WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,664

IN THE MATTER OF:	Served December 17, 2010
VGA, INCORPORATED, WMATC Carrier No. 445, Investigation of Violation of Seating Capacity Restriction and Unauthorized Transfer of Assets	Case No. MP-2009-108
ROYAL SYSTEM SERVICES CORP., Trading as VGA GROUP, Investigation of Unauthorized Operations	Case No. MP-2009-109

This consolidated proceeding is before the Commission on respondents' request for reconsideration of Order No. 12,439, served June 11, 2010.

Order No. 12,439 revoked Certificate No. 445 for the willful failure of VGA to comply with Article XI, Sections 6(a) and 14, of the Compact, Commission Regulation Nos. 58, 60, and 67, and the seating capacity restriction in Certificate No. 445.

Order No. 12,439 also assessed the following civil forfeitures for the following reasons:

- Against VGA, Incorporated, (VGA), in the amount of $271,250 for knowingly and willfully violating Article XI, Section 6(a), of the Compact by exceeding the 15-person seating capacity restriction in Certificate No. 445 on 725 days and for operating without sufficient insurance in violation of Regulation No. 58 on 360 of the 725 days;

- Against VGA in the amount of $250 for knowingly and willfully violating Article XI, Section 11(a), of the Compact by transferring Certificate No. 445 without Commission approval; and

- Against Royal System Services Corp., trading as VGA Group, (Royal), in the amount of $141,000 for knowingly and willfully violating Article XI, Section 6(a), of the Compact by transporting passengers for hire between points in the Metropolitan District without a certificate of authority and without evidence of insurance on file with the Commission on 282 days.

Finally, Order No. 12,439 stipulated that the following outstanding fees and report would remain due from VGA: the $50 late

insurance fee due under Regulation No. 67-03(c); the annual report for 2010 due under Regulation No. 60-01; the $150 annual fee for 2010 due under Regulation No. 67-02; and the $200 in late fees due under Regulation No. 67-03(a),(b).

I. RESPONDENTS' APPLICATION FOR RECONSIDERATION

Under Title II of the Washington Metropolitan Area Transit Regulation Compact, Article XIII, Section 4,[1] a party to a proceeding affected by a final order or decision of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved, and stating specifically the errors claimed as grounds for the reconsideration.[2] If the application is granted, the Commission shall rescind, modify, or affirm its order or decision with or without a hearing, after giving notice to all parties.[3]

Respondents timely applied for reconsideration of Order No. 12,439 on July 12, 2010.[4] Respondents argue that the Commission committed various errors in issuing Order No. 12,439, and urge the Commission to rescind Order No. 12,439 in its entirety. Alternatively, respondents urge the Commission to: (1) limit the revocation of Certificate No. 445 to one year; (2) drastically reduce the size of the forfeitures assessed in Order No. 12,439; or (3) grant such other further relief as justice may require.

The Commission granted the application on August 9, 2010, in Order No. 12,502, and offered respondents an opportunity to present additional evidence in support of their application. More than four months have passed without further proffer.

We now turn to an analysis of respondents' specific allegations of error.

II. DISCUSSION OF ALLEGED ERRORS

The allegations of error are enumerated in seven paragraphs. We consider each in turn.

A. The civil forfeitures ("fines") levied under the Order are excessive and oppressive in fact, and were levied without providing the Respondents an opportunity to be heard in mitigation. The fines are so substantial as to threaten the financial viability of these small minority owned businesses. Had they been given the opportunity, the Respondents would have presented information of their respective financial circumstances and the efforts of VGA in recent months to subcontract the AFRH contract to another carrier and the frustration

[1] Pub. L. No. 101-505, § 1, 104 Stat. 1300, 1311 (1990).

[2] Compact, tit. II, art. XIII, § 4(a).

[3] Compact, tit. II, art. XIII, § 4(d).

