BEFORE THE

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 554

IN THE MATTER OF:	Served December 29, 1965
Application of Holiday Tours, Inc., for a Certificate of Public Convenience and Necessity ("grandfather").	Application No. 18 Docket No. 31

APPEARANCES:

LEONARD A. JASKIEWICZ, Attorney for Holiday Tours, Inc., Applicant.

MANUEL J. DAVIS, Attorney for D. C. Transit System, Inc., and Washington, Virginia and Maryland Coach Company, Inc., Protestants.

JOHN R. SIMS, JR., and S. HARRISON KAHN, Attorneys for Alexandria, Barcroft and Washington Transit Company, The Gray Line, Inc., and Diamond Tours, Inc., Protestants.

Before Chapin M. Duke, Chairman, Edward D. Storm, Vice Chairman, and H. Lester Hooker, Commissioner.

By Order No. 334, entered after lengthy hearings, the Commission denied the application of Holiday Tours, Inc., for a certificate of public convenience and necessity, based on "grandfather" rights, under Article XII, Section 4(a) of the Washington Metropolitan Area Transit Regulation Compact. Reconsideration of its Order was denied by Order No. 343. Authority was sought to engage in charter and special sightseeing operations by bus[1] between specified points in the Washington Metropolitan District.

1/ For purpose of this order, a bus is any vehicle with a seating capacity of nine passengers or more, exclusive of the driver.

The above orders were appealed to the United States Court of Appeals for the District of Columbia Circuit, and on July 14, 1965, the Court entered its opinion, which opinion set aside the Orders of the Commission and remanded the case to the Commission "for further appropriate proceedings."

The original application was, and continues to be, protested by D. C. Transit System, Inc.; Washington, Virginia and Maryland Coach Company, Inc.; Alexandria, Barcroft and Washington Transit Company; The Gray Line, Inc.; and Diamond Tours, Inc., all of whom hold authority from the Commission to engage in sightseeing operations. The applicant maintained, following the entry of the aforementioned Court opinion, that the Commission should, on the then existing record, issue a certificate of public convenience and necessity to applicant. The protestants, on the other hand, urged just as strongly that in order to comply with the mandate of the Court further hearings were required. The Commission was unable to see how further hearings could prejudice applicant inasmuch as applicant is presently operating pursuant to Court order. The Commission, in order to penetrate and explore in depth certain areas of uncertainty in its quest for the truth, held further hearings on this matter on October 25, 1965, November 8, 1965, and December 13, 1965.

Every party was afforded a full and complete opportunity to present such testimony as its interest may have appeared. In fact, insofar as new and additional testimony was concerned, the Commission was willing to conduct the hearing as a de novo proceeding, except that the record developed at the prior hearings would, of course, be considered in disposing of the case. The Commission would not allow any procedural issue to thwart its search for the facts.

At the hearing held on October 25, 1965, counsel for applicant elected to rest its case on the previous record. Counsel for applicant offered to adduce additional testimony if requested by the Commission. While the Commission will always feel free to make limited inquiries of counsel concerning matters before it, it will never assume the role of counsel, and will certainly abstain from instructing counsel as to how to present or develop his case.

The protestants, at the hearing held on October 25, 1965, adduced the testimony of certain witnesses which was ruled either inadmissible or irrelevant to this proceeding. Following the testimony of protestants, Mr. Walter Lee Davis, president of applicant, presented certain testimony which will be discussed later. The testimony adduced at the hearings on November 8, 1965, and December 13, 1965, will also be discussed later.

The great majority of "grandfather" applications coming before the Commission within the ninety-day period following March 22, 1961 (the effective date of the Compact creating the Commission), were disposed of without hearing because there was no dispute as to the facts. In those cases where the applicants sought authority to continue bus operations, the normal situation was that the applicant owned buses and operated them pursuant to a certificate of public convenience and necessity issued by the appropriate state authorities and/or the Interstate Commerce Commission. In those cases where the applicants sought authority to continue limousine operations[2], the applications were dismissed as being exempt from the certificate jurisdiction of the Commission.

In this case, the applicant, Holiday Tours, Inc., held no certificate of public convenience and necessity from any state or federal authority, and it owned no buses on March 22, 1961. Notwithstanding these two important factors, applicant contends that it was bona fide engaged in bus transportation on March 22, 1961, as contemplated by the Compact. Under the rule laid down in Warrenner v. Washington Metropolitan Area Transit Commission, ____U. S. Appl. D.C.____, _____F. 2d_____(1965), for an operation to be bona fide, it is not necessary that it be legal.

