

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4019

IN THE MATTER OF:

Served November 23, 1992

Investigation of Post-Revocation)
Operations of JAPAN TRAVELERS)
SERVICE, INC., and HIDEO KOGA)

Case No. MP-92-36

This investigation was initiated on September 21, 1992, pursuant to Order No. 4006. That order directed Japan Travelers Service, Inc. (JTS), and Mr. Hideo Koga, JTS's president, to each submit an affidavit concerning JTS's and Mr. Koga's possible transportation of passengers after June 28, 1988, when JTS's authority to conduct such operations was revoked. The order also directed the production of certain related documents. JTS and Mr. Koga timely responded by filing a joint affidavit with the requested documents on October 7, 1992. The Commission finds that filing fully responsive to Order No. 4006.

The facts set forth in the affidavit and accompanying documents are dispositive of the issues in this investigation. Accordingly, the Commission agrees with respondents that an oral hearing is unnecessary.

Respondents' Transportation of Passengers
Between June 28, 1988, and September 21, 1992

The affidavit signed by Mr. Koga in both his official and individual capacities states that:

JTS primarily provides package tours to its tour group customers. More particularly, JTS has 15 to 20 large Japanese travel agencies for whom it acts as Washington agent. In this capacity, JTS chooses all of the hotels, restaurants, and transportation providers for its tour group customers. JTS receives compensation for doing so, in a lump sum, which is not broken down as to transfers, food, sightseeing, hotels, etc. Thus, JTS did receive an indeterminate amount of compensation for the transportation that it provided to its passengers

. . . .

Throughout the period of time from June 28, 1988 to the present JTS has owned and operated a Cadillac limousine, which JTS utilizes to transport passengers for sightseeing, and in effecting transfers, in addition to transporting its own personnel. In addition, throughout this period of time we have owned and operated two vans, whose present capacity is ten (10) passengers each, and whose capacity has never exceeded ten (10) passengers each. Primarily, these vans are used by JTS to transport baggage only. However, on an emergency and infrequent basis, not

exceeding one or two times per month at most, JTS has used its vans to transport its passengers as well, almost always for transfer purposes. Invariably this has been in response to emergency conditions, such as a vehicle breakdown, or nonappearance of a chartered vehicle, or a sudden change in plane schedules, or if no other vehicle is available to provide the needed transportation.

With regard to the transportation provided by limousine, which was divided about evenly between transfers and sightseeing, and which occurred on a once a day basis throughout the subject period, it was my understanding that limousines are exempt from the WMATC's jurisdiction. However, I have recently learned from my counsel that the WMATC does in fact assert that it has jurisdiction over limousines unless they qualify as "bona fide taxicab service." . . .

. . . [O]n those few occasions . . . when JTS used its vans for transporting passengers, I thought that it was permissible for me to do so since the only persons being transported were members of groups which were formed by me, being transported to places chosen by me, over routes selected by me. In other words, I thought that my transportation of my own tour group members was likewise within the "bona fide taxicab service" exemption from the WMATC's jurisdiction.

I am not asserting that my aforesaid understanding concerning JTS' van usage was correct, or in accordance with applicable WMATC precedent. In fact, I now understand that it was incorrect, and that WMATC certification is required for all transportation of passengers in motor vehicles between points in the Metropolitan District, excluding transportation solely between points in Virginia

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I regret that JTS apparently has, through inadvertence and lack of awareness on my part, been engaged in providing certain transportation for which JTS should first have obtained WMATC certification. Now that I am aware of this, I am anxious to file the appropriate application for WMATC certificate authority so that JTS can thereafter operate secure in the knowledge that it is in full compliance with all applicable regulations and orders of the WMATC. On JTS' behalf however, I once again wish to emphasize that most of JTS' passenger movements during the subject period were performed by certificated WMATC carriers acting at the specific behest of JTS.

On the basis of Mr. Koga's affidavit and supporting exhibits, the Commission finds that JTS and Mr. Koga transported passengers for

hire between points in the Metropolitan District between June 28, 1988, and September 21, 1992, when Order No. 4006 was served, a total of 1,545 days in limousines and 76 days in vans, 76 being the approximate median of the range established by 1 to 2 times per month for 51 months.

