

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,817

IN THE MATTER OF:

Served April 19, 2011

Application of ACADEMY EXPRESS,            )  
L.L.C., Trading as ACADEMY, for a        )  
Certificate of Authority --                )  
Irregular Route Operations                )

Case No. AP-2011-037

Applicant seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District. The application is unopposed.

Article XI, Section 7(a), of the Washington Metropolitan Area Transit Regulation Compact<sup>1</sup> provides that the Commission (WMATC) shall issue a certificate of authority to any qualified applicant, authorizing all or any part of the transportation covered by the application, if the Commission finds that: (i) the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission; and (ii) the transportation is consistent with the public interest. An applicant must establish financial fitness, operational fitness, and regulatory compliance fitness.<sup>2</sup>

Applicant proposes commencing operations with 25 motorcoaches. Applicant proposes operating under a tariff containing charter rates and rates for transportation under contracts with government agencies and private entities.

Applicant verifies that: (1) applicant owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) applicant owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) applicant has access to, is familiar with and will comply with the Compact, the Commission's rules, regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

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<sup>1</sup> Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending tit. I, art. III).

<sup>2</sup> *In re Metro Day Treatment Center, Inc.*, No. AP-10-032, Order No. 12,729 (Feb. 15, 2011).

Normally, such evidence would establish an applicant's fitness,<sup>3</sup> but this applicant has a history of regulatory violations.

#### **I. PAST VIOLATIONS**

In 2002, the Commission initiated an investigation of applicant and Academy Bus Tours, Inc., WMATC No. 456. The issue was whether Academy Bus Tours' operations in the Washington Metropolitan Area Transit District had been unlawfully transferred to applicant. Both carriers were directed to produce any and all records in their possession, custody or control relating to their operations in the Metropolitan District and the corporate status of Academy Bus Tours, Inc. A response filed May 13, 2002, admitted that "Academy Bus Tours, Inc., transferred all of its assets to Academy Express, L.L.C., in a transaction approved by the Surface Transportation Board (Board), effective October 1, 2001."<sup>4</sup> The response further stated that Academy Bus Tours, Inc., no longer existed but that Academy Express, L.L.C., had not performed any transportation originating in the Metropolitan District.<sup>5</sup>

The transfer of "all assets" would obviously include WMATC Certificate No. 456, but instead of applying for WMATC approval of the already accomplished transfer, applicant argued that such approval was not necessary. The Commission held otherwise, as follows:

The response goes on to argue that approval of the transfer under the Washington Metropolitan Area Transit Regulation Compact is unnecessary given what respondents view as the [Surface Transportation] Board's exclusive jurisdiction over interstate motor carrier mergers and the Board's ancillary jurisdiction to approve transfers of intrastate authority and property. The response cites 49 U.S.C. § 14303(f) and precedent involving decisions of the Board's predecessor, the Interstate Commerce Commission (ICC), in support. We disagree with respondents' position

When Congress first approved the Compact in 1960, it suspended the laws of the United States relating to or affecting transportation under the Compact, to the extent that such laws are inconsistent with or in duplication of the provisions of the Compact, for as long as the Compact remains effective. The legislative history of the Compact identifies Title 49 as one of the suspended laws. In the words of the ICC, "the effect of the Compact is to remove from our jurisdiction local bus operations in the

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *In re Academy Bus Tours, Inc., & Academy Express, L.L.C.*, No. MP-02-32, Order No. 6757 at 2 (Aug. 5, 2002).

<sup>5</sup> *Id.* at 2.

vicinity of Washington, and to vest that jurisdiction instead in a local regulatory body (WMATC)."

Congress's approval of the amended Compact in 1990 reaffirmed the suspension of federal legislation in the Metropolitan District to the extent such laws conflict with the Compact. Article XIV, Section 2(c), of the Compact provides that "during the existence of the Compact, the jurisdiction of the interstate Commerce Commission is suspended to the extent it is in conflict with the provisions of this Act." Article VIII, Section 3, of the Compact provides that "[u]pon the termination of this Compact, the jurisdiction over the matters and persons covered by this Act shall revert to the signatories and the federal government, as their interests may appear, and the applicable laws of the signatories and the federal government shall be reactivated without further legislation."

