

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4499

IN THE MATTER OF:

Served February 16, 1995

Application for Approval of Asset)
Purchase Agreement Between CAREY)
LIMOUSINE D.C., INC., and ADV)
INTERNATIONAL CORPORATION, Trading)
as MORAN LIMOUSINE SERVICE)

Case No. AP-94-53

ADV INTERNATIONAL CORPORATION,)
Trading as MORAN LIMOUSINE SERVICE,)
Suspension and Investigation of)
Revocation of Certificate No. 183)

Case No. MP-94-37

By application accepted for filing October 28, 1994, Carey Limousine D.C., Inc. (Carey or transferee), Carrier No. 69, and ADV International Corporation, trading as Moran Limousine Service (Moran or transferor), Carrier No. 183, (collectively applicants) seek Commission approval of Carey's purchase of substantially all the assets of Moran, including Moran's certificate of authority.

Notice of this application was served on November 4, 1994, in Order No. 4425, and applicants were directed to publish further notice in a newspaper and file an affidavit of publication. Carey was directed to file a certificate of good standing and certain statements concerning: (1) Carey's proposed leasing of limousines and minibuses from Moran; (2) whether Carey is requesting waiver of Commission Regulation No. 62-08; and (3) whether Carey is requesting temporary approval. Moran was directed to file a statement indicating the disposition of its vehicles.

On December 2, 1994, JAR Enterprises, Inc., WMATC Carrier No. 281, filed a protest. The protest was withdrawn on December 21, 1994.

Applicants are in compliance with the aforementioned filing requirements, and the application stands unopposed.

SUMMARY OF EVIDENCE

The application includes information regarding, among other things, transferee's corporate status, carrier affiliations, facilities, proposed tariff, finances, and regulatory compliance record. Also included is a copy of the purchase agreement executed on June 30, 1994.

Under the purchase agreement, Moran agrees to sell, and Carey agrees to buy, certain specified assets, including trade secrets, operating rights, customer lists, furniture and fixtures, and contract rights. Moran assigns to Carey all right, title and interest in Moran's corporate and trade names and agrees not to conduct business under those names. Moran's only WMATC vehicles, four minibuses, are covered by a master lease agreement as supplemented by four, open-ended, vehicle-

specific leases. Carey agrees to employ Moran's president/sole shareholder for a term of one year, which agreement automatically renews at the end of each term, subject to a 60-day termination notice requirement. Moran's president agrees to devote substantially all of her working time to her duties under the employment contract. Moran's president further agrees not to compete against Carey within one hundred miles of DC for a period of two years and not to solicit Carey's clients for a period of three years, following the end of her employment with Carey.

Although Carey is not obligated to hire Moran's employees, the application states that all Moran employees have been retained with no loss in salary and now enjoy upgraded insurance benefits.

Carey proposes a general tariff containing hourly, mileage, and transfer rates for service in sedans, limousines, vans and minibuses. Carey also proposes a contract tariff for service to and from the Washington Harbour building pursuant to a contract acquired from Moran under the purchase agreement. The only Moran vehicles currently operated by Carey are the four leased minibuses used to service the Washington Harbour contract.

Transferee filed a balance sheet as of May 31, 1994, showing assets of \$3,094,953; liabilities of \$1,099,114; and equity of \$1,995,839. Transferee's income statement for the eighteen months ended May 31, 1994, shows operating revenue of \$6,410,707; costs, expenses and loss on sale of assets of \$5,663,947; and net income of \$746,760.

Transferee certifies it has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire.

DISCUSSION AND CONCLUSION

Under Article XI, Section 11(a), and Article XII, Section 3(a)(ii), of the Compact, the Commission may approve the transfer of assets, including Certificate of Authority No. 183, from Moran to Carey if the Commission finds the transfer consistent with the public interest.

Prior to amendment of the Compact in 1990, effective 1991, the public interest analysis in a transfer of operating rights and other assets from one WMATC carrier to another focused on the transferee's fitness, the fairness of the purchase price, the resulting competitive balance, the dormancy of operating rights, the benefits and costs to the riding public, and the interest of affected employees.¹ The purchase price and dormancy inquiries are no longer relevant under the amended

¹ D.C. CODE ANN. § 1-2414 (1992); In re Eugene H. George, t/a Silver Star Sightseeing Tours, & Samuel J. Howell, No. AP-89-23, Order No. 3393 (Aug. 17 1989); In re Dawson's Charter Serv., Inc., & Beltway Limo. Serv., Inc., No. AP-81-21, Order No. 2304 (Jan. 6, 1982); In re Atwood's Transport Lines, Inc., & Gray Line, Inc., No. AP-78-30, Order No. 1912 (Nov. 6, 1978).