The Unlawful Nature of Respondents' Operations

Throughout the period under investigation, the Compact governed "the transportation for hire by any carrier of persons between any points in the Metropolitan District" ¹ During that period, the Compact prohibited a carrier from engaging in any such transportation without a certificate, in force and issued by the Commission, authorizing said carrier to perform that transportation. ² As respondents observe, however, there was an exception to the certificate requirement for "bona fide taxicab service." ³

Since May 24, 1984, bona fide taxicab service has been defined as:

- (a) transportation intended in good faith to be provided only between points selected at will by the person or persons hiring the vehicle in which such transportation is provided;
- (b) conducted in a vehicle subject to the exclusive use of the passenger or single party of passengers hiring the vehicle for the entire time such vehicle is under hire;
- (c) priced at rates based on the duration and/or distance of the transportation rendered; and
- (d) conducted in vehicles engaged solely in rendering or performing transportation as described in subparagraphs (a), (b), and (c) above. ⁴

¹ Washington Metro. Area Transit Reg. Compact, Pub. L. No. 101-505, § 1, Title II, Art. XI, § 1(a), 104 Stat. 1300 (1990) (codified at D.C. Code Ann. § 1-2411 (1992)) [hereinafter Amended Compact]; Washington Metro. Area Transit Reg. Compact, Pub. L. No. 86-794, § 1, Title II, Art. XII, § 1(a), 74 Stat. 1031 (1960), as amended by Pub. L. No. 87-767, 76 Stat. 765 (1962) [hereinafter Original Compact].

² Amended Compact, Title II, Art. XI, § 6(a); Original Compact, Title II, Art. XII, § 4(a).

³ See Amended Compact, Title II, Art. XI, § 3(f); Original Compact, Title II, Art. XII, § 1(c).

⁴ In re Title II, Art. XII, § 1(c) of the Compact, No. MP-83-01, Order No. 2559 (May 24, 1984); see also Commission Reg. No. 51-09(a)-(d) (1991).

In addition, the vehicles used in providing this service must seat 8 passengers or less, excluding the driver.⁵

Clearly, respondents' transportation of passengers in 10-passenger vans does not meet the exception. It is also clear that, under the circumstances, respondents' transportation of passengers in limousines and 8-passenger vans does not meet this exception, either. To meet the bona fide taxicab service exception, the transportation must be directed by the passengers.⁶ According to Mr. Koga, he chose the destination points and selected the routes, not his passengers.⁷ We, therefore, hold that all of respondents' transportation of passengers as described in the affidavit was in violation of the Compact.

The Knowing and Willful Nature of Respondents' Acts

The Amended Compact, Title II, Article XIII, § 6(f) provides that a person who knowingly and willfully violates a provision of the Compact shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation and that each day of the violation constitutes a separate violation.

"Knowingly" means with "perception of the facts necessary to bring the questioned activity within the prohibition of the [Compact]," not "awareness that such activity is in fact prohibited."⁸ The term "willfully," as used here, does not mean with evil purpose or criminal intent; rather, "it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the [Compact] or is

⁵ Order No. 2559 at 1 & n.1; Commission Reg. No. 51-09(e).

⁶ In re Airport Transport, Inc., No. 34, Order No. 283 at 2 (July 3, 1963) (on reconsideration) (emphasis added), aff'd per curiam, sub nom., Bartsch v. WMATC, 361 F.2d 528 (D.C. Cir. 1965).

⁷ While these statements were made by Mr. Koga in reference to van service, it is implicitly clear from the rest of the affidavit and explicitly clear from the argument of respondents' counsel that these statements apply with equal force to respondents' limousine service.

⁸ In re Madison Limo. Serv., Inc., No. AP-91-39, Order No. 3914 at 4 & n.15 (Mar. 25, 1992) (on reconsideration) (quoting from Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10th Cir. 1967); United States v. Key Line Freight, 481 F. Supp. 91, 95 (W.D. Mi. 1977), aff'd, 570 F.2d 97 (6th Cir. 1978)).

plainly indifferent to its requirements."⁹ Previous convictions or violations are very probative of willful disregard.¹⁰

The Commission finds that the violations committed in the vans were knowing and willful. The Commission does not find that the violations committed in the limousines were knowing and willful.

This is not the first time that Mr. Koga has admitted transporting passengers in violation of the Compact. The first admission occurred during the hearing on JTS's application for a certificate of public convenience and necessity in 1982. Mr. Koga admitted operating an 11-passenger van and 20-passenger minibus without WMATC authority prior to applying for the certificate. Mr. Koga acknowledged being advised, after the fact, that such operations were unlawful and vowed that no vehicles of 8-passenger capacity or greater would be used to transport passengers until the Commission issued a certificate to JTS. Under the circumstances, respondents' unlawful, post-revocation use of 8- and 10-passenger vans must be viewed as knowing and willful.

It is not clear, however, that respondents' post-revocation use of 7-passenger Cadillac limousines was also knowing and willful. It may have been, but on the record before us we cannot determine that to be the case.

