

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2821

IN THE MATTER OF:

Served February 5, 1986

Application of AMERICAN COACH)
LINES, INC., for a Certificate of)
Public Convenience and Necessity to)
Conduct Charter Operations between)
Points in the Metropolitan District)

Case No. AP-85-36

By motion filed January 10, 1986, The Airport Connection, Inc., Webb Tours, Inc., and T&S Bus Service, Inc. ("TAC et al." or "protestants"), request that the Commission issue a subpoena to American Coach Lines, Inc. ("ACL" or "applicant"), requiring 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 January 1, 1986." In support of its request, TAC et al. state that protestants have observed ACL conducting what appear to be illegal operations on numerous occasions. Protestants assert that they have documentation of these movements some of which involve picking up passengers at Washington Dulles International or Washington National Airports. It is protestants' position that production of the requested documents will bear on fitness by indicating that applicant has knowingly and willfully violated the Compact and the Commission rules and regulations by performing operations outside the scope of the authority contained in WMATC Certificate No. 1. In addition TAC et al. request copies of ". . . all memoranda, documents and correspondence relating in any way to the issue of the American authority to operate within the Washington Metropolitan District . . . includ[ing] any documents prepared by American and its predecessors or attorneys, past or present, referring or relating to such operating authority."

Gold Line, Inc., Eyre Bus Service, Inc., and National Coach Works, Inc. ("Gold Line et al." or "protestants"), join in the request for subpoena of TAC et al. for the reasons stated therein. In addition, Gold Line et al. note that ACL has been previously required by the Commission in Order No. 2801, served November 26, 1985, to produce the documents at issue in the instant request for subpoena. Order No. 2801 was issued in the context of Case No. AP-85-27 in which ACL sought authority identical to that involved in this proceeding. Although counsel for Gold Line et al. appeared to review those documents on December 2, 1985, the date specified by the Commission, that review was not accomplished because ACL withdrew its application

on that date. Protestants assert that the reasons which required the production of documents in Case No. AP-85-27 still exist and apply equally in this case.

ACL does not oppose issuance of a subpoena limited to review by the Commission and protestants' attorneys of charter orders covering service which it provided between July 22, 1985, and December 31, 1985, beginning and ending at points within the Metropolitan District, provided names and addresses of customers and accounts are excised from those orders to protect the confidentiality of that business information. Applicant opposes as unnecessarily burdensome the production of documents other than charter orders or dealing with service provided prior to July 22, 1985, or concerning service with one point only inside the Metropolitan District. Applicant further states that production of documents concerning service provided prior to July 22, 1985, is irrelevant because ACL has already admitted conducting such operations. ACL objects to the production of any memorandum or correspondence relating to the issuance of American's operating authority on the basis that those documents either represent work product or are privileged communications between attorney and client.

By motion filed January 15, 1986, ACL requests that the Commission issue a subpoena directed to all protestants in this case requiring the production of all charter orders for the period of July 22, 1985, through December 31, 1985. ACL asserts that it ". . . regularly chartered buses from TAC, Webb and, to some extent T&S. It also employed Gold Line." In order to provide service already booked but prohibited by the Commission's cease and desist order as outside ACL's authority, ACL further claims to have referred numerous requests for new service to protestants since July 22, 1985. It is applicant's position that such documentation is necessary to disprove arguments to the contrary raised by protestants in their protest.

Protestants object to applicant's request for subpoena on the grounds that the material sought to be produced is irrelevant to the issues at hand for which ACL bears an affirmative burden of proof. Gold Line et al. assert that production of the requested documents will not prove that ACL fully complied with the Commission's cease and desist order and that ACL has in its possession documentation as to each instance when ACL engaged another carrier to provide service for its customers. Protestants point out that applicant does not even represent that it used the services of Eyre Bus Service, Inc., or National Coach Works, Inc., and deny that ACL ever chartered Gold Line for operations within the Metropolitan District during the period for which discovery is sought.

TAC et al. object to ACL's request for subpoena on the ground that it is overly broad and burdensome in light of what it purports to prove. TAC et al. note that ACL's use of protestants does not prove

that ACL refrained from performing illegal services for others. T&S denies that it performed any work for ACL during the latter half of 1985. TAC and Webb performed some service for ACL and are agreeable to providing all charter orders relating to that work. In light of their willingness to provide the information, TAC & Webb question the need for a subpoena.

In Order No. 2801, served November 26, 1985, we dealt extensively with the basis for the Commission's power to direct pre-hearing discovery. That order was issued in the context of Case No. AP-85-27, Application of American Coach Lines, Inc. for a Certificate of Public Convenience and Necessity to Conduct Charter Operations and concerned requests for subpoenas filed by the same protestants and seeking production of substantially the same documents. In that case we stated

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). . . . 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.

As a preliminary matter, we note that protestants request for any documents prepared by ACL, its predecessors, and attorneys relating

to its operating authority may involve the disclosure of privileged information. We shall deny that request without prejudice as overly broad.

