

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1785

IN THE MATTER OF:

Served December 22, 1977

Application of OMNIBUS CORPORATION)	Application No. 996
for a Certificate of Public)	
Convenience and Necessity to Perform)	Consolidated Docket No. 380
Charter Operations Pursuant to Six)	
Contracts)	
)	
Application of OMNIBUS CORPORATION)	Application No. 999
for Temporary Authority to Perform)	
Charter Operations Pursuant to Five)	Consolidated Docket No. 380
Contracts)	
)	
Application of McMICHAEL SCHOOL BUS)	Application No. 1017
SERVICE, INC., for Temporary)	
Authority to Perform Charter)	
Operations Pursuant to Contract - U.S.)	
Customs Service)	

By Application Nos. 996 and 999 Omnibus Corporation (Omnibus) seeks permanent and temporary authority from this Commission to engage in the for-hire transportation of passengers, in charter operations, pursuant to various contracts including a now-expired contract with the United States Customs Service (Customs). By Order No. 1716, served June 23, 1977, Application No. 999 was granted in part. Order No. 1762, served October 26, 1977, denied Application No. 996 for the reasons (a) that Omnibus had failed to establish its fitness properly to perform the proposed services and to comply with the requirements of the Compact and the Commission's rules, regulations and orders thereunder, and (b) that Omnibus had failed to establish that specified parts of the proposed service were required by the present or future public convenience and necessity. Order No. 1762 also extended the temporary authority granted by Order No. 1716 for a period of 20 days "[t]o permit an orderly transition. . . for those persons now utilizing applicant's service."

By Application No. 1017, McMichael School Bus Service, Inc. (McMichael), seeks temporary authority to conduct charter operations pursuant to a contract with Customs, transporting passengers in the same operation previously performed by Omnibus. This application was granted by Order No. 1768 served November 11, 1977.

Omnibus has filed three pleadings concerning one or more aspects of the above-described applications. The Commission now has before it (a) a petition for modification of Order Nos. 1716 and 1762, (b) an application for reconsideration of Order No. 1768, and (c) an application for reconsideration of Order No. 1762. See Order No. 1784, served this date.

We conclude initially that the above-referenced petition for modification should be denied. In support of this request for an extension of previously granted temporary authority, Omnibus requests the Commission to rely on its prior findings of need for Omnibus' service and further contends that some unspecified economic loss may result from expiration of the temporary authority. We find little merit in this position. First, we note that some of the contracts involved were of short duration and the need for service, e.g., by Bretton Woods (a summer day camp), no longer has any immediate and urgent character. Second, Atwood's Transport Lines, Inc., has recently been granted a new certificate of public convenience and necessity authorizing charter operations embracing all points at issue herein. See Order No. 1761, served October 26, 1977. Accordingly, it can no longer be said that there is no carrier service capable of meeting such service needs as may exist. Compact Title II, Article XII, Section 4(d)(3). Third, the Commission has no obligation to protect the finances of an applicant in circumstances where, as here, the business was acquired by unlawful operations conducted and continued without even color of right. Finally, Omnibus has been found unfit to operate as a certificated carrier and, for the reasons set forth below, that finding shall be affirmed herein. A grant of any authority to Omnibus is, perforce, prohibited.

Next for determination is Omnibus' application for reconsideration of Order No. 1768 which granted McMichael temporary authority to serve the U.S. Customs Service. Omnibus complains (a) that it did not have notice of Application No. 1017; (b) that the representations by McMichael concerning Atwood's Transport Lines, Inc., Vernoy Franklin and The Gray Line, Inc., potential competing carriers, constitute hearsay and are entitled to no weight; and (c) that the Commission acted arbitrarily and capriciously by granting McMichael's application while Omnibus held conflicting temporary authority.

