

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2764

IN THE MATTER OF:

Served September 11, 1985

Application of AMERICAN COACH	)	Case No. AP-85-08
LINES, INC., for Declaratory Order	)	
or, in the Alternative, Temporary	)	
Authority to Conduct Charter	)	
Operations Between Points in the	)	
Metropolitan District	)	

By Order No. 2738, served July 22, 1985, and incorporated by reference herein, the Commission denied the petition of American Coach Lines, Inc. ("ACL"), for a declaratory order interpreting its WMATC Certificate No. 1 to authorize unrestricted charter operations between points in the Metropolitan District, denied the application of ACL for temporary authority pursuant to Title II, Article XII, Section 4(d)(3) of the Compact to conduct unrestricted charter operations between points in the Metropolitan District, and directed ACL to cease and desist from conducting any operations other than the round-trip sightseeing and pleasure tours authorized in its Certificate No. 1.

On August 12, 1985, ACL filed an application for reconsideration of Order No. 2738. On August 20, 1985, The Airport Connection, Inc. ("TAC"), and T&S Bus Service ("T&S") filed a joint reply. Gold Line, Inc. ("Gold Line"), Eyre's Bus Service, Inc. ("Eyre"), and National Coach Works, Inc. ("NCW"), filed a joint reply on August 22, 1985. After careful review of the record and the contentions of the parties, we find that the application for reconsideration should be denied.

POSITION OF PROTESTANTS

TAC, T&S, Gold Line, Eyre, and NCW agree with the Commission's interpretation of Certificate No. 1 and request that Order No. 2738 be affirmed. With regard to ACL's petition for declaratory order, protestants TAC and T&S contend that ACL's charter authorization should remain restricted to round-trip sightseeing and pleasure tours, transportation which has previously been decided by the Commission to exclude general charter. See In re Application of Webb Tours, Inc., Order Nos. 2423 and 2404, served May 27, and March 30, 1983, aff'd. 83-1784 (D.C. Cir. May 18, 1984). Gold Line, Eyre, and NCW note that to obtain the authority requested by its Petition for Declaratory Order, ACL asks the Commission to remove two restrictions: round-trip service and sightseeing or pleasure tours.

Both restrictions preclude airport transfer service, which is not covered by the incidental-to-air exemption contained in the Interstate Commerce Act. Protestants note that inasmuch as the Interstate Commerce Commission ("I.C.C.") has limited charter authority to sightseeing and pleasure tours, such a restriction must be consistent with a grant of charter authority. As to ACL's application for temporary authority, TAC and T&S contend that applicant is unfit to perform such service and, even if it were fit, no immediate and urgent need exists for the service proposed; nor is there an absence of carrier service capable of meeting such need if it did exist since TAC and T&S are ready, willing, and able to fill any general charter service requirements which should arise. Gold Line, Eyre, and NCW contend that the evidence in support of ACL's application for temporary authority establishes that a plethora of general charter service exists and that ACL seeks to justify a grant of temporary authority solely on the basis of past illegal operations. In their reply protestants state:

Obviously, temporary authority could not be granted simply on the basis of "past" service by a carrier. If that were the case, a party desiring to conduct operations within this Transit District would need only institute an unlawful service and then come to this Commission for temporary authority based on its past unlawful operations. Such a concept is an an[athema] to transportation regulation.

In sum protestants contend that the record before the Commission provides no factual basis on which the Commission would be empowered to grant temporary authority and that ACL has advanced no valid reasons on reconsideration that would justify the Commission's re-examining its initial findings.

