WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2387

IN THE MATTER OF: Served December 22, 1982

Investigation to Determine the Nature of Uncertificated Operations, if any, by DAVID E. KLINGAMAN and BANNER SIGHTSEEING COMPANY, between Points in the Metropolitan District	))))))	Case No. MP-82-11

By Order No. 2368, served September 14, 1982, this investigation was instituted pursuant to Title II, Article XII, Section 13(b) of the Compact to determine if respondents were engaging in the transportation of passengers for hire between points in the Metropolitan District without complying with the requirements of the Compact and Commission regulations issued thereunder. A public hearing on this matter was held on October 25, 1982.

Officer Gordon Dause of the U. S. Park Police testified that, on August 25, 1982, he observed Mr. Klingaman operating a 1976 van with two bucket seats and four bench type seats bearing Maryland tag number Z-75165 in the District of Columbia. There were 10 passengers in the van, in addition to Mr. Klingaman. Between approximately 8 a.m. and 10 a.m., Mr. Klingaman transported the passengers from the 1500 block of Constitution Avenue, N. W., where Mr. Klingaman picked up White House tour tickets, to the Washington Monument, then around Lafayette Park and the White House, then to the Peterson House and Ford's Theatre on 10th Street, N. W.

Shortly before 10 a.m. Officer Dause issued a citation to Mr. Klingman for an unlicensed 1/ vehicle and failure to issue tour tickets in conformance with regulations of the Metropolitan Police Department. At that time Mr. Klingaman told Officer Dause that no citation should be issued inasmuch as the tour began in Maryland. One

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1/ By unlicensed, Officer Dause meant a vehicle which had not been approved to conduct sightseeing operations in the District of Columbia as contrasted to an unregistered or uncertificated vehicle.

passenger interviewed by Officer Dause stated that his tour had been arranged through a hotel in Rockville, Md., and showed Officer Dause a receipt headed "Banner Sightseeing Company" indicating that payment had been made for the tour.

Officer Dause had reviewed records kept by the National Park Service which show the number of White House tour tickets obtained by van and bus operators. On July 21 and 22 and August 25 and 27, 1982, Mr. Klingaman picked up at least 10 tickets. On other dates, Mr. Klingaman would pick up from four to six tickets.

The Executive Director of the Commission testified that he is custodian of Commission records, and that those records reveal that neither Mr. Klingaman nor Banner Sightseeing Company has ever held a certificate of public convenience and necessity from this Commission. Consequently, the records also show that neither respondent has ever filed a WMATC tariff or a certificate of insurance.

On October 8, 1982, the Commission received by mail a copy of Harleysville Mutual Insurance Company family combination automobile policy number FAC-55-56-97. That policy shows bodily injury limits of $20,000 a person and $40,000 an occurrence and a property damage limit of $10,000 per occurrence. Corresponding minimums established by WMATC Regulation No. 62 are $100,000, $500,000 and $50,000. The policy provides that it is inapplicable "to any automobile while used as a public or livery conveyance . . . ." The policy shows David E. Klingaman as the insured and the operator and describes the same 1976 van described by Officer Dause.

The Commission notes that, despite being so ordered by us and by the United States District Court for the District of Columbia, respondents have refused to produce the books, records and assessment required by Order No. 2368.

Respondents assert in their brief a failure to ". . . prove here that Respondent used a vehicle designed to carry more than eight passengers plus driver," and to ". . . prove that the alleged escorting comprised a sightseeing tour and that more than eight passengers paid for any such tour." The only sections of the Compact wherein the issue of "eight passengers" is relevant are Title II, Article XII,

Sections 1.(c) 2/ and 2.(d). 3/ And these sections deal with the seating capacity of the vehicle rather than the number of paying passengers.

At the hearing, Mr. Klingaman presented no evidence but made a statement for the record. Mr. Klingaman stated "[a]s a matter of fact" that, on the day he was cited by Officer Dause, only eight of his 10 passengers paid. (Transcript, p. 25, lns. 3, 4.) Thus, the seating capacity of the vehicle is established as being at least 11 (10 plus the driver), and the operation cannot, therefore, fit the definition of either a taxicab or other vehicle used in performing bona fide taxicab service within the meaning of Sections 1.(c) or 2.(d). Accordingly, if even one passenger was transported for hire in such a vehicle, the transportation would fall within the ambit of Title II, Article XII, Section 1.(a), 4/ and the exact number of paying passengers and precise seating capacity in excess of eight plus the driver are not relevant. As to whether the "alleged escorting comprised a sightseeing tour," Officer Dause's testimony establishes that on the specific occasion in question, and routinely on other occasions, Mr. Klingaman picked up White House tour tickets for his passengers, and further that he escorted his group to the Washington Monument, the White House, the Peterson House where Abraham Lincoln died and Ford's Theatre. We fail to see how this can be other than a sightseeing itinerary, especially when added to the facts that Mr. Klingaman calls his company "Banner Sightseeing Company," uses stationery with "Banner Sightseeing Company" printed on it, and as we noted in Order No. 2368, lists that company in the C & P Telephone Yellow Pages for the Maryland suburbs under

