

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2132

IN THE MATTER OF:

Served August 1, 1980

Application of CALL-A-MESSENGER, INC., )  
for Special Authorization to Perform )  
Charter Operations Pursuant to Contract )  
with Trans World Airlines, Inc. )

Case No. CP-80-03

Application of CALL-A-MESSENGER, INC., )  
for Temporary Authority to Perform )  
Charter Operations Pursuant to Contract )  
with Trans World Airlines, Inc. )

Case No. AP-80-21

By Order No. 2030, served July 23, 1980, the application in Case No. CP-80-30 was denied inasmuch as (a) the applicant had not affirmatively demonstrated that the proposed service would be conducted by its own employees acting under applicant's control, (b) there remained a question as to whether both applicant and protestant Executive Limousine Service, Inc., would be called upon for service under concurrent contracts and (c) the contract between applicant and Trans World Airlines, Inc. (TWA), was not for a definitive term of at least 181 days.

On July 25, 1980, Call-A-Messenger, Inc. (CAM), filed Case No. AP-80-21, seeking temporary authority to conduct the same service proposed in Case No. CP-80-03 <sup>1/</sup>, and on July 30, 1980, Executive filed a verified protest to that application. An application for reconsideration in Case No. CP-80-03 was filed by CAM on July 29, 1980, and Executive's reply was received on the next day. On July 31, 1980, applicant submitted an additional verified statement in support of the application. For the reasons set forth below, we are of the opinion that the application for reconsideration should be granted and a special authorization issued to CAM. Because this action renders moot the temporary authority application, Case No. AP-80-21 will be denied.

As its first ground for reconsideration, CAM avers that all drivers involved in passenger transportation subject to regulation by this Commission are full-time employees who are screened, trained and supervised by CAM. All vehicles involved are either owned by CAM or leased from a local dealer pursuant to lease contracts which have been filed with the Commission in accordance with Regulation No. 69. CAM also submitted a letter from TWA to Executive, dated June 25, 1980, notifying the latter that its contract with TWA to transport flight

<sup>1/</sup> See Order No. 2130, which is incorporated by reference herein.

attendants would stand terminated effective August 1, 1980. 2/ Also submitted was a letter from the acting general manager of in-flight services for TWA expressing that company's desire to utilize the services of CAM and a memorandum of agreement between CAM and TWA modifying their original contract to provide ". . . for a fixed term of 181 days, commencing August 1, 1980, except that the contract may be terminated within that period upon thirty (30) days prior written notice."

Executive's reply essentially reiterates its position regarding applicant's drivers, asserting that they are independent contractors who lease (or sublease) CAM's vehicles. Executive submits a letter from its president to TWA offering to continue service beyond August 1, 1980, as proof for the proposition that TWA has agreed to continue with Executive despite the above-described notice of cancellation. Protestant argues extensively that applicant lacks sufficient vehicular capacity adequately to serve TWA and that the nature of TWA's requirements preclude profitable operations by CAM under the contractual price structure. It appears that TWA has two flights each requiring the virtually simultaneous transportation of up to 12 flight attendants. According to CAM's equipment list submitted with the application, that company has no vehicles accomodating 12 passengers.

Executive also contends that CAM's vehicles are improperly registered with the State of Maryland as "Class A" vehicles. Finally, protestant contends that the 30-day cancellation provision in the memorandum of agreement leaves the contract outside the parameters prescribed by Commission Regulation 70-05 which requires a contract to be of at least 181 days duration.

In reply to the matters raised by Executive, CAM reavers that it controls all vehicles and drivers used for passenger transportation. CAM also operates a package delivery service in which it utilizes owner-operators and a form contract describing that relationship has been submitted. That contract, by its own terms, is not applicable to operations conducted in CAM owned or leased vehicles. CAM avers complete responsibility for the licensing, maintenance and insurance of the involved vehicles and for the screening, training, supervision and payment of its passenger drivers. 3/

2/ This contract is virtually identical to that submitted by CAM, but its filing and effective dates preceded adoption of Regulation No. 70. Executive's Authorization No. SP-18-05 to operate pursuant to WMATC Special Certificate of Public Convenience and Necessity No. 1 was issued in accordance with the provisions of Regulation No. 70-11.

3/ Apparently, CAM's drivers are paid on a commission basis which implies that no withholding taxes are deducted. Our concern, however, is whether CAM controls the instrumentalities of service, and no opinion is expressed as to how the Internal Revenue Service might view the relationship between CAM and its drivers.

On July 29, 1980, CAM purchased a new 15-passenger van which it proposes to use to serve TWA. This vehicle, it is said, would be used in conjunction with an 11-passenger (excluding the driver) van equipped with a covered luggage rack to cover the two flights about which Executive expressed concern. Applicant does not anticipate any necessity to use more than one vehicle per TWA flight. Moreover, CAM states that by coordinating scheduling for TWA with its current operations for United Airlines and Pan American Airlines, applicant will be able to operate its fleet in a more efficient manner by eliminating deadheading, conserving fuel, and generally achieving greater utilization of its vehicles.

CAM's general manager states that he telephoned the Maryland Division of Motor Vehicles to investigate Executive's allegations about improperly registered vehicles and was informed that applicant's vehicles are properly licensed in all respects. Should it be discovered that new or additional licensing is required, however, CAM would immediately undertake to accomplish that. Finally, CAM states that it has been informed that TWA has not extended or reinstated its terminated contract with Executive.

