

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4851

IN THE MATTER OF:

Served May 21, 1996

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| Application of VOCA CORPORATION) | Case No. AP-96-14 |
| OF WASHINGTON, D.C., for a) | |
| Certificate of Authority --) | |
| Irregular Route Operations) | |
| Investigation of Unauthorized) | Case No. MP-96-18 |
| Operations of VOCA CORPORATION) | |

This matter is before the Commission on the application of VOCA Corporation of Washington, D.C., for a certificate of authority and as a result of our investigation of VOCA's passenger transportation operations in the Metropolitan District.

I. CONTESTED ISSUES

The investigation of VOCA's operations was initiated February 26, 1996, on the basis of information received from a WMATC carrier and, later, an inspector from the DC Commission on Health Care Finance (CHFC).¹ As the initial order noted, VOCA was observed transporting passengers on two occasions. The passengers in the second instance were identified as "DC Medicaid customers." We contacted VOCA after the first incident and informed VOCA of our jurisdiction. After the second incident, we ordered VOCA to show cause why a civil forfeiture should not be assessed for knowing and willful violation of the Compact.

VOCA responds that the transportation it performs for CHFC is not "transportation for hire" within the meaning of the Compact and that, therefore, both proceedings should be dismissed. VOCA argues in the alternative that any violations it committed were unwitting, thus negating the grounds for assessing a civil forfeiture. VOCA requests an oral hearing if the evidence adduced so far does not establish a lack of jurisdiction.

As discussed below, we disagree with VOCA's conclusion that it does not perform transportation for hire within the meaning of the Compact and conclude that a hearing on the issue is unnecessary. We do, however, agree that VOCA did not knowingly and willfully violate the Compact. Finally, we conditionally grant VOCA's application for a certificate of authority.

¹ In re VOCA Corp., No. MP-96-18, Order No. 4772 (Feb. 26, 1996).

II. WMATC JURISDICTION OVER ICF TRANSPORTATION

VOCA operates eighteen group homes in the District of Columbia pursuant to contracts with the DC Department of Human Services (DHS). The contracts are administered by CHCF and identify the homes as "intermediate care facilities" (ICFs). A separate contract has been executed for each ICF, but the substantive terms of each are identical.

Under these contracts (ICF Agreements), VOCA is obligated to provide ICF services, which are defined as "those items and services furnished by a facility which meets fully all requirements for licensure under State Law." ICF Agreement, ¶ I.A. VOCA must furnish a cost report annually and comply with all District ICF regulations. ICF Agreement, ¶¶ I.B.1. & I.C.5. In return, DHS agrees to pay for such ICF services in accordance with applicable laws after a proper claim is submitted and approved. ICF Agreement, ¶¶ II.A. & II.B.

One of the regulations VOCA must comply with under the terms of its ICF Agreements is 22 D.C.M.R. § 3501.3, which states:

Each [group home] shall be within easy walking distance of public transportation or demonstrate that it can provide transportation for its residents to the following facilities.

- (a) Stores;
- (b) Restaurants;
- (c) Movies;
- (d) Parks;
- (e) Recreation facilities;
- (f) Libraries;
- (g) Post Offices;
- (h) Churches; and
- (i) Similar facilities.

According to Part III of VOCA's application, VOCA transports group home residents to and from job training locations and work sites, and occasionally VOCA uses its vehicles to take residents on recreational outings. The application also states that in providing transportation service under the ICF Agreements

VOCA incurs both fixed and variable vehicle leasing, maintenance and other vehicle-related costs which vary from home to home and depend on the needs of particular patients for participating in activities or programs off-site. To the extent allowable by law and subject to audits conducted by agencies of the District of Columbia Government, VOCA applies for and receives certain reimbursement of total program expenses, including those relating to the operation of its vehicles. This reimbursement is made pursuant to the District of Columbia's payment obligations under the [ICF Agreements].

Exhibit D.

On these facts, we find that VOCA's transportation of group home residents -- as paid for by DHS -- is transportation for hire within the meaning of the Compact. Under the ICF Agreements, VOCA is expressly authorized to furnish transportation services to its residents in fulfillment of its ICF service obligations,² and DHS is obligated to pay for such transportation. Where parties to a contract expressly and specifically agree that one party will pay for passenger transportation performed by the other, it scarcely can be said that one has not hired the other for that purpose.

VOCA's reliance on In re Shaw Enters., Inc., t/a United Inn of America, No. 359, Order No. 1667 (Apr. 5, 1977), is misplaced. The applicant in Shaw was a hotel which had entered into a single-price contract with a government agency obligating the hotel to provide a package of services, including transportation of agency visitors between the hotel, on the one hand, and the government agency and various shopping and sightseeing areas, on the other. The Commission found jurisdiction in Shaw on the basis of four factors: (1) the cost of transportation was a factor in setting the package price; (2) the transportation aspect of the contract was severable from the nontransportation aspect; (3) the vehicle drivers performed no other duties; and (4) transportation was not an essential element of the contract. Only item 3 favors VOCA. VOCA's drivers spend most of their time performing nontransportation duties. We have held since Shaw, however, that using employees for transportation and nontransportation functions alike does not defeat our jurisdiction.³

The linchpin of VOCA's argument appears to be that, assertedly, it is not obligated to provide transportation services to its residents and is therefore providing service akin to so-called "free" shuttle service allegedly furnished by some hotels for the convenience of their guests. We are not persuaded by this reasoning.

