

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4730

IN THE MATTER OF:

Served January 4, 1996

Application of DOUBLE DECKER BUS)
TOURS W.D.C., INC., Trading as) Case No. AP-95-21
DOUBLE DECKER BUS WASHINGTON, D.C.,)
for a Certificate of Authority --)
Irregular Route Operations)

On August 9, 1995, the Commission issued Order No. 4642, conditionally granting the application of Double Decker Bus Tours W.D.C., Inc., for a certificate of authority and approving common control of Double Decker and New York Apple Tours, Inc. On August 31, 1995, protestant, Old Town Trolley Tours of Washington, Inc., WMATC Carrier No. 124, filed an application for reconsideration of Order No. 4642 and a motion to stay its execution in the alternative.

The application for reconsideration challenges the Commission's findings that Double Decker is fit as to regulatory compliance and that common control of Double Decker and New York Apple Tours, Inc., is consistent with the public interest. The Commission reached those findings after considering allegations that New York Apple had operated unlicensed vehicles in 1994. Under Commission precedent the compliance fitness of a commonly-controlled carrier is relevant to a determination of an applicant's compliance fitness. We expressed our concern that given the commonality of ownership and control, applicant might exhibit some of the same alleged behavior. On the other hand, we acknowledged the presence of extenuating circumstances and recognized New York Apple's considerable monetary expenditure in bringing its buses up to DCA standards. Weighing these factors we found applicant fit.

Protestant now brings to our attention evidence that was not available prior to the issuance of Order No. 4642 but which bears on this issue. Protestant has introduced into the record a copy of a notice of hearing issued August 11, 1995, by the New York City Department of Consumer Affairs (DCA), the agency which licenses New York Apple. The notice charges New York Apple with various violations of city ordinances in July and August of 1995, including operating unlicensed vehicles, and breaching a DCA Consent Judgment/Order (CJO), in which New York Apple admits operating unlicensed vehicles in 1994. Protestant also has introduced a copy of an order issued August 14, 1995, authorizing seizure of New York Apple's DCA plates. Faced with New York Apple's admission of prior unlicensed operations and DCA's seizure of New York Apple's plates, we stayed Order No. 4642 to protect the public interest pending Double Decker's reply to protestant's application.¹

¹ Order No. 4658 (Sept. 6, 1995).

Upon learning DCA had consented to New York Apple resuming operations pending a resolution of the August 11 charges, we lifted the stay but granted reconsideration to factor these developments into our determination of applicant's compliance fitness and our assessment of whether common control is in the public interest.² Naturally, our decision on whether to rescind, modify, or affirm Order No. 4642 had to wait until the DCA proceedings concluded. The record now reflects that those proceedings have terminated pursuant to a settlement agreement in which New York Apple neither admits nor is found guilty of committing the violations alleged in the August 11 notice. This leaves us with a record of New York Apple's violations in 1994.

When a carrier has a record of violations, the Commission considers the following factors in assessing the likelihood of future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether the carrier has made sincere efforts to correct its past mistakes, and (5) whether the carrier has demonstrated a willingness and ability to comport with applicable licensing laws and rules and regulations thereunder in the future.³ We shall use this test as a derivative measure of Double Decker's fitness and a gauge of whether common control is in the public interest. We did not apply it in Order No. 4642 because we had no evidence that New York Apple was guilty of any violations in 1994, only that it had been cited by DCA.

Operating unlicensed vehicles is a serious offense, and the 1994 CJO reveals that New York Apple continued operating unlicensed vehicles after being ordered to stop.⁴ On the other hand, we noted in Order No. 4642 the presence of extenuating circumstances, and New York Apple paid significant fines to DCA to correct its past mistakes. That New York Apple is still operating under DCA authority is some measure of its willingness and ability to comport with applicable licensing laws.

After reviewing the record as supplemented by the parties, we must now consider whether to rescind, modify, or affirm Order No. 4642.⁵ We do not believe New York Apple's record merits rescinding Order No. 4642, but neither do we believe that the order should stand as originally issued. We see a basis in the New York Apple/DCA settlement agreement, and in Double Decker's submissions in this proceeding, for modification.