Admittedly, Omnibus was not served by McMichael with a copy of Application No. 1017 and did not have notice thereof. This technicality, however, resulted in no actual prejudice to Omnibus. On October 26, 1977, Order No. 1762 was served, denying permanent authority to Omnibus and, as noted above, extending temporary authority until November 15, 1977, for the sole purpose of permitting those persons then using Omnibus' service to arrange for service by another carrier. At that point, Omnibus had been found unfit and its status as a carrier was due to terminate shortly. At the time Application No. 1017 was perfected (November 10, 1977), by

the filing of an executed contract, no application for reconsideration of Order No. 1762 had been filed and Omnibus' temporary authority was due to expire in five days. Prompt action by the Commission was required to assure continuous service to the U.S. Customs Service by a responsible carrier. Moreover, Omnibus retained, and has subsequently exercised, its right to seek reconsideration of Order No. 1768 and Omnibus has now had a full opportunity to express its views on this matter. Under these circumstances, we find that the lack of prior notification to Omnibus is of insufficient moment to require modification of Order No. 1768.

The assailed representations made by McMichael concerning other carriers are, of course, part of a verified application and Omnibus' objection thereto goes more to the weight to be accorded such statements than to their admissibility. The Commission does not lightly question statements made under oath and, of course, the subsequent failure of potentially competing carriers to seek reconsideration serves to confirm their incapacity to render the service for which temporary authority was granted.

Finally, we find nothing arbitrary or capricious about a grant of temporary authority to McMichael. The minimal conflict with Omnibus' waning rights occurred in light of the facts that Omnibus had been found unfit and that a transitional period for transportation consumers was specifically contemplated by Order No. 1762. As Omnibus concedes, the granting and duration of temporary authority is a matter for the Commission's discretion, and we find no abuse of discretion in selecting a fit carrier over an unfit carrier. This application for reconsideration shall be denied.

Now we reach the application for reconsideration of Order No. 1762, filed November 25, 1977, and the opposition thereto filed December 1, 1977, by McMichael. */ Omnibus asserts the following errors:

- (a) The Commission has failed to determine whether the proposed transportation services have been "excepted" from its jurisdiction by the Compact.
- (b) The Commission has failed to consider the evidence of record developed in Application No. 999.
- (c) The Commission has improperly concluded that Omnibus is not fit, willing and able to perform the services for which it seeks a certificate.

*/ On the same date, McMichael also filed oppositions to the above-referenced petition for modification and application for reconsideration of Order No. 1768.

- (d) The Commission has improperly concluded that Omnibus is not willing and able properly to comply with the requirements of the Compact and the Commission's rules, regulations and orders thereunder.

Dealing with these contentions ad seriatum, we first reject Omnibus' contention that any part of the service proposed in Application No. 996 is excepted from regulation pursuant to Title II, Article XII, Section 1(a)(3) of the Compact. That section provides:

This Act shall apply to the transportation for-hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except -- * * * transportation by motor vehicles employed solely in transporting school children and teachers to or from public or private schools.

Omnibus now asserts, for the first time, that service pursuant to contracts with the U.S. Customs Service and the Washington School for Secretaries may be excepted from regulation by the above-quoted provision.

Omnibus has failed to establish, however, that the persons transported are schoolchildren, that the facilities of the contracting parties are schools and that the transportation is performed in motor vehicles used solely for the excepted purpose. In fact, the evidence of record supports exactly opposite conclusions. Omnibus' president testified that the subject motor vehicles were not segregated for only school transportation, and the persons being transported appear to be adults. Moreover, we have serious reservations about whether employee training classes or commercial adult vocational training facilities can be considered schools within the meaning of the Compact.

In any event, this contention is not timely raised at the reconsideration stage of a proceeding. The filing of an application, without a concurrent motion to dismiss or some other formal raising of a jurisdictional question at the initial stages of the proceeding mitigates against permitting applicant to now raise the issue. This is especially true where, as here, there was full opportunity to litigate this question in three proceedings including a formal complaint proceeding which is administratively final. Moreover, the Commission's jurisdiction was purposefully invoked by this applicant successfully to obtain temporary authority in Application No. 999. Accordingly, we conclude that the doctrines of res judicata and estoppel, as well as the lack of substantive merit, preclude favorable consideration of the assignation of error. See Davis, Administrative Law Treatise, Section 18.07.