[4] Although technically the deadline was June 11, 2010, because June 11 fell on a Sunday, respondents had until July 12 to file their application under Commission Rule No. 7-01.

of those efforts by the insurance companies that would be involved in that arrangement. WMATC also should have considered that Respondents do not anticipate bidding for further transportation of persons for hire in the Metropolitan District in the foreseeable future. The imposition of such extensive civil fines without a better opportunity for Respondents to be more involved in the process is a deprivation of property without due process of law.

Article XIII, Section 6(f), of the Compact provides that a person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate, shall be subject to a civil forfeiture of not more than $1,000 for the first violation and not more than $5,000 for any subsequent violation and that each day of the violation constitutes a separate violation.

The Commission applied Commission precedent in setting the daily forfeiture amounts. Respondents offer no analysis of that precedent. See the discussion below in Section B.

As for opportunity to present evidence of financial circumstances and of efforts to comply with the Compact and Commission regulations, respondents' first opportunity to present evidence was in response to Commission Order No. 12,109, served August 3, 2009. Respondents were directed to produce vehicle lists, copies of vehicle registration cards, and copies of safety inspection certificates. Respondents also were directed to produce any and all books, papers, correspondence, memoranda, contracts, agreements, and other records and documents, including any and all stored electronically, within respondents' respective possession, custody or control relating to the transportation of passengers for hire between points in the Metropolitan District during the period beginning January 1, 2007, as to VGA, and June 1, 2008, as to Royal, and ending August 3, 2009.

VGA produced a vehicle list and copies of vehicle registration cards and safety inspection certificates but nothing else. Royal did not produce anything.

Respondents' second opportunity to present evidence was in response to Commission Order No. 12,192, served October 15, 2009, which gave respondents 30 days to show cause why the Commission should not revoke Certificate No. 445 and assess civil forfeitures against respondents for, among other things, failing to produce documents as directed by Order No. 12,109. Order No. 12,192 additionally stipulated that respondents would have 15 days to request an oral hearing. Respondents did not request one.

VGA eventually produced documents containing financial information relating to its operations during the relevant time period. If VGA possessed other documents bearing on those operations, it should have produced them in response to Order No. 12,109 and subsequently Order No. 12,192.

Royal has yet to produce any documents in this combined proceeding. If Royal possessed documents bearing on operations conducted during the relevant time period, it should have produced them in response to Order No. 12,109 and subsequently Order No. 12,192.

Although respondents had ample opportunity to present evidence of their "respective financial circumstances" prior to issuance of Order No. 12,439, the Commission offered respondents an opportunity to present such evidence on reconsideration. Order No. 12,502, served August 9, 2010, granted respondents an opportunity to demonstrate that their unlawful operations yielded little or no profit. The Commission has admitted such financial evidence on reconsideration in the past for the purpose of establishing a basis for partially suspending a civil forfeiture.[5] More than four months have passed, and respondents have yet to respond.

As for VGA's efforts "in recent months" to find a suitable subcontractor, respondents should have produced evidence of VGA's efforts to find a subcontractor in support of the application for reconsideration. It has been the Commission's experience that other carriers have been successful in making such arrangements under similar circumstances. Moreover, because VGA waited until the threat of sanction was all but certain before beginning the process of looking for a subcontractor, evidence of such efforts would carry little weight as grounds for mitigating years of violations.

Finally, respondents' "anticipation" that they will not bid on any passenger transportation contracts in the Metropolitan District in the foreseeable future hardly justifies compromising any of the sanctions handed down in Order No. 12,439. In respondents' case, the public interest demands certainty.

B. The Respondents believe that the fines imposed in these cases have no relationship to any meaningful guidelines and are excessive under whatever ad hoc WMATC precedent as may exist.

The "meaningful guidelines" of relevance may be found in the Compact itself, which as noted above provides in Article XIII, Section 6(f), that a civil forfeiture shall be "not more than $1,000 for the first violation and not more than $5,000 for any subsequent violation" and that "each day of the violation constitutes a separate violation." The daily forfeiture amounts assessed in Order No. 12,439 are consistent with those limitations.