Under the settlement agreement, executed September 29, 1995, New York Apple agrees to: (1) paint the VIN of each licensed bus on the bus itself; (2) rivet each DMV plate and DCA plate on each licensed bus; (3) assign each licensed bus a permanent number; (4)

² Order No. 4666 (Sept. 22, 1995).

³ Id. at 3 & n.7.

⁴ See Exhibit F to Applicant's Reply to Protestant's Application for Reconsideration, filed Sept. 8, 1995 (DCA v. New York Apple Tours, Inc., Consent Judgment/Order, ¶¶ 2-3 (Oct. 14, 1994)).

⁵ Compact, tit. II, art. XIII, § 4(d).

permanently affix all required DMV decals, stickers and registrations to each licensed bus; and (5) provide DCA with a regular update of all buses kept in New York City, both licensed and unlicensed.⁶ Upon any breach of the agreement, New York Apple will be subject to fine, suspension or revocation.⁷

We will modify Order No. 4642 to prescribe a one-year period of probation. During the first year of Double Decker's operations, as measured from the date Double Decker's certificate of authority was issued, October 12, 1995, Double Decker shall be required to report any allegation or finding that the September 29 agreement has been breached, plus any modification or amendment, and each vehicle Double Decker deploys in the Metropolitan District shall first be presented for inspection by the Commission's staff, and staff shall first be provided with proof of ownership or lease and proof of safety inspection. Suspension or revocation of New York Apple's authority while Double Decker is on probation shall constitute grounds for suspension or revocation of Double Decker's authority. Double Decker shall be subject to civil forfeiture, and its certificate of authority shall be subject to suspension or revocation, upon a violation of the terms of probation.

Our decision to modify Order No. 4642 in this manner is animated in substantial measure by Double Decker's self-contradictions and misrepresentations regarding the origins of its vehicles. Double Decker initially represented that it had agreed to purchase its buses from New York Apple. A contract of sale filed with the application showed Double Decker had agreed to purchase from New York Apple "six (6) double decker diesel buses." New York Apple warranted that it owned all six. When protestant questioned the safety of these buses Double Decker replied that it would be using vehicles that were inspected, registered and currently in use in New York.⁸ Then, when it appeared the DCA proceedings might derail Double Decker's application, Double Decker seemingly repudiated its contract with New York Apple.

In response to protestant's application for reconsideration and without any explanation -- or fear of contradiction -- Double Decker now claims that the six buses "are all new buses brought in from London" and that "[n]one of the buses used in New York, which are currently the subject of controversy, will be used in Washington."⁹ Double Decker further assures the Commission that the "busses imported for Double Decker's use in Washington are entirely different vehicles,

⁶ See attachment to Status Report Pursuant to Order No. 4666, filed Oct. 2, 1995 (DCA v. New York Apple Tours, Inc., Stipulation, ¶ 6 (Sept. 29, 1995)).

⁷ Id., ¶ 11.

⁸ See Applicant's Reply to Protest and Request for Hearing of Old Town Trolley Tours of Washington, Inc., at 12, filed May 26, 1995, and attached Affidavit of Hayim Grant, ¶¶ 22-23.

⁹ See Applicant's Reply to Protestant's Application for Reconsideration at 18, filed Sept. 8, 1995.

and are in no way connected to the New York busses."¹⁰ The truth, however, is that all of Double Decker's buses were under investigation by DCA.

The record shows that prior to the September 29 settlement, DCA consented to New York Apple resuming operations in exchange for New York Apple's pledge to provide "a complete list of the sight-seeing buses that New York Apple owns, operates or otherwise controls," including those not licensed by DCA.¹¹ Buses unlicensed by DCA were to be immobilized.¹² All of Double Decker's buses were identified in the lists provided by New York Apple to DCA.¹³ DCA's immobilization of four of those vehicles in New York City¹⁴ underscores the magnitude of Double Decker's misstatement.

Double Decker's expedient efforts to persuade the Commission that none of its vehicles were tainted by the August 11 allegations -- in an obvious attempt to deflect our concern and defeat the petition for reconsideration -- detract from an otherwise satisfactory application. We believe the modification to Order No. 4642 adopted herein is the appropriate response.