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2/ (c) Notwithstanding the provisions of paragraph (a) of this section, this Act shall apply to taxicabs and other vehicles used in performing bona fide taxicab service having a seating capacity of eight passengers or less in addition to the driver thereof with respect only to (i) the rate or charges for transportation from one signatory to another within the confines of the Metropolitan District, and (ii) requirements for minimum insurance coverage.

3/ (d) The term "taxicab" means any motor vehicle for hire (other than a vehicle operated, with the approval of the Commission, between fixed termini on regular schedules) designed to carry eight persons or less, not including the driver, used for the purpose of accepting or soliciting passengers for hire in transportation subject to this Act, along the public streets and highways, as the passengers may direct.

4/ 1. (a) This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, ...

"Sightseeing Tours." The record is more than adequate for the findings we make below. In this connection, we must also note the incongruity of respondents' argument that lack of evidence warrants dismissal of this investigation when any lack of evidence flows directly from respondents' deliberate refusal to comply with the orders of this Commission and the U. S. District Court.

Respondents' brief reasserts that the Commission has no jurisdiction over sightseeing operations, citing Universal Interpretive Shuttle Corp. v. WMATC, 393 U.S. 186, 89 S.Ct. 354, 21 L.Ed. 2d 334 (1968). Such an interpretation of the dicta in that case is, however, clearly inconsistent with both the language of the Compact itself and with judicial interpretations thereof.

In Universal, the issue was whether authority granted by Congress to the Secretary of the Interior [D.C. Code (1981 Ed.) §8-104 formerly D.C. Code (1973 Ed.) §8-108] preempted -- with regard to transportation on Federal property under the Secretary's imprimatur -- the entire regulatory scheme otherwise created by the Compact for passenger carriers. After answering that question in the affirmative, the Court noted that the primary concern of Congress in approving the Compact was to provide a unified and simplified regulatory scheme for mass transit operations.

Other decisions, previously cited in the Commission's reply of November 9, 1982, in C.A. No. 82-2861, WMATC v. Klingaman, et al., clearly uphold the proposition that sightseeing is "transportation for hire" within the meaning of Title II, Article XII, Section 1(a) of the Compact. The following is excerpted from that reply:

> As a matter of information, however, defendants' reliance on Universal Interpretive Shuttle Corp. v. WMATC, 393 U.S. 186, 89 S.Ct. 354, 21 L.Ed.2d 334 (1968), is totally misplaced. The Universal case turned upon construction of a statute granting to the Secretary of Interior ". . . exclusive charge and control . . ." over the Washington, D. C., Mall [D.C. Code (1981 Ed.) §8-104, formerly D.C. Code (1973 Ed.) §8-108]. See also U.S. v. District of Columbia, 571 F.2d 651 (D.C. Cir. 1977). No such reservation of jurisdiction in favor of this defendant exists, nor can the Universal case be deemed controlling for situations not involving transportation around Federal reservations controlled by the Department of Interior. Compare Executive Limousine Service, Inc. v. Goldschmidt, 628 F.2d 115, 121 (D.C. Cir. 1980).
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> For-hire sightseeing operations by motor vehicle (with the exception of those performed under the aegis of the Secretary of Interior) have been subject to regulation since 1935. Cf. Peninsula Transit Corp. Common Carrier Application, 1 M.C.C. 440 (1937). This Commission has regulated such transportation

since March 22, 1961, the effective date of the Compact. Carriers specifically authorized to engage in individually ticketed sightseeing operations since that time include White House Sightseeing Corporation, Blue Lines, Inc., Gold Line, Inc., Washington Area Mini-Bus Tours, Inc., Webb Tours, Inc., and Milling Tours. Defendant subjects all of these carriers to illegitimate competition.

In several cases involving Holiday Tours, Inc., both the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit have affirmed WMATC's regulatory jurisdiction over sightseeing tour operators. In Holiday Tours, Inc. v. District of Columbia, 234 A.2d 179 (1967):

> "Appellants [had] been engaged in the business of providing sightseeing tours in and around Washington, D. C. * * * At trial it was stipulated that appellants did not have a certificate of public convenience and necessity issued by the Commission and that on each of the dates alleged in the information appellants operated sightseeing buses in the District of Columbia. [Footnote omitted.]"