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[5] *See In re Skyhawk Logistics, Inc.,* No. MP-09-044, Order No. 12,242 (Dec. 2, 2009) (discussing financial evidence introduced on reconsideration to establish basis for reducing forfeiture); *see also In re Jimmie Lee Davenport & James L. Hughes*, No. MP-04-164, Order No. 9987 (Oct. 11, 2006) (discussing unjust profits on reconsideration); *In re Zohery Tours Int'l, Inc.*, No. MP-02-46, Order No. 7096 (Mar. 19, 2003) (same).

In setting the daily forfeiture amounts, the Commission expressly took into consideration Commission precedent that distinguishes carriers operating without authority and without adequate insurance, on the one hand, from carriers operating without authority but with adequate insurance, on the other – assessing a larger amount against those without adequate insurance.[6] That $500 per day/$250 per day distinction is amply supported by the precedent cited in Order No. 12,439. Respondents offer no analysis of that precedent and cite none to the contrary.

C. Under Public Law 101-505 (the "Compact"), WMATC is without jurisdiction to impose civil forfeitures, with that power being reserved thereunder to the United States District Court. Similarly, any finding as to "willful violation" is within a section of the Compact that speaks to what a court may find, and if found, then do. It is only by this construction of the Compact that due process is preserved.

The Commission faced this argument in *In re Madison Limo. Serv., Inc.*, No. AP-91-39, Order No. 3914 (Mar. 25, 1992), shortly after the civil forfeiture provision was added to the Compact and consented to by Congress. It is helpful at this point to review the Commission's holding in that case.

> The Compact, Title II, Article XIII, Section 6(f)(iii) provides that "Civil forfeitures shall be paid to the Commission with interest as assessed by the court." In addition, the Compact, Title I, Article X, Section 2 provides that "[i]n accordance with the ordinary rules for construction of interstate compacts, (the Compact) shall be liberally construed to effectuate its purposes." Applying the ordinary rules of statutory construction, the limiting phrase, "as assessed by the court," should be construed to modify only the last antecedent, "interest." Hence, only interest would be assessed by the court, not the underlying forfeiture. Interest would be necessary only if the assessed party did not pay the forfeiture promptly and court action were required to enforce the Commission's order.
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> This construction effectuates purposes for which the Compact was amended. Prior to amendment of the Compact, effective February 1, 1991, a carrier's operating authority could be suspended or revoked at the administrative level -- putting the carrier completely out of business -- but a simple $50 fine required a criminal conviction. This anomaly has been removed. The Commission now may apply its expertise in fashioning an

[6] Order No. 12,439 at 12.

> appropriate remedy when suspension or revocation either is unwarranted or has failed, as in the instant case, which is particularly important now that the standard for granting a certificate has been lowered from "public convenience and necessity" to "consistent with the public interest." At the same time, administrative efficiency has been enhanced and an unnecessary burden removed from the judiciary.
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> Madison's reading, which proceeds from an oversimplified analysis of the section, runs contrary to the ordinary rules of construction and would defeat purposes for which the Compact was amended. Accordingly, we affirm our holding implicit in Order No. 3891 that the Compact authorizes administrative assessment of civil forfeitures.

Order No. 3914 at 3-4 (footnotes omitted).

Not only would respondents' construction of the Compact's civil forfeiture provision diminish its effectiveness as a sanction for minor offenses, defeat application of Commission expertise, and undermine the Compact's goal of uniform regulation throughout the Washington Metropolitan Area Transit District, respondents' construction would have the perverse effect of increasing the burden on carriers such as respondents. Under Article XIV, Section 1, of the Compact:

> (a) A carrier shall bear all expenses of an investigation or other proceeding conducted by the Commission concerning the carrier, and all litigation expenses, including appeals, arising from an investigation or other proceeding.
> (b) When the Commission initiates an investigation or other proceeding, the Commission may require the carrier to pay to the Commission a sum estimated to cover the expenses that will be incurred under this section.
> (c) Money paid by the carrier shall be deposited in the name and to the credit of the Commission, in any bank or other depository located in the Metropolitan District designated by the Commission, and the Commission may disburse that money to defray expenses of the investigation, proceeding, or litigation in question.
> (d) The Commission shall return to the carrier any unexpended balance remaining after payment of expenses.

