

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2801

IN THE MATTER OF:

Served November 26, 1985

Application of AMERICAN COACH)
LINES, INC., for a Certificate of)
Public Convenience and Necessity)
to Conduct Charter Operations)

Case No. AP-85-27

By Order No. 2777, served October 22, 1985, the Commission directed American Coach Lines, Inc. ("ACL" or "applicant"), to produce specific documents for inspection and review at the Commission's offices on November 6, 1985. The order issued in response to a motion by Gold Line, Inc.; Eyre's Bus Service, Inc.; and National Coach Works, Inc. ("Gold Line et al."), requesting that the documents be made available in preparation for the public hearing scheduled in the above-named case. Applicant filed no reply to protestants' motion within the time allowed by Rule 15-02. The Commission found that the documents sought were relevant to the subject application inasmuch as they bear on the issue of compliance fitness and further found that the request was reasonable in scope inasmuch as the documents sought to be discovered cover a recent period and deal with operations by which compliance fitness could be implicated.

By motion filed October 21, 1985, counsel for protestants The Airport Connection, Inc.; T&S Bus Service, Inc.; and Webb Tours, Inc. ("TAC et al." or "joint protestants"), sought to join the motion of Gold Line et al. for production of records. By the time the Commission received the motion of TAC et al., its decision on the prior motion had been made and was simply awaiting the administrative work involved in producing and serving the order. Accordingly, that motion stands unresolved.

On October 28, 1985, ACL filed a Motion for Reconsideration and Opposition to Motion to Produce directed to Order No. 2777. Counsel for applicant asserts that he did not receive either motion for discovery and had no knowledge of any request for production of documents prior to issuance of Order No. 2777. Applicant now objects to the production of documents required by the Commission's order stating as grounds for his objection that the order is not accompanied by a subpoena issued pursuant to Rule 18-01, that protestants have failed in their motion to demonstrate general relevance and reasonable scope, and that neither charter orders of the applicant nor the facts to be proved thereby have been defined with sufficient specificity. More specifically, applicant admits that it has an affirmative burden

of proving its fitness, willingness, and ability to conform to the Compact and the Commission's rules and regulations. However, ACL denies that performance of work requiring general charter authority prior to application for that authority has any bearing on its proof of fitness because prior to issuance of the Commission's decision in Case No. AP-85-08 such operations were performed openly and notoriously, and after that decision such operations ceased. ACL also objects to production of documents on the grounds that the documents contain operating information which "might" give protestants a competitive advantage. Finally, applicant proposes that, if a subpoena or order to produce is issued, it be limited to charter orders for service within the Metropolitan District subsequent to the Commission's cease and desist order and properly edited to protect confidential information.

Gold Line et al. filed a reply to applicant's motion stating that protestants' motion and the Commission's findings fully support the issuance of a subpoena. Protestants allege that ACL continued unlawful operations after specific rulings by the Commission that those operations were unauthorized. As support for this allegation protestants point to applicant's performance history and assert that the Commission and protestants are entitled to determine from evidence of actual performance whether ACL can sustain its affirmative burden of establishing compliance fitness. Protestants cite Order No. 2738, served July 22, 1985, directing applicant to cease and desist operations beyond its certificated authority. That order noted Order No. 1525, served March 29, 1976, placing ACL on notice that its certificate does not authorize charter movements other than sightseeing and pleasure tours and Order No. 2550, served May 1, 1984, informing ACL's principals that Certificate No. 1 does not authorize airport service within the Metropolitan District. Protestants submit that the effect of these orders and applicant's failure to seek authority long ago make it highly relevant to the issue of compliance fitness in the instant proceeding to determine whether applicant has continued to operate illegally, a determination which can be made with certainty by examining the documents reflecting ACL's recent charter service. Protestants state that the documents requested are readily identifiable and cover a time period which is reasonable in scope, and that discovery will not result in the disclosure of confidential information since production will be limited to protestants' counsel.