A determination as to whether or not applicant was bona fide engaged in bus operations on March 22, 1961, as contemplated by the Compact, notwithstanding the admitted illegality of such operations, if in fact bus operations were being conducted by applicant, requires a penetrating inquiry into the numerous facets of bus operations.

The Court, in remanding the case to the Commission, stated "the Commission is to make the factual determinations, not on the basis of legal technicalities, but on such things as 'the absence of evasiveness and of deliberate and knowing disregard of the requirements of the law.' " The Court went on to say:

> "In this case the Commission should consider and make findings inter alia as to whether the bus operations were openly conducted without attempts at concealment or disguise and in such a manner as to indicate a real intention to offer and conduct a bus sightseeing operation, and whether the applicant intended to comply or believed that it had complied with all applicable Federal and state law...."

2/ Limousines are vehicles with a seating capacity of eight passengers or less, exclusive of the driver.

In addition, the Court deemed it appropriate for the Commission to make certain specific findings, in the following language:

> "...In its reconsideration the Commission should make findings as to whether the applicant sold the sightseeing tours carried by bus in its own name and issued its own tickets therefor, as to whether the tickets were sold on an individual basis for the tours, as to whether the bus drivers (and the tour passengers) were required to conform to the routes, the stops, the timing, the buildings and sites to be visited, and other details as established and directed by the applicant, as to the applicant's responsibility to the tour group and to the public for the tour transportation and operations, and as to any other factor deemed relevant. Among these we think should be whether and to what extent a guide-lecturer was provided by the applicant for the tours, and whether the applicant was alone responsibile to the tour group for provision of the transportation for the tours.
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> "In this connection also consideration should be given and findings made as to whether the applicant would have been responsible to the tour passengers for negligent operation of the bus and for a failure to conduct the tour as outlined in the brochure; and whether the chartering bus company was serving the public directly or was merely an instrument performing a part of a sightseeing transportation service offered by the applicant."

For purposes of our decision, we find that applicant sold its tickets for its sightseeing tours transported by bus or limousine and that such tickets were issued on an individual basis and in its own name. The drivers were required to conform to the routes, the stops, the timing, the buildings and sites to be visited, as directed by applicant. It is customary in charter operations for the chartering party to direct and control the movement of the vehicle, and to tell the chartering bus company and the driver of the bus when and where the bus is to go.

There is no basis for a finding that applicant provided a guide-lecturer for the tours. It is customary in the trade for the bus driver to also act as a guide-lecturer. The cost of furnishing the bus and the driver-guide-lecturer was included in the overall

hourly rate paid by the applicant to the chartering bus company pursuant to published tariffs covering charter rates.

As to whether applicant would have been responsible to the tour passengers for negligent operation of the bus, the president of applicant stated that the buses used had never been involved in any incident to enable this issue to be determined. It would appear however, that in any event the chartering bus company would have been liable inasmuch as it owned the bus, it carried insurance on the bus, the bus was operated pursuant to appropriate authority, the driver was on its payroll, and further, the name of the chartering bus company was clearly displayed on the outside of the bus.

As to the advertisements[3] of applicant that it provided sightseeing service by "air-conditioned coach," in view of its policy of chartering buses occasionally from certificated carriers, neither the competing bus companies nor the federal and state regulatory authorities had reason to suspect that any law was being violated.

We think that one important fact in this entire proceeding may have escaped proper attention. Holiday Tours, Inc., was without question, bona fide engaged in sightseeing operations by limousine on March 22, 1961. It had every right to print and sell its tickets in its own name and to transport its passengers in its own limousines. This is what it did. Apparently, it did not always know in advance that occasionally persons to whom individual tickets were sold would constitute a group too large to be transported by limousine. In such cases, buses were chartered to move the group. In the most recent instances, applicant chartered the bus on an hourly basis from Atwood's Transport Lines, Inc., and Atwood furnished the driver, as is customary in charter operations.

We can see nothing wrong with allowing the passengers, who had already purchased tour tickets, to use those tickets for admission on the bus in charter operation. The tour ticket also serves as a means of identification of the passenger in boarding the bus at the various stops along the way. Atwood was being paid the hourly charter rate by applicant and was not concerned about the financial arrangement between applicant and the tour passengers as represented by the individual tickets. The ticket arrangement was between applicant and the tour passengers. Atwood was being paid the tariff rate. It is similar to a public school chartering a bus from an authorized carrier at the published charter rates, and then charging the students an individual fare to cover the school's cost of chartering the bus. This could not be construed as putting the school in the bus business nor making the school liable for negligent operation of the bus.

3/ The date of the single brochure containing the "coach" advertisement was never established.