We do not believe that the signatories and Congress contemplated that the Commission would be forced to choose between routinely subjecting carriers to this additional burden for minor offenses, on the one hand, or forgoing the imposition of civil forfeitures as a sanction for all but major offenses, on the other.

Finally, respondents cite no authority for the proposition that administrative assessment of civil forfeitures violates due process. We are unaware of any such authority. Case law is to the contrary.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (Jan. 19, 1994), the Supreme Court denied a Due Process challenge to the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act). The Mine Act provided for administrative assessment of civil penalties by the Department of Labor's Mine Safety and Health Administration (MSHA) and empowered the Secretary of Labor to enjoin habitual violations of health and safety standards and to coerce payment of civil penalties through suit in Federal District Court. Mine operators enjoyed no corresponding right to sue the agency but were constrained to complain to the Federal Mine Safety and Health Review Commission and from there to a United States Court of Appeals. Thunder Basin argued that this violated its rights under the Federal Due Process Clause. The Court disagreed. The Court held that because the statute provided for adequate judicial review of agency action and Thunder Basin faced no serious threat of prehearing deprivation, the Mine Act's exclusive statutory review scheme did not violate Due Process.

We find that respondents are in as good a position as Thunder Basin was. As noted above, respondents had multiple opportunities to present any and all evidence bearing on the issues raised in this combined proceeding, including evidence of respondents' financial condition. Order No. 12,502 specifically offered respondents an opportunity to present financial evidence that might warrant partial suspension of the civil forfeitures assessed in Order No. 12,439. Respondents may seek appellate review of Order No. 12,439 and this order in the United States Court of Appeals for the Fourth Circuit or in the United States Court of Appeals for the District of Columbia Circuit pursuant to Article XIII, Section 5, of the Compact and the original Congressional consent provisions in Section 6(1) of Public Law 86-794.[7]

D. The transport of persons by a federal contractor under the subject AFRH contract in these cases was "transportation performed by the federal government" within the meaning of the Compact, and thus excluded from the purview of the Compact. Alternatively, the federal procurement rules and regulations governing the said contract provide a pervasive scheme of regulation - including provisions for USDOT inspection of vehicles and insurance requirements - that preempts these matters. WMATC should not be permitted to impose sanctions bottomed on failures to meet insurance and inspection requirements inconsistent with that imposed under federal law and the subject contract.

"In determining the party who in reality is performing a given transportation service, the overall test of substance involving an

[7] Act of Sept. 15, 1960, Pub. L. No. 86-794, § 6(1), 74 Stat. 1031, 1051 (1960).

inquiry into all pertinent factors – including control, responsibility, and assumption of financial risk – is the decisive consideration. Usually, no single factor is by itself conclusive."[8]

The record before us does not support a finding that the federal government performed the transportation at issue in this proceeding. The agency obligated to pay VGA under the Armed Forces Retirement Home (AFRH) contract was the Department of the Treasury, Bureau of Public Debt, in Parkersburg, WV. There is nothing in the record to indicate that the AFRH or the Bureau of Public Debt performed the transportation at issue. Respondents, on the other hand, acknowledge that the AFRH contract required VGA to insure its operations against, hence assume the risk of, third-party claims, and it is clear from a reading of the AFRH contract that all of the control and responsibility was placed on the Contractor, as illustrated by the following provisions.