First, it is not at all clear that VOCA is not obligated to provide transportation services to its residents. The ICF Agreements state that VOCA must locate its homes within walking distance of public transportation or provide transportation itself. VOCA's vice president avers that VOCA has satisfied this obligation by locating all of its homes within easy walking distance of Metro bus and rail stops and is, therefore, not obligated to perform transportation

² Even if the ICF Agreements did not reference applicable DC regulations, it is a fundamental principle that implied into every contract as a term thereof is the law existing at the time the contract is formed. Maryland-National Capital Park & Planning Comm'n v. Lynn, 514 F.2d 829 (D.C. Cir. 1975); Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

³ See In re Jewish Council for the Aging of Greater Washington, Inc., No. AP-89-28, Order No. 3441 (Dec. 11, 1989) (JCA drivers hired primarily for skills in caring for elderly); In re Jewish Council for the Aging of Greater Washington, Inc., No. AP-89-27, Order No. 3362 (June 26, 1989) (JCA operations subject to WMATC jurisdiction). In retrospect, we question whether factors 2 through 4 in Shaw have any bearing on this issue.

itself. VOCA's vice president may find VOCA's homes within easy walking distance of Metro stops, but that does not mean each and every VOCA resident would agree. According to VOCA's vice president, the clients served by VOCA "suffer from forms of mental retardation (and, in many cases, physical disabilities) of a character which require continuous health care and supervision on a 24-hour per-day basis." Affidavit at 2. Indeed, DHS pays VOCA for transporting group home residents to and from the homes notwithstanding their proximity to Metro stops. This suggests that public transportation is not within "easy walking distance" for every resident.

Second, VOCA's argument that it is providing the equivalent of "free" hotel shuttle service relies on a misinterpretation of dictum in Shaw. What Shaw was saying, in this regard, is that where there is no meeting of the minds between parties to a contract as to whether the contract price covers ancillary transportation of passengers, a finding of no jurisdiction arguably might be warranted even though passengers are incidentally transported under the contract. Here, the evidence clearly establishes that the parties have had a meeting of the minds with respect to whether the contract price covers transportation. In any event, this Commission has never held that so-called "free" hotel shuttle service is not subject to our jurisdiction. Determinations of jurisdiction are necessarily fact-bound. We cannot predict whether a case such as that described in Shaw might come before this Commission and if so what our holding might be. In this case, the facts do not support a finding of no jurisdiction.

Third, even if VOCA could demonstrate satisfaction of the option of locating homes near Metro stops, we do not see how VOCA's decision to locate its homes within walking distance of public transportation and provide transportation itself robs us of jurisdiction.

We agree with VOCA that it does not resemble the common carriers identified in Bryant v. Liberty Mutual Ins. Co., 407 F.2d 576 (4th Cir. 1969) and Kelly v. General Elec. Co., 110 F. Supp. 4 (E.D. Pa. 1953). VOCA's operations resemble those of a contract carrier. This Commission held long ago that both common carriers and contract carriers operating in the Metropolitan District are subject to the Commission's jurisdiction.⁴

The incidental nature of the transportation services supplied by VOCA does not detract from our finding. As VOCA acknowledges, the DC Circuit, our court of review, has held that "[n]othing in the law strips the WMATC of its jurisdiction simply because those providing transportation for hire are also in another business." Banner Sightseeing Co. v. WMATC, 731 F.2d 993, 994 (D.C. Cir. 1984). The Interstate Commerce Commission's (ICC's) decision in Joseph L. Ritter, Broker Application, 9 Fed. Car. Cas. (CCH) ¶ 32,663 (Nov. 14, 1952), illustrates this point. Ritter operated a ski school and incidentally made arrangements for the participants' transportation. The ICC held

⁴ In re Authority to Perform Contract Operations, No. 234, Order No. 1361 (Oct. 16, 1974).

that "[a]dmittedly, the arranging for transportation may be incidental to the operation of applicant's ski tours, but the relative importance of this portion of his activities does not affect the question of applicant's status as a broker subject to regulation under the act." Likewise, transportation of group home residents may be incidental to the operation of the homes, but the relative importance of this portion of VOCA's activities does not affect the question of VOCA's status as a carrier subject to regulation under the Compact.⁵

We have certificated many carriers over the years even though transportation of passengers was merely incidental to each carrier's main business. E.g., In re The Hospital for Sick Children, No. AP-95-35, Order No. 4660 (Sept. 6, 1995) (hospital); In re HMC Acquisition Properties, Inc., t/a Westfields Int'l Conference Ctr. by Marriott, No. AP-95-07, Order No. 4573 (Apr. 12, 1995) (conference center); In re The American National Red Cross, Montgomery County Chapter, No. AP-93-07, Order No. 4090 (Apr. 21, 1993) (disaster relief organization); In re APCOA, Inc., No. AP-92-06, Order No. 3919 (Apr. 10, 1992) (garage operator); In re Jewish Council for the Aging of Greater Washington, Inc., No. AP-89-28, Order No. 3441 (Dec. 11, 1989) (elder care organization); In re Georgetown University, No. AP-78-50, Order No. 1962 (Feb. 15, 1979) (university); In re Shaw Enters., Inc., t/a United Inn of America, No. 359, Order No. 1667 (Apr. 5, 1977) (hotel). Our exercise of jurisdiction over ICF transportation is consistent with this precedent.