Our authority to place Double Decker on probation derives from Article XI, Section 7(d), of the Compact, which provides that the Commission may attach to the issuance of a certificate and to the exercise of the rights granted under it any term, condition, or limitation that is consistent with the public interest. On this record, ordering a period of probation is consistent with the public interest.¹⁵

Protestant asks us to require Double Decker to prove it has complied with United States Department of Transportation (DOT) safety regulations regarding documentation of imported motor vehicles. We deny that request for two reasons. First, this issue should have been raised before Order No. 4642 was issued. Second, a protestant challenging an applicant's safety fitness bears the burden of

¹⁰ See Application for Reconsideration of the Grant of a Stay Pending a Determination on Protestant's Application for Reconsideration at 5, filed Sept. 8, 1995.

¹¹ See Exhibit G to Applicant's Reply to Protestant's Application for Reconsideration (New York Apple Tours, Inc. v. Cerullo, No. 120165/95, Stipulation and Order, (Aug. 17, 1995) (emphasis added)).

¹² Id.

¹³ See attachment to Motion to Lodge Letters, filed Sept. 29, 1995 (faxes from Bruce Paulsen to Susan Kassapian, dated Aug. 21, 1995).

¹⁴ See id. (fax from Hayim Grant to Peter Lempin, dated Sept. 5, 1995).

¹⁵ Cf., Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) (ICC may issue certificate to marginally fit carrier for limited time period, subject to review).

demonstrating that applicant is unable or unwilling to comply with Commission Regulation No. 64, titled "Safety Regulations." Regulation No. 64, provides as follows:

The Commission adopts and incorporates herein by reference the Federal Motor Carrier Safety Regulations as amended from time to time, to the extent that the said regulations apply to the operations of passenger carriers. These regulations are set out in Title 49 of the Code of Federal Regulations.

The best evidence that a carrier's vehicles satisfy federal motor carrier safety standards is proof that such vehicles have passed inspection under 49 C.F.R. Part 396. The Federal Highway Administration has determined that the inspection programs of the District of Columbia, Maryland and Virginia "are comparable to, or effective as, the Federal [periodic inspection] requirements" contained in Part 396.¹⁶ Our normal practice of conditioning the issuance of a certificate of authority on applicant's filing proof that its vehicles have passed safety inspection by one of these three jurisdictions or DOT ensures compliance with all relevant vehicle safety standards.¹⁷

THEREFORE, IT IS ORDERED:

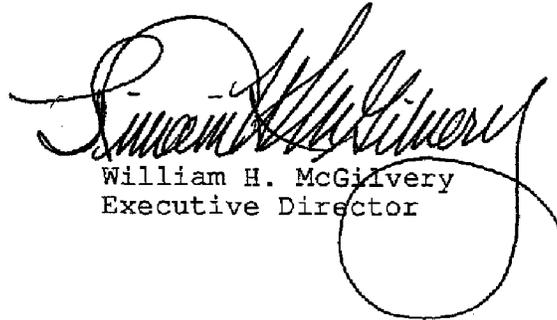
1. That staff's Motion to Lodge Letters is granted.
2. That only so much of protestant's Motion to Supplement Record as is necessary to include in the record the photographs of double-decker buses parked in DC is approved. The remainder is denied.
3. That Order No. 4642 is modified to provide for a one-year period of probation as measured from the date Double Decker's certificate of authority was issued, October 12, 1995. The terms of the probation are as follows. During the first year of Double Decker's operations:
 - a. Double Decker shall report to this Commission: (i) any allegation or finding that the September 29 agreement between DCA and New York Apple has been breached by New York Apple, and (ii) any modification or amendment of the agreement.
 - b. Each vehicle Double Decker deploys in the Metropolitan District must first be presented for inspection by the Commission's staff, and staff must first be provided with proof of ownership or lease and proof of safety inspection.
 - c. Suspension or revocation of New York Apple's operating authority shall constitute sufficient grounds for suspension or revocation of Double Decker's operating authority.

¹⁶ 59 Fed. Reg. 17830 (1994).

¹⁷ In re D.C. Ducks, Inc., No. AP-94-21, Order No. 4361 (Aug. 9, 1994).

4. That Double Decker shall be subject to civil forfeiture, and its certificate of authority shall be subject to suspension or revocation, upon a violation of the terms of probation.

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



William H. McGilvery
Executive Director