On November 7, 1985, TAC et al. filed a Motion for Subpeona of Applicant for Production of Documents requesting pursuant to Rule 18-01 the production of "all records, driver's logs, manifest charters, orders and invoices for all American vehicle movements beginning or ending in the Washington metropolitan district for the period of January 1 through November 1, 1985." In support of the motion, joint protestants attached a partial list of vehicles, allegedly operated by ACL, which were observed transporting passengers at Washington National Airport, Gravelly Point, Va., and Dulles International Airport, Herndon, Va. Joint protestants assert that the documents requested

will prove that : (1) ACL has knowingly and willfully violated the Compact and the rules and regulations promulgated thereunder; (2) ACL has conducted illegal airport transfers after being advised by the Commission that such operations were not authorized; and (3) ACL has continued said illegal activity notwithstanding the Commission's cease and desist order. Joint protestants assert that the documents requested represent "the minimum amount of documents necessary for production" and that the documents are extremely relevant to the question of applicant's fitness. 1/

On November 15, 1985, ACL requested leave to reply out of time to the motion of TAC et al. stating that the motion had not been received until approximately 4 p.m. on November 12, 1985, apparently owing to the Veteran's Day holiday. 2/ In its reply, applicant contends that there is no basis for production of documents concerning operations conducted prior to August 1985 inasmuch as ACL has conceded the performance of those operations and offered a rationale therefor. It is applicant's position that protestants request for documents pertaining to service performed subsequent to August 1985 is also improper for the following reasons: (1) the request is overly broad insofar as it seeks documents pertaining to non-WMATC movements; (2) the request is without a valid basis as to local operations because observations of ACL equipment locally does not constitute proof of illegal operations since ACL holds ICC authority pursuant to which it regularly operates in the Washington area. ACL reiterates that it has complied with the Commission's cease and desist order at a substantial loss to itself and gain to protestants and that it will offer affirmative proof of its fitness at hearing. ACL maintains that disclosure of customer charter information to protestants would be a misuse of discovery procedures because it would give protestants' clients a competitive advantage. For these reasons, ACL asks that the motion of TAC et al. be denied or, if granted, confined to review of local transit charter orders by Commission staff.

1/ By this same motion, joint protestants request copies of "all memoranda, documents and correspondences relating in any way to the issue of the American authority to operate within the Washington Metropolitan District . . . include[ing] any documents prepared by American and its predecessors or attorneys, past or present, referring or relating to such operating authority." As presently worded, this request could involve the disclosure of privileged material; as such we deny this second request, without prejudice, as overly broad.

2/ In order to assure applicant the opportunity to state fully its position on the issue of pre-hearing discovery, the motion is hereby granted.

We note as a preliminary matter that reconsideration does not lie from an interlocutory order. Reconsideration is governed by Title II, Article XII, Section 16 of the Compact which expressly provides for reconsideration only from final orders or decisions of the Commission. Far from disposing of ACL's application, Order No. 2777 merely deals with a matter preliminary to the public hearing to be held on the matter. Reconsideration from that order is no more appropriate than reconsideration from a ruling of an administrative law judge in the midst of public hearing requiring a company witness to answer a question. Therefore, to the extent that ACL's filing is considered a petition for reconsideration it is rejected as improperly filed.

As an opposition to the production of documents, ACL's filing is untimely as to the motion of Gold Line et al. However, the substance of the unresolved motion of joint protestants and that of Gold Line et al. are the same. Accordingly, we shall accept ACL's filing as a reply to the motions of both groups of protestants. Additionally, we shall address the motion of TAC et al. for a subpoena, and applicant's opposition to that motion since the central issue of these filings is the same as the issue in the earlier filings: whether specified documents which could bear on the issue of compliance fitness are discoverable.

The Compact has provided the Commission with plenary powers of investigation and discovery. Title II, Article XII, Section 10(d) specifically empowers the Commission to discover any records kept in the ordinary course of business by a certificated carrier. Title II, Article XII, Section 13(d) specifically empowers the Commission to require the production of documents which it finds relevant or material to any proceeding under the Compact. When read together these sections indicate an intention on the part of the Signatories to provide the Commission with investigatory powers sufficiently broad to effectuate all purposes of the Compact including efficient and accurate resolution of issues during the hearing process prescribed by Title II, Article XII, Section 4(b). Even applicant concedes that the Commission's general counsel could examine the documents at issue in the motions before us and use this information at the public hearing scheduled for December 2, 1985. Likewise, the Compact in combination with Regulation 18-01 is clear that the Commission could on its own motion compel an ACL representative to appear at the public hearing and produce documentary evidence. Under certain conditions, protestants could gain production of documentary evidence by oral request made during the public hearing. Granting of protestants' motions deprives applicant of no privilege assuming the requirements of Rule 18-01 are met, it merely assures a more orderly hearing process and facilitates the protection of any confidential information. More importantly, in this proceeding, the Commission finds that compelling ACL to produce documents for the inspection of protestants will provide the Commission with maximum information and will assist the Commission in its determinations.