#### APPLICATION FOR DECLARATORY ORDER

While conceding that its authorized operations may be restricted to round trips, ACL restates its initial argument that absence of I.C.C. case law interpreting a charter certificate restricted to sightseeing and pleasure tours compels the conclusion that the restriction is applicable to special operations only. Applicant goes so far as to state that its I.C.C. authority held at the time White House, ACL's predecessor in interest, obtained its WMATC Certificate No. 1 and its WMATC authority as originally issued contained no such restriction. We dealt extensively with this issue in Order No. 2738, which is incorporated herein by reference, and we affirm both our result and our rationale as stated in that order. We will not repeat our reasoning here except to note (1) that applicant's I.C.C. certificate submitted with its WMATC grandfather application was plainly restricted to sightseeing and pleasure tours both as to charter and special operations, (2) that White House was aware of that restriction as exemplified by its I.C.C. tariff in effect at the time

it filed its WMATC grandfather application showing rates only for sightseeing and pleasure tours in charter and special operations, (3) that the authority issued by this Commission in response to the grandfather application was also similarly limited, and (4) that White House had reason to be aware of that limitation from the plain language of that authority and, later, from Order No. 1525, served March 29, 1976.

ACL also contends that it is authorized to conduct airport transfer service either under an exemption from the Interstate Commerce Act or by implication under its WMATC Certificate No. 1. The plain language of the Compact, its legislative history, and subsequent case law leave no doubt as to this Commission's jurisdiction over transportation of passengers for hire to or from both Washington National Airport, Gravelly Point, Va., and Washington Dulles International Airport, Herndon, Va. Inasmuch as WMATC Certificate No. 1 is now and always has been restricted to sightseeing and pleasure tours, it therefore precludes airport transfers. A review of White House's grandfather application reveals no indication that it was performing airport transfers at the time the jurisdiction of the I.C.C. was supplanted by the jurisdiction of this Commission. However, as we noted in Order No. 2738:

If White House were of the opinion that it had not been awarded authority commensurate with the operations which it was performing on March 22, 1961, White House had 30 days in which to petition for reconsideration pursuant to Title II, Article VII, Section 16 of the Compact. If reconsideration were denied, White House's remedy lay in appeal to the United States Court of Appeals for the District of Columbia.

No such action having been taken in a timely fashion, White House's successor in interest cannot now claim fruits based on filings now made over 20 years out of time.

#### TEMPORARY AUTHORITY

ACL further contends that its application for temporary authority should have been granted given the accompanying affidavits of support and ACL's assertion that it merely seeks authority to continue providing service which it has provided in the past without authority. According to ACL, the Commission has on 12 occasions granted temporary authority on the basis that the carrier seeking such authority had offered similar service illegally in the past.

With regard to granting temporary authority, the statute is clear. A showing of immediate and urgent need for service and a showing that no other carrier is capable of providing that service must precede a grant of temporary authority. Agency practice is consistent

with this standard. Applicant cites nine orders for the proposition that the Commission has granted temporary authority irrespective of public support where the carrier has a past history of performance. In fact, one of those orders 1/ involved a denial of temporary authority due to lack of compliance fitness. The applicant in that case had been a principal and operator of a certificated carrier and hence had an affirmative obligation to be familiar with the Compact and the Commission's rules and regulations. Given that former position, the Commission was unable to find that applicant had conducted its uncertificated operations in good faith. See also In re Application of Webb Tours, Inc., Order Nos. 2404 and 2423, served March 30, and May 27, 1983, respectively, aff'd. 83-1784 (D.C. Cir. May 18, 1984). Six of the cited orders 2/ deal with applications filed within six weeks of one another to perform essentially similar service, i.e., small, informal, relatively unstructured sightseeing tours of the Mall area. In each case, upon being advised that WMATC authority was needed to perform operations that applicants had been conducting without appropriate authority, applicants ceased operations and promptly proceeded to comply with the requirements of the Compact by, inter alia, filing applications for temporary authority. The applications were protested by a carrier that offered structured tours by prearrangement in British type double-deck buses, a service substantially different from that for which temporary authority was sought. An eighth order 3/ cited by ACL involved an application for temporary authority to conduct a sightseeing service from hotels and motels located in those parts of Montgomery and Prince George's Counties, Md., outside the Capital Beltway to points in the District of Columbia and Arlington Cemetery, Arlington, Va., and return. The application was protested by a single carrier which lacked authority to provide the proposed service. In the final order 4/ cited by ACL,