- Section 1.1: "The Contractor shall provide all management, supervision, personnel, services, and general and specialized equipment, except that specified herein as Government-furnished pursuant to FAR 52.245-2. . . . The Contractor shall perform Transportation services as described herein for the Armed Forces Retirement Home (AFRH) located in Washington, D.C."

- Section 1.3: "The Contractor shall provide various transportation services to the AFRH residents including, but not limited to, off-campus shuttle bus service, recreational trips, hospital and doctor visits and special events in the Washington D.C. Metropolitan area."

- Section 1.4: "The Contractor shall assume total responsibility for all requirements stated herein on the Contract start date."

- Section 1.5: "The Contractor shall perform all related administrative actions required to provide the services as specified herein. The Contractor shall manage the total work effort associated with transportation and all other services required herein to ensure the timely completion of these services. Included in this function will be a full range of management duties including, but not limited to, planning, scheduling, report preparation, establishing and maintaining records, and quality control."

- Section 2.5: "The Government will make available to the Contractor, on a one-time basis, in 'as is' condition. Government-furnished Flexible Floor Plan Bus — 21 Ambulatory to 7 Wheelchair Capacity by International. The equipment is not expected to be sufficient to meet the requirements of this

[8] *Washington, Va. & Md. Coach Co. v. Scenic Coach Rental, Inc.*, No. 165, Order No. 837 at 4-5 (July 10, 1968).

Contract. [Government furnished equipment] determined to be no longer suitable, safe, or repairable for intended use that is returned to the Government will not be replaced in kind by the Government. The Contractor shall continue to be responsible for all work performed under this Contract."

- Section 3.1: "The Contractor shall furnish all equipment including motor vehicles, and administrative equipment for performance of work required under this Contract."

- Section 3.2: "The Contractor shall repair and maintain all Contractor-Owned, Contractor-Operated (COCO) vehicles and equipment in a safe and serviceable condition suitable for their intended use."

The AFRH contract also contradicts respondents' argument that they should not be bound by WMATC requirements. Under Section 1.4: "The Contractor shall complete all work in accordance with all applicable Federal, State, and local laws, regulations, and industry standards." Under Section 1.8: "The Contractor and all Contractor personnel shall operate all vehicles according to local and State laws and regulations."

E. The Commission's determinations that the AFRH contract was among the assets transferred from VGA Incorporated to Royal System Services Corp., and that the latter company was engaged in unauthorized operations in violation of the Compact, are incorrect and are without substantial basis in fact. As a matter of federal law the contract cannot be transferred without the contacting officer signing a novation agreement.

The Commission's finding that Royal performed the AFRH contract in violation of the Compact rests on the evidence in VGA's contemporaneous records and in respondents' counsels' correspondence with agency officials establishing that the sale of assets to Royal and Royal's hiring of VGA employees to operate those assets to perform the AFRH contract took place on June 1, 2008, as recited in respondents' Articles of Sale and Transfer filed with the Maryland Department of Assessments and Taxation[9] – not on any finding that the AFRH contract had been legally transferred to Royal. Royal offers no analysis of the Commission's discussion of that evidence in Order No. 12,439. Royal's summary denial of wrongdoing, therefore, offers no basis for changing our finding.

F. The Commission's finding of willful violation is incorrect, and is without substantial basis in fact. The Respondents sought guidance as to how to best proceed and then did seek to find a "partner" pending resolution of the insurance issue to reinstate VGA Incorporated Certificate of Authority. As stated above, those efforts

[9] Order No. 12,439 at 6-9.

proved to be fruitless. Royal did nothing to willfully violate the Compact, any regulation thereunder, or any Commission Order. Willfulness is, of course, a state of mind. Mere violations do not presuppose willfulness: there may be technical violations while one is trying to do the right thing. There was no testimony in these cases, so there was no occasion in which the Commission might gauge the credibility and veracity of witnesses.