Having found that the Commission is empowered to direct pre-hearing discovery, we further find that protestants have met the requisite showing under Rule 18-01 for the issuance of a subpoena. ACL concedes that it bears an affirmative burden to demonstrate its fitness. In considering fitness, it is well within the province of the Commission to consider applicant's past activity. Applicant correctly contends that fitness determinations are prospective in scope, i.e., the concern is whether applicant will adhere to the law in the future. However, where, as here, there is a substantial question as to whether an applicant has continued to conduct illegal operations in the face of a cease and desist order and other admonishments by the Commission, past behavior plays a greater role in the calculus of the determination of fitness.

Protestants claim to have documented proof of ACL's violations of Commission orders and urge the Commission to allow them to inspect certain ACL documents in order to verify that documentation. If applicant's assertions that all ACL vehicles observed by protestants in the Metropolitan District were engaged in non-WMATC movements are true, its case for compliance fitness will be more firmly established at public hearing. If protestants' allegations are true, and we are not expressing any view upon the allegations at this time, not only could applicant's compliance fitness be implicated but ACL also could be subject to further administrative action. Clearly, a continued pattern of violations is pertinent to this proceeding, and just as clearly, in order for protestants' allegations to be allowed as evidence at a public hearing, the allegations must be substantiated. Thus, protestants' requests are relevant and material to this proceeding. In this context protestants seek specific documents from a limited and recent time period. All documents sought have been specifically named or described by protestants and should be kept in the ordinary course of business and be readily identifiable by applicant.

We note that ACL has expressed concerns about producing sensitive documents to its competitors. If ACL has complied with the Commission's orders, there will be no customer information pertaining to general charter movements within the Metropolitan District. Nevertheless, we shall permit all documents produced to be edited to delete the names and addresses of ACL's customers. ACL shall, however, provide such identifying information to the Commission for the sole and exclusive use of the Commission and its staff. This procedure in combination with the fact that the documents will be viewed only by counsel should effectively protect ACL's business interests.

THEREFORE, IT IS ORDERED:

1. That counsel for American Coach Lines, Inc., appear at the offices of the Commission, 1625 I Street, N.W., Suite 316, Washington, D.C. 20006, on Monday, December 2, 1985, at 9:30 a.m. and produce for inspection and review by counsel for the Commission, Gold

Line, Inc., Eyre's Bus Service, Inc., National Coach Works, Inc., The Airport Connection, Inc., T&S Bus Service, Inc., and Webb Tours, Inc., the following documents:

(a) all charter orders of American Coach Lines, Inc., received between July 22 and November 22, 1985, and all charter orders pertaining to services provided between July 22 and November 22, 1985, for operations beginning or ending in the Metropolitan District;

(b) all charter orders of American Coach Lines, Inc., received between January 1 and November 22, 1985, for service beginning or ending at Washington National Airport, Gravelly Point, Va., and/or Dulles International Airport, Herndon, Va., and all charter orders of American Coach Lines, Inc., pertaining to service provided between January 1 and November 22, 1985, which began or ended at Washington National Airport, Gravelly Point, Va., and/or Dulles International Airport, Herndon, Va.; and

(c) all drivers' logs, charter manifests, orders, and invoices of American Coach Lines, Inc., for all American Coach vehicle movements conducted between July 22 and November 22, 1985, and involving any point within the Metropolitan District.

2. That all drivers' logs, manifests, charter orders, and service invoices produced may be altered only to delete customer names and addresses.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS SCHIFTER AND SHANNON;
WORTHY, Chairman, not participating:


WILLIAM H. MCGILVERY
Executive Director