The two cases cited by respondents examine the Interstate Commerce Act's preemption of state statutes in Illinois and Minnesota. They do not consider Congress's suspension of the Interstate Commerce Act in the Washington Metropolitan Area Transit District.<sup>6</sup>

Based on the foregoing findings and the failure of Academy Bus Tours to maintain compliance with WMATC insurance requirements, the Commission revoked Certificate No. 456 and gave "respondents" 30 days to: (1) remove all WMATC markings from "respondents' vehicle(s)"; (2) file an affidavit verifying compliance; and (3) surrender Certificate No. 456.<sup>7</sup> Neither applicant nor Academy Bus Tours, Inc., complied.

Applicant later reconsidered its position and applied for a WMATC certificate of authority in 2007, but because the aforementioned affidavit and Certificate No. 456 still had not been submitted in compliance with the revocation order, the Commission denied the application without prejudice for applicant's failure to demonstrate compliance fitness.<sup>8</sup>

## **II. ASSESSMENT OF FORFEITURE**

Applicant's manager, Francis Tedesco, takes issue with the Commission's finding in Order No. 6757 in 2002 that Certificate No. 456 was transferred to applicant without Commission approval. It

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<sup>6</sup> *Id.* at 2-3 (citations omitted).

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *In re Academy Express, L.L.C., t/a Academy*, No. AP-07-180, Order No. 10,954 (Nov. 29, 2007). Although the failure to comply with the revocation order was deemed to be that of the persons controlling applicant, upon reexamination of the revocation order, it is clear that the failure belongs to applicant directly, as well.

is not clear whether applicant argues this point as a matter of fact or law or both. But the time to contest the Commission's finding was within 30 days of the issuance of Order No. 6757 in an application for reconsideration.<sup>9</sup> A 2001 Surface Transportation Board (STB) decision submitted by applicant in this proceeding tends to contradict applicant's manager, in any event. That decision approving applicant's acquisition of assets from Academy Bus Tours, Inc., was based in part on the STB's understanding that applicant would be acquiring "the properties of Academy Bus Tours, Inc.",<sup>10</sup> not merely properties.

On the other hand, although the Commission found in Order No. 6757 that the certificate transfer provisions of the Compact had been violated, no civil forfeiture was assessed. While it might have been appropriate for the Commission to assess a civil forfeiture at the time it made its findings, it would not be appropriate to do so now nearly nine years after the fact, especially in the absence of any evidence of post-transfer operations under Certificate No. 456.

Applicant's failure to timely comply with Order No. 6757, however, is a different matter. Applicant's manager has filed an affidavit in this proceeding belatedly verifying that applicant promptly removed all WMATC vehicle markings from the buses obtained in the transfer from Academy Bus Tours. He also states that a diligent search for Certificate No. 456 has been conducted, but the certificate could not be found. Taking nearly nine years to accomplish what should have taken 30 days at most is not acceptable. Applicant's manager agrees the failure to timely respond was "inexcusable".

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.<sup>11</sup>

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.<sup>12</sup> The term "willfully" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard whether or not one has the right so to act.<sup>13</sup> Employee negligence is no defense.<sup>14</sup> "To hold carriers not liable for penalties where the violations . . .

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<sup>9</sup> Compact, tit. II, art. XIII, § 4.

<sup>10</sup> *In re Tedesco Family ESB Trust*, No. MC-F-20983 (Aug. 2, 2001) (emphasis added).

<sup>11</sup> Compact, tit. II, art. XIII, § 6(f)(i).