We turn now to the matter of whether protestants have met the required showing under Rule 18-01 for issuance of a subpoena. In these proceedings ACL bears an affirmative burden to demonstrate its fitness. Applicant has been under a cease and desist order from this Commission since July 22, 1985. Prior to that time applicant had been formally informed by order of this Commission that airport transfers were beyond the scope of the authority contained in Certificate No. 1. Protestants claim to have documented ACL's violation of these Commission orders and urge the Commission to allow them to inspect certain ACL documents in order to verify that documentation.

In considering fitness, it is well within the purview of the Commission to consider applicant's past activity especially where as here a substantial question is raised regarding applicant's compliance with the Compact and a Commission order. That question must be resolved before the Commission can determine whether applicant will adhere to the law in the future. If protestants' allegations are true, and we are not expressing any view of those allegations at this time, not only could applicant's compliance fitness be implicated; but also ACL could be subject to further administrative action. For this reason we find protestants' requests to be relevant and material to this proceeding. Furthermore, protestants have specifically named or described the type of documents which they seek to view. All those documents should be kept in the ordinary course of business and be readily identifiable by applicant.

However, two weaknesses in protestants' requests prevent us from granting those requests in their entirety. First, although we assume that protestants are requesting documents for a 12-month period rather than a single day as the request for subpoena would indicate, protestants' motion stands uncorrected. Moreover, protestants have presented merely bare allegations of illegal operations. The appendix purporting to list specific instances of misbehavior is lacking from TAC et al.'s request for subpoena. On the other hand, applicant has failed to object to either of these obvious matters within the time period provided. In fact applicant has even interpreted protestants' request as representing a one year period. Weighing these factors we find that protestants' requests meet the requirements of Regulation No. 18-01 to the extent that these elements of that request stand unopposed by applicant. In the interest of resolving the questions raised by protestants' allegations, we shall direct applicant to submit additional information for inspection and copying by the Commission staff.

ACL has expressed concerns about producing sensitive documents to its competitors. To protect ACL's business interests, discovery

shall be limited to counsel for protestants and the Commission, and we shall permit all documents produced for inspection by protestants' counsel to be edited to delete the names and addresses of ACL's customers. ACL shall, however, provide the related names and addresses together with information sufficient to link them with specific charter orders to the Commission for the sole and exclusive use of the Commission and its staff. Documents produced for inspection and copying by Commission staff shall be unedited.

We turn now to applicant's cross-motion for subpoena. ACL requests that all protestants produce all charter orders for the period July 22, 1985, through December 31, 1985, in order that ACL may prove that it chartered vehicles from these carriers subsequent to the Commission's cease and desist order. ACL requests all charter orders for a five-month period despite the fact that it should be able to specifically state those bookings referred to other carriers. Moreover, ACL requests that all protestants produce these documents despite the fact that it alleges that it referred work only to four of the six protestants. We find ACL's request overly burdensome and, as stated, not relevant to these proceedings. As TAC et al. have correctly stated, ACL's use of protestants does not prove that ACL refrained from performing illegal services for others.

Finally, as we have noted earlier, this exact application was previously filed on August 28, 1985, as Case No. AP-85-27. After three months of processing, including protests by the same parties and similar requests for discovery, opposition thereto, and decision thereon, Case No. AP-85-27 was withdrawn by applicant at the very hour when discovery had been directed. By the end of that same week the same application had been refiled as Case No. AP-85-36, the case here under consideration. Predictably, the parties have gone through the discovery process again, leading us to this same point of decision again. However, had they not done so -- given recent proceedings involving this applicant -- we would have directed on our own initiative the discovery we here direct.

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, February 10, 1986, at 9:30 a.m. and produce the following:

- (a) all charter orders of American Coach Lines, Inc., received between July 22, 1985, and December 31, 1985, and pertaining to operations beginning and ending in the Metropolitan District and all charter orders pertaining to services provided between July 22 and December 31, 1985, for operations beginning and ending in the Metropolitan District;

(b) all charter orders of American Coach Lines, Inc., received between July 22, 1985, and December 31, 1985, for service beginning or ending in the Metropolitan District and all charter orders of American Coach Lines, Inc., pertaining to service provided between July 22, 1985, and December 31, 1985, which began or ended in the Metropolitan District;

(c) all charter orders of American Coach Lines, Inc., received between January 1 and December 31, 1985, for service beginning or ending at Washington National Airport, Gravelly Point, Va., and/or Washington Dulles International Airport, Herndon, Va., and all charter orders of American Coach Lines, Inc., pertaining to service provided between January 1 and December 31, 1985, which began or ended at Washington National Airport, Gravelly Point, Va., and/or Washington Dulles International Airport, Herndon, Va; and

(d) all invoices of American Coach Lines, Inc., for all American Coach vehicle movements conducted between July 22 and December 31, 1985, and involving any point within the Metropolitan District.

2. That the documents described in ordering paragraph No. 1(a) above are to be produced for inspection and review by counsel for 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., and may be altered only to delete customer names and addresses.

3. That the documents described in ordering paragraph No. 1(a), (b), (c), and (d) above are to be produced for inspection and copying by counsel for the Commission and shall be unedited in any way.

4. That the request of American Coach Lines, Inc., for issuance of a subpoena is hereby denied.

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


WILLIAM H. MCGILVERY
Executive Director