Compact.² The public interest analysis focuses now on fitness, competitive balance, net benefits to the riding public and interests of affected employees.³ We need not assign equal weight to each element of the analysis.⁴ The specific circumstances of an acquisition will dictate the prominence that each element takes on of its own accord.⁵

The net benefits to the public and interests of affected employees do not require extensive analysis. A comparison of Carey's existing tariff with its proposed tariff shows that the costs to the public will not increase substantially and may even decline. Carey's hourly rates will increase slightly, but its minimum airport transfer rates will decline or stay the same. Moran's single contract customer has approved assignment of the contract to Carey. All Moran employees have been retained with no loss in salary and now receive upgraded insurance benefits. We find these two factors favor approval.

The competitive impact from consolidation of certificated operations is uncertain. Approval of the purchase agreement will leave only one WMATC carrier where two once stood, suggesting a lessening of competition. On the other hand, Moran's WMATC operations are limited to performing a single contract with four vehicles. Considering the size of the market,⁶ any anticompetitive effect flowing from the consolidation of certificated operations will be negligible.

The impact from consolidation of noncertificated limousine and sedan operations also is uncertain. Carey proposes operating these vehicles under its WMATC certificate once we have approved the purchase agreement. In the Metropolitan District, noncertificated limousines and sedans may be used only for providing bona fide taxicab service. Bringing its limousines and sedans under its WMATC certificate allows Carey to provide other services in those vehicles. The record is silent on whether either carrier would have taken such action independently. In any event, the record shows that consolidation removes only five Moran limousines and sedans from the Metropolitan District, an insignificant number whether certificated or not. On balance, we view the competitive impact factor as neutral.⁷

² In re Executive Sedan Mgmt. Servs., Inc., t/a Washington Car & Driver, No. AP-94-26, Order No. 4354 (Aug. 1, 1994); In re WestScot Ltd. Partnership & Conference Ctr. Interests, Inc., t/a Westfields Int'l Conference Ctr., No. AP-93-24, Order No. 4175 (Sept. 30, 1993); In re Boston Coach-Wash. Corp., No. AP-93-21, Order No. 4163 (Sept. 13, 1993).

³ Order No. 4354; In re Williams Bus Lines, Inc., & Laidlaw Transit (Virginia) Inc., No. AP-94-17, Order No. 4316 (June 9, 1994).

⁴ Order No. 4354.

⁵ Id.

⁶ The number of certificated carriers currently exceeds 150. The number of contract tariffs on file currently exceeds 50.

⁷ As noted above, the parties have entered a noncompetition agreement. We express no opinion at this time as to the validity of that agreement under the Compact.

As an existing WMATC carrier authorized to operate vehicles unrestricted as to seating capacity, Carey is presumptively fit to acquire and operate Moran's minibuses under Article XII, Section 3, of the Compact.⁸ The record supports that presumption, except with respect to compliance fitness. Carey has been operating a substantial part of Moran's property in the Metropolitan District since July 1, 1994, without prior Commission approval. We find Carey's violation of the Compact to be knowing and willful⁹ and assess a \$500 civil forfeiture against Carey under Article XIII, Section 6(f). In addition, during the course of this proceeding, the Virginia State Corporation Commission (VASCC) entered a \$700 judgment against Moran for operating in Virginia without a limousine certificate.¹⁰ We will condition approval of the transfer agreement on Carey's payment of the \$500 civil forfeiture and Moran's satisfaction of the VASCC's judgment.

Upon satisfaction of all conditions stated herein, Certificate of Authority No. 69 will be reissued to Carey to reflect our approval of the purchase agreement. At that time, Certificate of Authority No. 183, which is appended to the application as Exhibit K, will merge into Certificate No. 69 and stand revoked.¹¹

Carey has requested temporary approval to operate the Washington Harbour contract pending reissuance of Certificate No. 69. Under the Compact, "the Commission may grant 'temporary approval' without a hearing or other proceeding up to a maximum of 180 consecutive days if the Commission determines that grant to be consistent with the public interest."¹² Although fitness is an element of the public interest analysis in a temporary approval proceeding, it must be weighed against the urgency of the transportation need.¹³ In this case, Moran's contract customer has already assigned the contract to Carey. Carey is financially and operationally fit to perform the contract, and Moran's certificate of authority is currently suspended. We therefore shall grant Carey's request for temporary approval to perform Moran's

⁸ Cf. Order No. 4354 (presumption of fitness obtains where acquiring party controls WMATC carrier previously found fit).

⁹ The term "knowing" means with perception of the underlying facts, not that such facts establish a violation. In re Regency Limo. Serv., Inc., No. MP-94-01, Order No. 4323 at 3 (June 21, 1994). The term "willful" does not mean with evil purpose or criminal intent but means purposely or obstinately, with intentional disregard or plain indifference. Id.