<sup>12</sup> Order No. 12,729 at 5.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 5.

are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.<sup>15</sup>

We therefore find that applicant knowingly and willfully violated Order No. 6757 and accordingly shall assess a civil forfeiture of \$250.<sup>16</sup>

### III. LIKELIHOOD OF FUTURE COMPLIANCE

When an applicant or a person controlling an applicant has a record of violations, or a history of controlling companies with such a record, the Commission considers the following factors in assessing the likelihood of applicant's future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether the controlling party has made sincere efforts to correct past mistakes, and (5) whether the controlling party has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.<sup>17</sup>

Failure to obtain WMATC approval of the transfer of Certificate No. 456 is a serious violation - serious enough to warrant revocation.<sup>18</sup> On the other hand, there is no evidence in the record that any operations were conducted under Certificate No. 456 after it was suspended and then revoked in 2002. Applicant has consistently maintained since 2002 that no such operations have taken place.

Characterizing the certificate transfer violation and applicant's failure to timely comply with the revocation order as "flagrant and persistent" seems inapt on this record.

We find that applicant has made a sincere effort to correct past mistakes by belatedly complying with the revocation order.

This brings us to applicant's willingness and ability to comply with Commission requirements in the future. The issue is whether applicant has "put in place personnel and/or process sufficient to prevent recurring violations of routine regulatory requirements."<sup>19</sup>

In the past, the Commission has found such evidence in the hiring of counsel to act as an ongoing advisor or in the existence of

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<sup>15</sup> *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

<sup>16</sup> See *In re Paramed Med. Transp., Inc., t/a Para-Med*, No. MP-10-015, Order No. 12,723 at 4 (Feb. 15, 2011) (assessing \$250 for failure to timely produce documents).

<sup>17</sup> Order No. 12,729 at 6.

<sup>18</sup> *In re Atlantic Valet, Inc., t/a Atlantic Transp.*, No. MP-01-34, Order No. 6254 (June 15, 2001).

<sup>19</sup> *In re Pantio Med. Transp.: LLC*, No. AP-10-124, Order No. 12,631 at 2 (Nov. 19, 2010).

a new investor with no record of regulatory violations and sufficient control and financial incentive to ensure compliance with the Compact and the Commission's rules, regulations and orders thereunder.<sup>20</sup>

The record in this proceeding shows that applicant has hired the services of former ICC general counsel Fritz R. Kahn, a Washington, D.C., transportation practitioner with extensive experience representing clients before transportation regulatory agencies, including WMATC.

Upon payment of the forfeiture assessed herein, the record will support a finding of prospective compliance fitness,<sup>21</sup> subject to a one-year period of probation.<sup>22</sup>

#### IV. CONCLUSION

Based on the evidence in this record, and in consideration of the terms of probation and other conditions prescribed herein, the Commission finds that the proposed transportation is consistent with the public interest and that applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

THEREFORE, IT IS ORDERED:

1. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against applicant in the amount of \$250 for knowingly and willfully violating Order No. 6757.

2. That applicant is hereby directed to pay to the Commission within thirty days of the date of this order, by check or money order, the sum of two hundred fifty dollars (\$250).

3. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 456 shall be issued to Academy Express, L.L.C., trading as Academy, 111 Paterson Avenue, Hoboken, NJ 07030-6012.

4. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

5. That applicant is hereby directed to present its revenue vehicle(s) for inspection and file the following documents within the 180-day maximum permitted in Commission Regulation No. 66: (a)

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> *See* Order No. 12,729 (same).

<sup>22</sup> *See id.* (same).

evidence of insurance pursuant to Commission Regulation No. 58; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the for-hire vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the registered owner, for each vehicle to be used in revenue operations; and (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia.

6. That applicant shall be placed on probation for a period of one year commencing with the reissuance of Certificate No. 456 in accordance with the terms of this order and that a willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, by applicant during the period of probation shall constitute grounds for immediate suspension and/or revocation of applicant's operating authority without further proceedings, regardless of the nature and severity of the violation.

7. That the grant of authority herein shall be void and the application shall stand denied upon applicant's failure to timely satisfy the conditions of issuance prescribed herein.

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



William S. Morrow, Jr.  
Executive Director