The Court affirmed appellants' criminal conviction on ". . . 6 counts of knowingly and wilfully, as a carrier, engaging in the transportation for hire of persons by motor vehicle in the District of Columbia and the Washington Metropolitan Area Transit District without first having obtained a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission . . . . Title II, Article XII, §4(a) of the Washington Metropolitan Area Transit Regulation Compact, Pub.L. 86-794, 74 Stat. 1031, 1037 (1960)." [Footnote omitted.]

Other decisions consistent with that just cited are Holiday Tours, Inc. v. WMATC, 122 U.S.App.D.C., 352 F.2d 672 (D.C. Cir. 1965) and Holiday Tours, Inc. v. WMATC, 125 U.S.App.D.C. 366, 372 F.2d 401 (D.C. Cir. 1967).

Although these opinions were rendered prior to the decision in the Universal case, supra, subsequent pronouncements of both the U. S. Court of Appeals and the U. S. District Court have sustained the proposition that a certificate of public convenience and necessity is a prerequisite for engaging in the transportation of sightseeing passengers for hire. See WMATC v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), WMATC v. Holiday Tours, Inc., Nos. 77-1379 and 77-1465 (D.C. Cir. not printed), judgment and order entered May 24, 1978, and WMATC v. Holiday Tours, Inc., No. 76-1500 (D.C.D.C. not

printed), memorandum and order entered March 28, 1980. Accordingly, we must reject respondents' jurisdictional arguments and find that we properly have jurisdiction over this matter.

The Commission again notes that, despite being so ordered by us and by the United States District Court for the District of Columbia, respondents have refused to produce the books, records and assessment required by Order No. 2368. Hence, while we now proceed to make findings of fact and conclusions of law based on the record to date, the Commission reserves jurisdiction to make modifications thereof, if any should be warranted, in the event that the materials required by Order No. 2368 are ever produced.

We find that neither respondent holds a certificate of public convenience and necessity from the Commission, and that neither respondent has caused to be filed with the Commission a tariff or evidence of security for the protection of the public.

We find that the 1976 van owned and operated by Mr. Klingaman, with four bench seats and two bucket seats is a vehicle generally described as a "maxivan" which has a manufacturer's designed seating capacity for at least 11 persons including the driver.

We find that on several occasions in 1982, including July 21 and 22 and August 25 and 27, that David E. Klingaman, doing business as Banner Sightseeing Company, did transport passengers for hire between points in the Metropolitan District in said 1976 van.

We find that Harleysville Mutual Insurance Company family automobile policy number FAC-55-56-97, naming David E. Klingaman as the insured excludes from the terms of coverage instances when the said 1976 van is used for public and livery conveyance including the transportation for hire of passengers found to have occurred herein.

We find that since at least March 1982, Mr. Klingaman has known (because of the terms of his policy and the letter submitted as Exhibit 3 herein) that his automobile insurance on the 1976 van did not cover public or livery conveyance, and that, despite such knowledge, Mr. Klingaman did operate his vehicle as a public conveyance transporting passengers for hire between points in the Metropolitan District.

We find that respondents have knowingly and wilfully failed to comply with the production and assessment requirements of Commission Order No. 2368.

From these findings, the Commission concludes that: respondents have violated Title II, Article XII, Section 4(a) of the Compact by transporting passengers for hire between points in the

Metropolitan District without appropriate authority; respondents have violated Title II, Article XII, Section 5(d) of the Compact and Commission Regulation No. 55 thereunder by charging, for transportation subject to the Compact, fares not contained in a filed and effective tariff and by failing to file a tariff; respondents have knowingly and wilfully violated Commission Regulation No. 62 issued pursuant to Title II, Article XII, Section 9(a) of the Compact by conducting operations subject to the Compact without maintaining security for the protection of the public; and respondents have knowingly and wilfully violated Title II, Article XII, Sections 10 and 19(a) and Commission Order No. 2368 by failing to provide documents and the assessment directed to be produced by said Order.

THEREFORE, IT IS ORDERED:

1. That David E. Klingaman and Banner Sightseeing Company are hereby directed to cease and desist, directly or indirectly, from engaging in the for-hire transportation of passengers between points in the Metropolitan District unless and until there is in force a certificate of public convenience and necessity issued by the Commission authorizing such transportation.

2. That the staff of the Commission take all steps including such administrative, civil or criminal procedure as are necessary to assure compliance with this Order.

3. That respondents are jointly and severally liable for all costs of this investigation and enforcement thereof.

BY DIRECTION OF THE COMMISSION, COMMISSIONERS CLEMENT, SCHIFTER AND SHANNON:

WILLIAM H. McGILVERY
Executive Director