III. VOCA'S PAST OPERATIONS

We find that VOCA's transportation under the ICF Agreements with DHS, although subject to our jurisdiction, does not rise to the level of willful violation of the Compact. The term "willfully" means purposely or obstinately, with intentional disregard or plain indifference.⁶ Given the state of our decisions in this area prior to today, we cannot characterize VOCA's actions as obstinate or intentional. Shaw in particular may be confusing or misleading. At best, it does not establish a clear guideline for anyone in VOCA's position as to what is permissible without WMATC authority and what is not. Consequently, there is no basis for assessing a civil forfeiture.

IV. VOCA'S APPLICATION

By application filed March 26, 1996, VOCA Corporation of Washington, D.C., a District of Columbia corporation, seeks a certificate of authority to transport passengers in irregular route

⁵ The ICC's decision in Cain Broker Application, 2 M.C.C. 633 (1937), cited in VOCA's brief and, together with Ritter, in Shaw, stands for the same proposition. See Cain, 2 M.C.C. at 635 (broker activities "incidental to and a part of a larger undertaking" still subject to act).

⁶ In re Capitol Bus Rental, Inc., t/a Capitol Tours, No. MP-95-04, Order No. 4609 (June 7, 1995).

operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

Notice of this application was served on April 1, 1996, in Order No. 4802, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication. Applicant complied. The application is unopposed.

A. Summary of Evidence

The application includes information regarding, among other things, applicant's corporate status, facilities, proposed tariff, finances, and regulatory compliance record.

Applicant proposes to conduct operations with twenty-five vans. Applicant proposes a contract tariff for transportation under the DC Medicaid program.

Applicant filed a balance sheet as of December 31, 1995, showing assets of \$9,177,598; liabilities of \$7,948,098; and equity of \$1,228,350. Applicant's projected operating statement for the first twelve months of WMATC operations shows transportation revenue of \$470,103 and transportation expense of \$470,103.

Applicant 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. Applicant further certifies that neither applicant nor any person controlling, controlled by, or under common control with applicant has any control relationship with a carrier other than applicant.

B. Discussion

This case is governed by the Compact, Title II, Article XI, Section 7(a), which provides in relevant part that:

. . . the Commission shall issue a certificate to any qualified applicant . . . if it finds that --
(i) the applicant is fit, willing, and able to perform [the] transportation properly, conform to the provisions of this Act, and conform to the rules, regulations, and requirements of the Commission; and
(ii) that the transportation is consistent with the public interest.

Based on the evidence in this record, the Commission finds applicant to be fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements. The Commission further finds that the proposed transportation is consistent with the public interest.

V. Conclusion

Based on our finding of jurisdiction we will deny VOCA's motion to dismiss. Inasmuch as the pertinent facts are not in dispute, we will deny VOCA's request for oral hearing.⁷ We find that VOCA has shown good cause for not assessing a civil forfeiture. VOCA's application will be conditionally granted.

THEREFORE, IT IS ORDERED:

1. That the motion to dismiss and request for oral hearing are denied.

2. That VOCA Corporation of Washington, D.C., 200 K Street, N.W., Suite 3, Washington, DC 20001, is hereby conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

3. That applicant 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) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (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. 342 is hereby assigned.

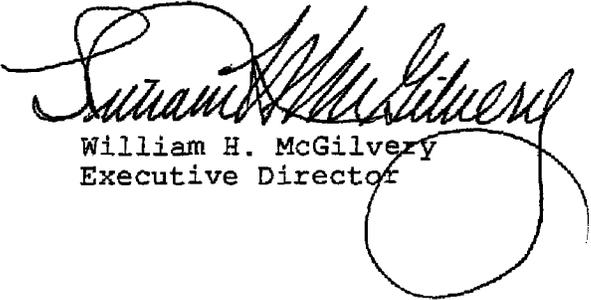
4. That upon timely compliance with the requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 342 shall be issued to applicant.

5. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

⁷ See In re Madison Limo. Serv., Inc., No. AP-91-39, Order No. 3891 (Feb. 24, 1992) (no need for hearing where material facts not in dispute, only conclusions to be drawn therefrom); In re Executive Limo. Serv., Inc., No. 804, Order No. 1270 at 3 n.2 & 5 n.4 (July 20, 1973) (no evidentiary hearing necessary if dispositive facts are not in dispute).

6. That unless applicant complies 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 grant of authority herein 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 AND LIGON:



William H. McGilveray
Executive Director