The Commission finds on reconsideration in Case No. CP-80-03 that applicant has met its burden of proof in establishing its fitness and the conformance of the proposed operation with the requirements of Regulation No. 70. Executive's allegations regarding CAM's drivers are unsupported by any evidence sufficiently credible to offset that produced by the applicant. As noted above, the Commission has consistently concerned itself with a carrier's ability to control the service and to bear responsibility therefor. The mere fact that applicant's drivers are paid a commission rather than an hourly wage is insufficient to establish that the drivers are independent operators. Similarly, we do not believe that the possibility (unsupported by any citation to the Annotated Code of Maryland or regulations issued thereunder) that applicant's vehicles may be improperly registered debilitates CAM from rendering an effective service to TWA. While we will require that CAM inform the Maryland Division of Motor Vehicles about its operations and registration status and report back to the Commission, in writing, this is the most that we feel is necessary on our part to secure additional compliance, if any is needed, with the motor vehicle registration laws of that signatory. In this connection we note that such laws are revenue related and are specifically excluded from the scope of our jurisdiction by Title I, Article VII of the Compact. 4/

Finally, we believe that the intent of the parties in executing the memorandum of agreement referenced above, particularly when read with the rate structure of the original contract which prescribes rates with a discount during the first year of service, is to establish a

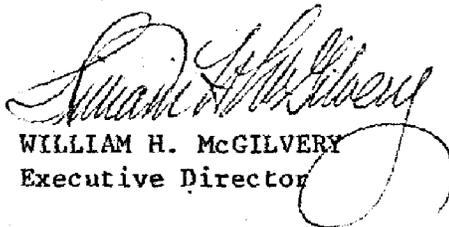
4/ Nothing herein shall be construed to amend, alter or in any wise affect the power of the signatories . . . to levy, assess and collect . . . fees for the licensing of vehicles and the operation thereof.

contractual relationship for a period of at least 181 days. Although this intent may be rather inarticulately expressed, it is a legitimate interpretation of the contractual documents to say that the 30-day cancellation clause embraced in the memorandum of agreement was designed to comply with Regulation No. 70 and the Commission's notation in Order No. 2130 that there be ". . . a definitive contractual term of at least 181 days cancellable only for good cause." To eliminate any possible misunderstanding by the parties to the agreement, however, we hereby state that the grant of authority set forth below is specifically conditioned upon this interpretation of the memorandum of agreement. The rendition of service by CAM and its acceptance by TWA shall be sufficient to constitute their irrevocable agreement with this interpretation, and the Commission shall not entertain any premature application supported by TWA for service covered by the authority granted herein unless it shall be proved to our satisfaction that there then exists good and sufficient cause for cancellation of the CAM - TWA contract by virtue of a material breach thereof.

THEREFORE, IT IS ORDERED:

1. That Order No. 2130, served July 23, 1980, is hereby vacated and set aside.
2. That the application for reconsideration of Call-A-Messenger, Inc., is hereby granted.
3. That Call-A-Messenger, Inc., is hereby granted authorization to operate pursuant to WMATC Special Certificate of Public Convenience and Necessity No. 1 to the extent set forth in Authorization No. SP-55-03 attached hereto and made a part hereof.
4. That Call-A-Messenger, Inc., is hereby directed to communicate, in writing, with the Maryland Department of Transportation, Division of Motor Vehicles, setting forth its scope of operations and vehicle registration status and requesting an official determination by that agency of the propriety of its current vehicle registrations within five days from the date of service of this order and is further directed to file copies of all correspondence on this matter with the Commission.
5. That Case No. AP-80-21 filed by Call-A-Messenger, Inc., is hereby denied.

BY DIRECTION OF THE COMMISSION, COMMISSIONERS SCHIFTER AND SHANNON.

  
WILLIAM H. MCGILVERY  
Executive Director

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

AUTHORIZATION NO. SP-55-03  
TO OPERATE PURSUANT TO  
SPECIAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 1

CALL-A-MESSENGER, INC.  
PHOENIX, ARIZONA

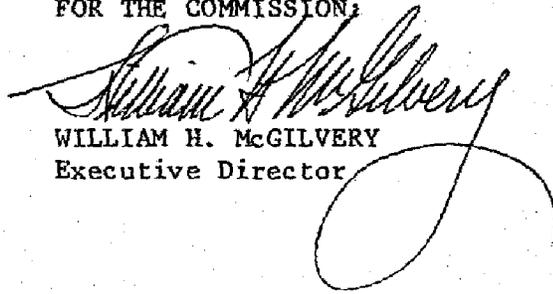
BE IT KNOWN, that pursuant to Special Certificate of Public Convenience and Necessity No. 1 issued by the Washington Metropolitan Area Transit Commission by Order No. 2004, served June 20, 1979, and effective July 23, 1979, and pursuant to Order No. 2132, served August 1, 1980, approving the issuance of this authorization, the above-named carrier may engage in the transportation of passengers, in charter operations pursuant to contract, between points in the Metropolitan District, as follows:

CHARTER OPERATIONS PURSUANT TO CONTRACT to transport passengers and their baggage, in the same vehicle with passengers, (1) between Dulles International Airport, Herndon Va., and Washington National Airport, Gravelly Point, Va., on the one hand, and, on the other Andrews Air Force Base, Md., and points in Washington, D. C., and (2) between Dulles International Airport, and Washington National Airport, via a route traversing Washington, D. C.

RESTRICTED in (1) and (2) above to the transportation of flight attendants employed by Trans World Airlines, only.

This authorization is valid until cancelled.

FOR THE COMMISSION:



WILLIAM H. MCGILVERY  
Executive Director