During the course of the proceeding on JTS's application for a certificate, Mr. Koga informed the Commission that JTS owned and operated two 7-passenger Cadillac limousines and that JTS intended to use them in its certificated operations. There is no evidence in the record from that proceeding, however, that Mr. Koga was ever advised that JTS's prior transportation of passengers in those vehicles without a certificate was illegal. In fact, all indications are to the contrary. There is no suggestion of any guilty knowledge on Mr. Koga's part with regard to the limousines and no vow to discontinue their use pending a determination on JTS's application, as there was with respect to the van and minibus. Although prior advisement of violation is not a prerequisite to a finding of willfulness,¹¹ under the circumstances, as further explained below, the absence of any evidence of such advice is entitled to some weight on this issue in favor of Mr Koga.

It appears from Mr. Koga's affidavit and exhibits that much -- probably most -- of the transportation arranged by JTS since June 28, 1988, has been provided by WMATC certificated carriers. On those

⁹ In re Ruchman and Assocs., Inc., No. AP-91-32, Order No. 3911 at 3 & n.10 (Mar. 25, 1992) (on reconsideration) (quoting from United States v. Illinois Cent. R.R., 303 U.S. 239, 243 (1938)).

¹⁰ Id. at 3 & n.11 (citing United States v. Paramount Moving & Storage Co., 479 F. Supp. 959, 965 (M.D. Fla. 1979); United States v. T.I.M.E.-D.C., 381 F. Supp. 730, 741 (W.D. Va. 1974)).

¹¹ Paramount Moving & Storage, 479 F. Supp. at 965-66; T.I.M.E.-D.C., 381 F. Supp. at 740-41.

occasions, Mr. Koga's acts as agent for tour groups may be attributed to those groups, and in that sense they "directed" the transportation. Mr. Koga apparently believed that this concept applied when he was providing the transportation, as well. It does not, but that does not change what he says he believed or what that says about his lack of indifference to the requirements of the Compact. In addition, we have noted that the difference between certain charter service and taxicab service is a matter of degree.¹² On the other hand, we also have observed that charter service "carries the connotation of travel arranged in advance to meet the predetermined needs of a larger group, whereas taxicab service connotes the more immediate travel requirements of an individual or small party."¹³

Considering that when the issue was first raised Mr. Koga seemingly was not advised that JTS's pre-certificate limousine operations were just as unlawful as its van and minibus operations, and considering that the difference between certain charter operations and taxicab operations is a matter of degree, the Commission can understand how Mr. Koga might have believed that respondents' limousine operations were lawful, notwithstanding the revocation of JTS's certificate. Thus, as it stands now, the record does not support a finding that respondents intentionally disregarded the Compact or were indifferent to its requirements when they transported passengers for hire in 7-passenger Cadillac limousines after June 28, 1988.

Conclusion and Assessment of Forfeiture

The civil forfeiture provision of the Compact serves at least two functions: deterrence of future violations through payment to the Commission of a civil penalty and restitution to the public for past violations through payment to the Commission of unlawfully acquired gains or benefits.¹⁴ JTS and Mr. Koga have been unjustly enriched by operating without authority during the period between June 28, 1988, and September 21, 1992, when JTS earned over \$2 million before taxes and underinsured its vehicles for \$750,000, instead of the mandatory \$1.5 million. Based on respondents' Exhibits 3-5, staff has calculated JTS's cumulative after-tax insurance premium savings to be approximately \$7,700.

The Commission hereby assesses against respondents a civil forfeiture in the amount of \$500 for each of the 76 days of violations committed in vans, or \$38,000. In recognition of respondents' good record during the time JTS was certificated, and respondents' complete cooperation in this investigation, the Commission will suspend all but \$10,000. No application for operating authority for JTS or Mr. Koga will be processed until the civil forfeiture is paid.

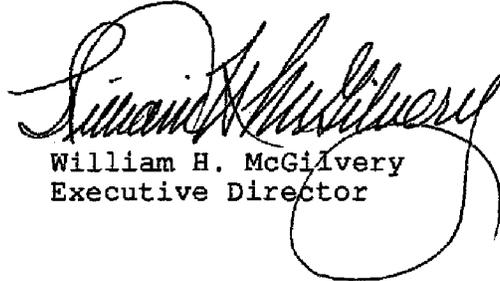
¹² Order No. 2559 at 10.

¹³ Id. at 9 n.10.

¹⁴ In re Madison Limo. Serv., Inc., No. AP-91-39, Order No. 3891 at 9 (Feb. 24, 1992).

THEREFORE, IT IS ORDERED that Japan Travelers Service, Inc., and Mr. Hideo Koga, are hereby jointly and severally directed to pay to the Commission within thirty (30) days from the date of this order, or such additional time as the Commission may direct or allow, by money order, certified check, or cashier's check, the total sum of ten thousand dollars (\$10,000).

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



William H. McGilvery
Executive Director