WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2398

IN THE MATTER OF: Served February 18, 1983

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

On December 22, 1982, the Commission entered Order No. 2387, incorporated by reference herein. By application filed January 21, 1983, respondents Banner Sightseeing Company and David E. Klingaman, seek reconsideration of that Order. By motion filed the same date, respondents also seek to strike certain evidence which, they claim, is inadmissible. On January 21, 1983, the Commission staff filed a reply to respondents' application and motion. On February 8, 1983, respondents sent to the Commission, the Commissioners and the Commission's General Counsel, a letter (a) asking that certain documents be considered by us and (b) taking issue with most arguments made by the staff in its reply. Although we reviewed this letter and considered its content in light of the documents referenced therein, no further action in this connection is necessary.

Inasmuch as the application and motion are interrelated, we shall dispose of them in a single order. Before turning to the various items which respondent would have stricken, it is useful to restate certain provisions of the Commission's Rules of Practice and Procedure.

> Rule 20-07. Formal exceptions to a ruling by the Commission or presiding officer are unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known on the record the action which he desires the Commission or the presiding officer to take, or his objection to the action of the Commission or the presiding officer, and his grounds therefor.
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> Rule 23-01. Relevant and material evidence shall be admissible, but the Commission or presiding officer may exclude such evidence as is unduly repetitious or cumulative.

> Rule 23-08. Wherever practicable, all exhibits of a documentary character offered in evidence shall be on paper of good quality and so prepared as to be plainly legible and durable, whether printed, photostated or typewritten, and shall conform to the requirements of Rule 4 whenever practicable.

These rules are typical examples of their genre. Cf. 5 U.S.C. §556(d) and 49 C.F.R. §§1100.73 and 1100.85. It is well known that strict rules of evidence do not apply in the administrative context. Calhoun v. Bailar, 626 F.2d 145, 148 (9thCir. 1980), certiorari denied 452 U.S. 906 (1981), cited with approval in Hoska v. U.S. Dept. of the Army, 677 F.2d 131, 139 (D.C.Cir. 1982). See also K. Davis, Administrative Law of the Seventies (1976), §14.00. In particular, hearsay evidence is admissible in administrative proceedings, provided it is relevant and material. Hoska, supra at 138, and Johnson v. U.S., 628 F.2d 187, 190 (D.C.Cir. 1980). Hearsay can constitute substantial evidence, particularly where it is of high probative value and reliability considering, inter alia, the disinterest of the source of the hearsay, whether the hearsay is contradicted by direct testimony, whether the hearsay is corroborated, and whether the party against whom hearsay is used had access to the statements prior to the agency hearing. Richardson v. Perales, 402 U.S. 389, 402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971), Johnson, supra at 190-91, and Calhoun, supra at 148-49.

Initially, it is noted that, for every item of evidence which respondents now seek to strike, no objection was made at the hearing. Hence, the entire motion is inappropriate. Similarly, respondents' contention that "the strict rules of evidence which would be effective in, for instance, the U.S. District Court" are applicable is also ill conceived.

Respondents list eight so-called "occurrences" of inadmissible evidence. These need not be reiterated individually and shall be grouped as set forth below.

Occurrence Nos. 1 and 2, because they are admissions against interest made by Mr. Klingaman, either on the record or to Officer Dause, are admissible as an exception to any hearsay rule.

Occurrence Nos. 4, 5 and 6, because they are statements made by a disinterested, knowledgeable third party, are relevant and material, and are uncontradicted by direct testimony, are admissible hearsay.

Occurrence Nos. 2 and 3, regarding testimony about citation(s) issued by Officer Dause are explanatory of other testimony and the officer's state of mind at the time. They were not offered as bearing on the validity of the citations. Hence, they are not hearsay but constitute relevant, material and admissible statements.

Occurrence Nos. 5 and 7 involve documents peculiarly under the control of respondents. Respondents' failure to produce these documents, despite lawful demands therefor, estops any complaint about the documents being obtained from other sources and then admitted into evidence without objection. Moreover, the insurance policy and letter and the testimony of Officer Dause about a receipt, all involve credible, disinterested sources, are relevant and material and are uncontradicted.

Occurrence No. 7, objecting to photocopies of documents, is invalid because unchallenged photostats are admissible under Rule 23-08. Moreover, the originals would appear to be in defendants' possession, and their failure to produce the originals, despite a lawful demand therefor, estops any complaint about the use of photocopies.

Occurrence No. 6, regarding Exhibit 1 involves a contemporaneous record made in the ordinary course of Officer Dause's business and sponsored by the author thereof who was available for cross-examination thereon.

Occurrence No. 7, regarding Exhibits 2 and 3 involves records kept by the Commission in its public records, obtained by a lawful request therefor and sponsored by the keeper of the Commission's records.

Occurrence No. 8 regards uncontradicted direct testimony. There is no requirement that underlying documents for that testimony be produced, particularly in the absence of a timely motion therefor. Moreover, Officer Dause stated that the records involved were located in an adjacent office and they could have been made available if there was a timely request therefor. Defendants' failure so to do estops any objection at this time.

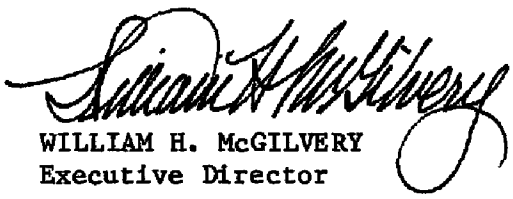
Finally, to the extent that respondents attempt in their Motion to Strike to "reserve . . . the right to add, on appeal, any allowable additional occurrences and/or arguments", no such right exists. See Compact, Title II, Article XII, §16.

Turning next to the Application for Reconsideration, it is apparent that alleged errors 1a-1g, 2c, d, and f-j, and 4 are premised on either erroneous characterizations of fact, inaccurate conclusions

of law or both. Alleged errors 2a and 2e are mere disagreements with the weight accorded to uncontradicted evidentiary statements. Alleged errors 2b and 3 relate to testimony not relied upon by the Commission in reaching any material finding of fact or conclusion of law and, if error at all, are harmless.

THEREFORE, IT IS ORDERED that the above-referenced Motion to Strike and Application for Reconsideration are hereby denied.

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



WILLIAM H. McGILVERY
Executive Director