Even if it were assumed that applicant had exercised that degree of control over the bus operations to constitute it an operation of applicant in the eyes of the law, we need to know more. We need to know whether, in the language of the Court, the operations were conducted in good faith and in the absence of "deliberate and knowing disregard of the law." Since we are concerned primarily with interstate operations, we need to know whether applicant believed it had complied with federal law.

Throughout this proceeding, Walter Lee Davis, president of applicant, has placed much reliance on an alleged conversation he had with a Joseph W. Clarke in 1959, to establish the fact that he had conducted bus operations in good faith and that he had complied with all federal laws. In 1959, and until July, 1960, Joseph W. Clarke was the District Supervisor of the Interstate Commerce Commission in the Washington area, and no one questioned his authority to pass upon the legality of bus operations in this area.

At the original hearing held on April 16, 1963, Mr. Davis stated in regard to the alleged conversation, at page 90 of the transcript:

> "I went to the Interstate Commerce Commission and talked to Mr. Clarke up there."

At the hearing on October 25, 1965, Mr. Davis reiterated that he had talked to Mr. Clarke in 1959, and that he was advised that sightseeing bus operations in the Washington area were exempt from ICC regulations.

At the original hearing the parties were deprived of an opportunity to hear Mr. Clarke's side of the conversation. Mr. Clarke was not called as a witness, and Mr. Davis was prohibited, by the hearsay rule, from stating what Mr. Clarke had said to him. Since Mr. Davis had placed so much importance on his alleged conversation with Mr. Clarke, both at the original hearing and the hearing held on October 25, 1965, the Commission concluded that in fairness to all parties Mr. Clarke should be called as a witness. It made no difference to the Commission which party called him. The important point was that the testimony of Mr. Clarke should provide important clues as to whether or not "the applicant intended to comply or believed that it had complied with all applicable" federal laws.

One of the protestants produced Mr. Clarke at the hearing held on November 8, 1965. Mr. Clarke testified in substance that he did not have any recollection of the name of Walter Lee Davis or Holiday Tours, Inc., but he did not deny that Mr. Davis might have been in his office during the time in question. Mr. Clarke testified, however, that had he been consulted concerning the latter's operations, that he would not have told him that bus operations were exempt from ICC regulations. In response to questions propounded by counsel for applicant, Mr. Clarke stated that it was proper for a limousine operator to charter a bus from an authorized carrier to take a group to whom had been sold individual tickets on a sightseeing tour. This is precisely what applicant did.[4]

Following the hearing held on November 8, 1965, applicant was given an opportunity to present additional evidence at a further hearing held on December 13, 1965. At the hearing held on December 13, 1965, Walter Lee Davis, president of applicant, did not testify, and did not, through any witness, attempt to explain away the testimony of Joseph W. Clarke, which was in direct conflict with the testimony of Mr. Davis, given earlier. The applicant did adduce the testimony of four witnesses, namely, Paul A. Swan, William P. O'Flinn, Herman Franklin Fraser, and Benjamin Gerrivz, which testimony, in the Commission's opinion, corroborates the testimony of Joseph Clarke and substantially discredits the testimony of Walter Lee Davis.

Mr. Swan testified that he, in partnership with Mr. William P. O'Flinn, operated a sightseeing business, consisting of one bus and three limousines, under the name of Federal Tours from 1955 through 1958. The following questions and answers appear in the record, counsel for applicant asking the questions, and Mr. Swan giving the answers:

Q. "Did you operate a bus?
A. Absolutely.
Q. Up to '58?
A. Through '58.
Q. Through '58. Why did you stop, if you did?
A. Well, I got a letter then from the I.C.C. requesting that Mr. O'Flinn and myself come down and see them.
Q. And, did you go down?
A. Yes, we did.

4/ Transcript, November 8, 1965, pp. 165, 166.

Q. And, as a result of going down, what happened?
A. Well, Mr. Clarke is the gentleman who met us and he told us that we were operating illegally. So then I told him what had happened. So, he said well, he said why don't we just forget about this thing. You stop operating and we won't dig up the past. So, we stopped operating."

The evidence further reveals that the conversation Mr. Swan had with Mr. Clarke, wherein he was advised that the bus operations were illegal, was the only conversation Mr. Swan ever had with Mr. Clarke.

The testimony of William P. O'Flinn merely confirmed and corroborated the above testimony of Paul A. Swan.

Herman Franklin Fraser testied that he bought a sightseeing bus in 1957 and kept it for a few months. In the Spring of 1957, he sold the bus back to Curtis Sightseeing Tours, from whom he originally purchased it. Although he licensed the bus, he never operated it.