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- 1/ In re Application of Scenic Sightseeing Tours, Order No. 2431, served June 7, 1983.
- 2/ In re Application of V.I.P. Tours, Inc., Order No. 2413, served May 5, 1983; In re Application of Nation's Capital Sightseeing Tours, Order No. 2414, served May 5, 1983; In re Application of Richard W. Butler t/a D.C. Historical Tours, Order No. 2422, served May 23, 1983; In re Application of James Warren Dickens and Henry Lichtenstein, Order No. 2426, served June 6, 1983; In re Application of Lucille R. Moore t/a Moore's Sightseeing Service, Order No. 2430, served June 7, 1983; In re Application of Samuel Howell t/a Samuel Howell Sightseeing Tours, Order No. 2428, served June 7, 1983.
- 3/ In re Application of Washington Tours, Inc., Order No. 2418, served May 17, 1983.
- 4/ In re Application of Babel Travel Service, Inc., Order No. 2421, served May 23, 1983.

applicant applied for temporary authority to conduct certain operations directed to a highly specialized market, i.e., tourists arriving in the Washington area from abroad, chiefly Latin America and Spain. Although protestant to that application employed Spanish-speaking guides/drivers, its authority was restricted as to airport service. Applicant was granted extremely narrow temporary authority commensurate with the service it had been offering that was different from that offered by protestant. 5/

ACL's claim that considerations of fitness are inappropriate to an application for temporary authority is completely unfounded. In every application for temporary authority referred to by ACL a finding of compliance fitness was specifically made based on the fact pattern presented. Moreover, as we stated in Order No. 2738, both ACL and its predecessor in interest were specifically informed of limitations as to Certificate No. 1. Nonetheless, as the record in this case indicates, ACL proceeded to perform those very operations which the Commission informed it by order were outside the scope of its authority. Given that we have ruled on ACL's legal argument, that ACL admits to performing the operations in question, and that our ruling rests on the fact that other carriers are capable of providing the service for which ACL seeks temporary authority, we see no reason to hold a hearing to examine the issue of fitness.

#### PROCEDURAL ISSUE

ACL reiterates its position that the Compact together with Commission regulations indicates that a Commission decision does not become final or enforceable for 30 days. As we specifically informed ACL in Order No. 2746, served August 9, 1985, such a position is contrary to the Compact, Commission Rule, and agency practice. Title II, Article XII, Section 15 of the Compact provides in pertinent part that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." Commission Rule 7-03 prescribes that "[o]rders of the Commission shall be effective as of the dates of service, unless otherwise specifically provided in the orders." No date other than date of service having been prescribed in Order No. 2738, that order became effective on July 22, 1985, the date

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5/ As to the three cases alluded to by ACL for no clear-cut proposition, we note that two were applications for permanent authority in which findings of fitness were made after extensive cross-examination. In re Application of T&S Bus Service, Inc., Order No. 2548, served April 13, 1984; In re Application of Dan Jenkins t/a Jenkins Transportation Service, Order No. 2649, served January 10, 1985. The third case contained no clear evidence on the record of unauthorized operations. In re Application of Eugene H. George t/a Silver Star Sightseeing Tours, Order No. 2543, served February 29, 1984.

it was served. The law being so clearly stated, ACL and its counsel reasonably should have known that it was bound by the Commission's order upon issuance. To the extent that ACL did not and has not complied with the Commission's order to cease and desist from any transportation of passengers other than transportation authorized by WMATC Certificate No. 1 as interpreted by Order No. 2738, its readiness, willingness, and ability to abide by the Compact and the Commission's rules and regulations are implicated in any future proceeding. Moreover, as we informed ACL in Order No. 2746:

No stay of a denial of this petition for declaratory order, no stay of a denial of this application for temporary authority, no stay of an order to cease and desist unauthorized operations, nor all of these together will provide applicant with authority it lacks.

THEREFORE, IT IS ORDERED:

1. That the application of American Coach Lines, Inc., for reconsideration of Order No. 2738, served July 22, 1985, is hereby denied in its entirety.

2. That Order No. 2738, served July 22, 1985, is hereby affirmed in its entirety and resumes full force and effect as of the date of service of this order.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS WORTHY, SCHIFTER, AND SHANNON:

  
WILLIAM H. MCGILVERY  
Executive Director