¹⁰ Virginia ex rel. State Corp. Comm'n v. Moran Limo. Serv., Inc., No. MCE941319, Final Judgment Order (Nov. 30, 1994).

¹¹ Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express, & United Mgmt. Corp., t/a Passenger Express, No. AP-92-12, Order No. 3956 (June 15, 1992). Certificate No. 183 currently is invalid and suspended for Moran's failure to replace its cancelled insurance certificate before August 20, 1994.

¹² Compact, tit. II, art. XII, § 3(d).

¹³ In re Highview Bus Serv., Inc., & Courtesy Bus Rental Sys., Inc., No. AP-78-47, Order No. 1975 (Mar. 27, 1979).

Washington Harbour contract, Contract Tariff No. CT-1, using the four minibuses leased from Moran. Such approval shall be effective from the date of this order and continue until such time as Certificate No. 69 is reissued, not to exceed 180 days. Carey will be directed to pay the \$50 application fee for temporary approval as specified in Order No. 3601.

Appended to the purchase agreement are two "Independent Operator Agreements," whereby each independent party agrees to make available a vehicle (limousine) and driver to be used in Moran's "Chauffeur Driver Service," and now, by virtue of the purchase agreement, Carey's. In the initial order, Carey was directed to state whether it is seeking a waiver of Commission Regulation No. 62-08, which generally prohibits the leasing of vehicles and drivers from the same source. This provision incorporates the presumption that the entity providing the vehicle and driver is the carrier.¹⁴ That presumption is not rebutted here with regard to the independent operators. On the contrary, each agreement specifically states that Carey will furnish the operator with the passenger's name and time of pickup, but that the "actual performance of said services shall not be under the direction of [Carey]." The independent operator "agrees to take all directions for his/her assignment from the [passenger]." Because the independent operator is the person "actually controlling and directing the transportation service," the operator, not Carey, is the carrier.¹⁵ Such service must stand on its own authority and may not be provided under Carey's certificate of authority.¹⁶

Based on the evidence in this record, the Commission finds the transfer of assets, including Certificate of Authority No. 183, from Moran to Carey to be consistent with the public interest.

The Executive Director may issue at any time, upon Carey's request, the standard letter waiving Regulation No. 61 as to limousines and sedans seating nine persons or less, including the driver.

THEREFORE, IT IS ORDERED:

1. That the transfer of assets, including Certificate of Authority No. 183, from Moran to Carey is hereby conditionally approved, contingent upon applicants' timely compliance with the requirements of this order.
2. That the Commission hereby assesses a civil forfeiture against Carey in the amount of \$500 for knowing and willful violation of the Compact, Article XII, Section 3, and that Carey is hereby directed to pay to the Commission the sum of five hundred dollars (\$500).
3. That Moran shall file proof of satisfaction of the Virginia State Corporation Commission judgment entered against Moran on November 30, 1994, in Case No. MCE941319.

¹⁴ In re Yellow Bus Lines, Inc., No. AP-79-14, Order No. 2083 at 7 (Feb. 20, 1980).

¹⁵ Washington, Va. & Md. Coach Co. v. Scenic Coach Rental, Inc., No. 165, Order No. 837 (July 10, 1968).

¹⁶ Compact, tit. II, art. XI, § 11(b).

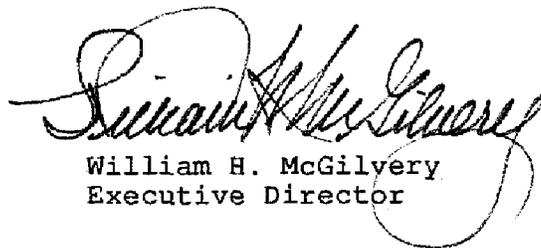
4. That Carey is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) four copies of a tariff or tariffs in accordance with Commission Regulation No. 55, plus an appropriate assignment, novation or consent agreement for each transferred contract; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 69 is hereby reassigned.

5. That upon timely compliance with the requirements of the preceding paragraphs and acceptance of the documents required by the Commission, Certificate of Authority No. 69 shall be reissued to Carey Limousine D.C., Inc., 768 South 23rd Street, Arlington, VA 22202, whereupon Certificate of Authority No. 183 shall stand revoked.

6. That contingent on Carey paying the \$50 application fee specified in Order No. 3601 and filing an affidavit of temporary vehicle identification pursuant to Commission Regulation No. 61, for which purpose WMATC TA No. AP-94-53 is hereby assigned, Carey is hereby granted temporary approval to perform the Washington Harbour contract, Moran's Contract Tariff No. CT-1, using the four minibuses leased from Moran. Such approval shall be effective from the date of this order and continue until such time as Certificate No. 69 is reissued, not to exceed 180 days.

7. That unless applicants comply with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the approval of transfer and temporary approval shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND SHANNON:


William H. McGilvery
Executive Director