or that the communications site will be used exclusively for municipal service. While we can recognize the probable benefit derived by the community from the operation of a private emergency service of this kind, the receipt of a municipal subsidy does not bring the business within the ambit of the regulations.

Appellant further contends that use of the site is necessary in order to bring the ambulance service into compliance with certain federal and state laws and regulations which impose criteria for the use of two-way communications in emergency vehicles. It is asserted that the subject federal land is the only available accessible site for the required facility, and it is alleged that appellant will incur additional expense through the operation of the facility on the subject site with no increase in profits or revenues.

Assuming that these allegations are correct, none of these facts qualify the appellant to receive an exemption from the payment of all fees and rentals. It is not uncommon that the operators of businesses must, from time to time, incur expenses to meet criteria imposed by a governmental agency for the conduct of that particular business, and that these expenses do not generate sufficient additional revenue to cover the cost. Examples of such criteria are legion in the areas of sanitation, safety, pollution control and regulation of public transportation. Meeting such criteria is simply an expense of engaging in the business concerned and does not entitle the operator to receive from the federal government the free use of land to ameliorate such expense.

Finally, we note that the theory that appellant is exempt from the payment of service fees and rentals was apparently newly developed at the time of the filing of this appeal, as no earlier reference thereto is contained in the case record, and the \$10 service fee was tendered by the appellant with his initial application. This payment would not have been required under 43 CFR 2802.1-2 if appellant had then asserted and established his qualification for exemption from payment of rentals and fees.

This case is comparable to Southern Oregon Timber Industries Association, A-30815 (March 26, 1968), in which this Department held that where a non-profit organization furnishes radio service to members that use the service as an integral part of their regular profit-seeking operations, the right of way would not be exclusively for a non-profit project and would not be entitled to use of the site without charge. Nevertheless, it was held in that case that the charge imposed might reflect the extent of the use of the right of way and the value of the operation as part of a distress and emergency service communication.

The case at hand differs from Southern Oregon Timber Industries Association in that the appellant in this case has not alleged that it is a non-profit project. Moreover, since it is in the business of deriving profit from responding to emergency calls, it is in a different category than was the appellant in Southern Oregon Timber Industries Association, in that there the appellant devoted a portion of its radio traffic to the transmission of emergency messages unrelated to the business of its constituent members, and received no remuneration in any form for such service. The decision in that case also apparently concluded that the appraisal of the site was based upon an incorrect premise. There is no contention in this case that the appraised value of the site is incorrect.

It may be that Carson Ambulance Service can demonstrate to the Nevada State Office that it is entitled to an adjustment on the basis of the same considerations that formed the rationale of the Department's decision in Southern Oregon Timber Industries Association. If so, the Nevada State Office is authorized to make whatever adjustment is appropriate. Such a showing, however, is not reflected by the record before us.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Joan B. Thompson, Member

Anne Poindexter Lewis, Member.