Omnibus also questions the Commission's role in regulating transportation for hire performed pursuant to a contract with a federal agency.

The obvious answer to this argument is that Title II, Article XII, Section 1(a)(2) excepts transportation performed by the federal government as opposed to service by a third party for the federal government. For the rationale underlying grants of charter authority pursuant to contract, see Order No. 1361, served October 16, 1974.

With respect to Omnibus' second contention, we find no error in our conclusion that the record fails to show a need for service to Bretton Woods and the U.S. Customs Service. No witness testified on their behalf, and affidavits submitted in Application No. 999 were properly excluded for the reasons set forth in Order No. 1762.

The question of comparative rates is also raised by Omnibus for the first time, with the applicant contending that its assertedly lower rates justify a grant of authority. As this Commission has held before, the issue of rates cannot be substituted in lieu of the statutory criterion that the public convenience and necessity be served. See Order No. 1671, served April 13, 1977. There has been no showing that McMichael's rates are so high as to constitute an embargo, and Omnibus' rates, at its request, were held confidential and are not a part of the public record. Omnibus cannot keep its rates confidential and immune from inquiry in a contested proceeding and then, when such tactics appear disadvantageous, assert on reconsideration that the Commission should hold further hearings or otherwise consider questions of price advantage.

Omnibus further asserts that, by its president, it never refused to supply the Commission with requested financial data. The fact remains, however, that Omnibus' counsel refused and the data was not supplied. Omnibus also suggests that the Commission "has been derelict in its duty" for failure to inquire further into Omnibus' operational and financial fitness. This argument, to say the least, lacks any support from the facts. Order No. 1762 finds no fault with Omnibus' maintenance program, safety program or any other aspect of operational fitness. The financial statement in question was requested by the Commission's staff counsel; it was Omnibus that was derelict by failing to provide pertinent and requested data.

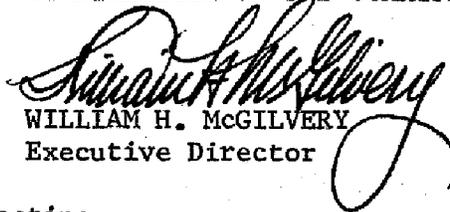
Finally, we are not persuaded that our finding that Omnibus has failed to establish its compliance fitness is erroneous. The records in Application Nos. 996 and 999 are replete with evidence of wilfull transgressions, unauthorized operations and a callous disregard for the regulatory requirements of this Commission. The mere fact that Omnibus had entered into a contract for the performance of these operations does nothing to change the essential illegal character thereof. Omnibus was ordered to cease and desist from conducting unauthorized operations; it deliberately violated that order.

Omnibus now argues, again for the first time, that it made the "self-determination" that its "school" and federal contract operations

were not subject to regulation. Had such "self-determination" been made, it would have been incumbent upon Omnibus to seek a determination of the Commission by means of a motion to dismiss those portions of the application or some other similar pleading. The fact that this was not done leads us to believe either that Omnibus simply determined to operate without any favorable ruling from the Commission or that this contention is a contrived ex post facto rationalization. In either event, it is not persuasive evidence of Omnibus' asserted desire to abide by pertinent regulatory requirements. This application for reconsideration must be denied.

THEREFORE, IT IS ORDERED that the above-referenced Petition for Modification of Order Nos. 1716 and 1762, Application for Reconsideration of Order No. 1768 and Application for Reconsideration of Order No. 1762 be, and they are hereby, denied.

BY DIRECTION OF THE COMMISSION:


WILLIAM H. MCGILVERY
Executive Director

BARNES, Vice Chairman, not participating.