As noted above, a person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than $1,000 for the first violation and not more than $5,000 for any subsequent violation. In addition, the Commission may suspend or revoke all or part of any certificate of authority for willful failure to comply with a provision of the Compact, an order, rule, or regulation of the Commission, or a term, condition, or limitation of the certificate.[10]

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.[11] The terms "willful" and "willfully" do not mean with evil purpose or criminal intent; rather, they describe conduct marked by careless disregard whether or not one has the right so to act.[12] Once a carrier is apprised of Compact requirements, the onus is on the carrier to determine whether its operations are in compliance.[13] Violations occurring thereafter are viewed as knowing and willful.[14] Employee negligence is no defense.[15] "To hold carriers not liable for penalties where the violations . . . are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.[16]

As noted in Order No. 12,439, the Commission specifically required VGA to demonstrate that none of its vehicles seated more than 15 persons during VGA's 2003 restricted authority application because evidence had surfaced that VGA was in possession of one or more larger capacity vehicles. VGA nonetheless bid on the AFRH contract in 2005 knowing that it did not possess the requisite authority, and VGA made no attempt to acquire the requisite authority until April 2008 –

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[10] Compact, tit. II, art. XI, § 10(c).

[11] *In re Skyhawk Logistics, Inc.*, No. AP-07-195, Order No. 11,693 at 3 (Nov. 19, 2008); *In re Emanco Transp. Inc*, No. AP-07-016, Order No. 11,304 at 4 (Apr. 24, 2008).

[12] Order No. 11,693 at 3; Order No. 11,304 at 4.

[13] Order No. 11,693 at 3.

[14] Order No. 11,693 at 3.

[15] *In re Couples, LLC, t/a Couples Limos.,* No. MP-09-134, Order No. 12,330 (Mar. 8, 2010); *In re* Zee *Transp. Serv., Inc.*, No. MP-07-120, Order No. 10,671 (Aug. 8, 2007); *In re Jimmie Lee Davenport & James L. Hughes*, No. MP-04-164, Order No. 9851 (Aug. 18, 2006).

[16] *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

nearly three years after it was selected as the winning bidder.[17] If that is not willful, nothing is.

Likewise, Royal knew before it commenced operating the AFRH contract that WMATC authority was required to operate the AFRH contract, that it did not possess the requisite WMATC authority, and that VGA did not possess the requisite WMATC authority.[18] Royal operated the AFRH contract for over one year notwithstanding that knowledge. If that is not willful, nothing is.

Finally, although we do not see how witness credibility and veracity enter into the equation, the absence of oral testimony in the record is the product of respondents not requesting an oral hearing as permitted by Order No. 12,192, served October 15, 2009.

G. The smallness of the Commission's staff, the long tenure, and the necessary effects of "corporate memory", so corrupt the process as to have denied the Respondents due process of law. There is no division at the Commission between its prosecutorial and adjudicative functions. The prevailing "memory" of its enforcement/decision-makers precludes a fair and unbiased determination of any issue of willfulness.

The Commission's staff does not act as adjudicator in formal investigations such as those in this combined proceeding. The findings, conclusions, and decision to revoke Certificate No. 445 and levy civil forfeitures in this proceeding were rendered by the Commission's appointed members pursuant to Article V of the Compact, and the Commission's Executive Director was directed to make known the Commission's decision, as noted just above the Executive Director's signature on Order No. 12,439.

The Commission's "memory" – the precedent contained in the orders the Commission has issued since its inception – has been available on the Commission's website in a searchable format since 2007.

III. CONCLUSION

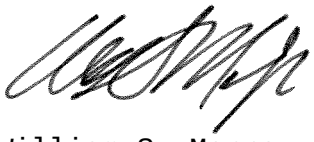
The Commission finds respondents' allegations of error are without merit and therefore affirms Order No. 12,439 in its entirety.

IT IS SO ORDERED.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER, HOLCOMB, AND KUBLY:

[17] Order No. 12,439 at 9-11.

[18] Order No. 12,439 at 11.



William S. Morrow, Jr.
Executive Director