Benjamin F. Gerrivz testified that he operated a sightseeing business under the name of Liberty Sightseeing Tours somewhere in the vicinity of 1955 and 1956, and operated one bus.

The testimony of each of the above four witnesses would tend to confirm that prior to 1958, information had emanated from the Interstate Commerce Commission that interstate sightseeing bus operations were exempt from the ICC regulations, but not in a single instance was the source of the information traceable to Mr. Clarke. In fact, it is obvious from the record that Mr. Clarke, in 1958, set out to get the record straight. He made it clear that interstate bus operations within the Washington, D. C. commercial zone were illegal without an appropriate certificate.

The applicant did not commence chartering buses, and then only on a limited scale, until 1958. Applicant never did acquire a bus until after the "grandfather" date. The Commission fails to see the relevancy of information, regardless of its accuracy or inaccuracy, given out some three years prior to the "grandfather" date.

It appears to us that if Walter Lee Davis did not know it, he at least had considerable doubt, as to whether or not he could legally operate a bus. Mr. Davis apparently realized when he chartered the first bus in 1958 that it was illegal for him to operate a bus. He must have realized that in the absence of operating authority from the Commonwealth of Virginia he could not operate between the District of Columbia and the

Commonwealth of Virginia, under the ICC exemption. While the evidence is somewhat unclear, Mr. Davis apparently went to Richmond in the early part of 1961 in an attempt to rectify the situation. Mr. Davis' purpose in going to Richmond, in the words of Mr. Davis, was "Just to have another certificate. Because there is just no sightseeing where you pick up and stay in Virginia itself."[5] He stated that while in Richmond he was told by Mr. Seibert, Commerce Counsel for the Virginia State Corporation Commission, to get in touch with the Washington Metropolitan Area Transit Commission and "they can give you the whole ball of wax in one fell swoop."[6] This would strongly indicate that Mr. Davis was interested in something more than just an intrastate certificate. Mr. Seibert's answer[7] strongly suggests that Mr. Davis was in Richmond to get a Virginia intrastate certificate in order that he might qualify under the commercial zone exemption of the Interstate Commerce Commission.[8]

When we look back on the operation of Holiday Tours, Inc., it is obvious that Mr. Davis showed proper respect for and awareness of, the law. He showed more restraint than many of his fellow operators, who purchased buses only to find out their operations were illegal. Applicant conducted its limousine operations in its own limousines, and when it had a group too large to be accommodated by limousine, it chartered a bus from an authorized bus company.

5/ Transcript, October 25, 1965, p. 119.
6/ Transcript, October 25, 1965, p. 118.
7/ Mr. Seibert properly advised Mr. Davis to contact this Commission in regard to authority for future interstate operations. The Interstate Compact creating this Commission had already been consummated, and upon the Commission's coming into official existence on March 21, 1961, the ICC's jurisdiction over bus operations within the Washington area ceased.
8/ One of the primary factors in the Warrenner case, supra, which prompted the Court to hold that Warrenner was bona fide engaged in bus operations between the District of Columbia and the Commonwealth of Virginia was that Warrenner had been issued an intrastate certificate by the Virginia State Corporation Commission. Warrenner had relied heavily on the Virginia intrastate certificate to bring his operation within the ICC Commercial Zone exemption.

The inference might be drawn from the record that since applicant purchased bus tags[9] for one or more of its limousines in the District of Columbia and transported up to ten or eleven children therein, applicant should at least be granted a certificate of public convenience and necessity authorizing special sightseeing operations in vehicles with a seating capacity of eleven passengers or less, exclusive of the driver, between points within the District of Columbia. No one advanced this specific argument and we do not consider it valid.

The Compact states that vehicles "having a seating capacity of eight passengers or less in addition to the driver" shall be exempt from the certificate requirements of the Commission except as to rates and insurance. Regardless of the number of passengers transported and regardless of the type of license acquired by applicant for the limousines in question, the seating capacity still was eight passengers exclusive of the driver; thus applicant could not be said to operate any vehicles larger than limousines, which are exempt.

The Commission finds and concludes that Holiday Tours, Inc., was not bona fide engaged in the transportation of passengers in motor vehicles with a seating capacity in excess of eight passengers, exclusive of the driver, on or before March 22, 1961.

THEREFORE, IT IS ORDERED, that the application of Holiday Tours, Inc., for a "grandfather" certificate of public convenience and necessity be, and it is, hereby denied.

BY DIRECTION OF THE COMMISSION:

SELMER ISON
Executive Director

9/ Prior to March 22, 1961, sightseeing bus operations were exempt from certificate regulations within the District of Columbia. A bus tag could be routinely acquired by anyone after meeting certain informal administrative requirements.