WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2423

IN THE MATTER OF: Served May 27, 1983

Application of WEBB TOURS, INC., for a Certificate of Public Convenience and Necessity to Engage in General Charter and Special Operations) Case No. AP-82-11

By Order No. 2404, served March 30, 1983, and incorporated by reference herein, the Commission denied virtually all of Webb Tours, Inc.'s application to broaden the charter and special operations authority contained in WMATC Certificate of Public Convenience and Necessity No. 33. 1/ Essentially, Webb sought to expand its operations to include those special and charter operations which are not sightseeing or pleasure tours; to serve Prince George's and Montgomery Counties, Md., Dulles International Airport and Fairfax County, Va., in special operations; and to use vans, motor coaches and double-deck buses interchangeably. At the public hearing commencing October 26, 1982, the application was restrictively amended to exclude special operations to and from Dulles International Airport and Washington National Airport.

On April 29, 1983, Webb filed an application for reconsideration of Order No. 2404. On May 6, 1983, Gold Line, Inc., and Beltway Limousine Service, Inc., each filed a reply thereto. On May 13, 1983, the staff of the Commission filed a reply together with a motion for leave to file the reply out of time. That motion is unopposed and shall be granted.

Webb contends that (1) it has an outstanding record for service and safety, (2) the Commission erred in concentrating on "mere minor technical violations" rather than looking at the record as a whole, (3) the Commission erred in considering Webb's record before the Interstate Commerce Commission (I.C.C.) (presumably the performance of operations that fall within the jurisdiction of the I.C.C.), (4) the Commission erred in holding that "isolated incidents" demonstrated that Webb has "knowingly and willingly" (sic) violated Commission rules and

---

1/ A restriction in Webb's certificate was amended to modify the description of the double-deck equipment that may be used.

regulations, (5) the Commission failed to consider the public interest, (6) so-called "market domination" by a few carriers is not in the public interest, (7) competition in the market has declined and (8) there are irregularities and errors in the procedural aspects of our decision-making process.

In addition, Webb asks the Commission to take official notice of the following:

(1) On March 30, 1983 (in MC-160925, served April 4, 1983), the I.C.C. granted Webb authority to perform operations between points in the United States. The grant of authority implies a finding that Webb is a fit carrier.

(2) The WMATC staff has recently determined that there are a large number of carriers operating without authority. These operations have resulted in the Commission issuing 18 (actually 20) notices of violations to date.

(3) The Commission granted on February 18, 1983, a 13 percent increase in Gold Line's tariff in order to "produce a just and reasonable return." 2/

If official notice of this "new" information is not taken, Webb alternatively moves that the information be added to the record.

POSITION OF APPLICANT WEBB

As pertinent, Webb argues that the Commission erred in concentrating on minor technical violations rather than looking at the record as a whole, claiming that "[t]he Commission's apparent requirement for 100 percent perfect compliance is unusual for governmental agencies." Emphasis is placed on Webb's service and safety records.

Applicant argues that the record does not support Commission findings that Webb has operated in violation of federal law, specifically the Interstate Commerce Act. As noted above, the I.C.C. issued to Webb a grant of authority to perform operations between points in the United States to which we will accord due weight.

2/ Case No. AP-82-15. See Order No. 2399, served February 18, 1983.

Restriction to sightseeing and pleasure tours in its certificate is the cause of many of the alleged violations, according to Webb. The carrier asserts that the Commission has never defined the term "pleasure tours" and that use of applicant's double-deck buses, because of their unique construction, results in "something more than mere point-to-point transportation" and, thus, is a pleasure tour. It also argues that discussion or description of "various landmarks and monuments" is sufficient for service to be "more than mere transportation between two points."

Further so-called "technical" violations include use of double-deck buses where a certificate restriction requires use of a van which Webb characterizes as transportation that ". . . merely happened to be outside the city limits" and resulted from the mechanical failure of applicant's van equipment. Webb urges removal of its certificate restrictions, contending that, at the time the restrictions were imposed, the company operated only one vehicle. Over the course of time, however, the equipment restrictions have caused Webb's service to become inefficient, thus warranting their removal. While acknowledging that improper one-way movements have occurred in the past, applicant asserts that after consultation with Commission counsel regarding the scope of the carrier's authority, one-way service was discontinued.

Also admitting that it had previously charged rates not then contained in its published tariff, Webb states that "[n]o one disputes that the public was never overcharged during this time. * * * Webb's sole error was in not filing their rates with the Commission." The Commission did subsequently approve a higher tariff than was previously charged by Webb in its unapproved rate schedule. 3/

Webb further asserts that the Commission has failed to consider the public interest by ". . . supporting the monopolistic practices of two carriers." It asserts that protestants control and dominate their respective markets.

Webb also argues that a denial of its application will cost the public thousands of dollars. Webb presents a per-seat cost comparison among itself and the two protestants herein, Gold Line, Inc., and Beltway Limousine Service, Inc., asserting that, for a four-hour minimum charter service, Webb's per-seat rate is $2.44, whereas Gold Line's is $3.40 and Beltway's is over $6.

3/ This matter was the subject of Case Nos. MP-81-11 and AP-81-29.

In furtherance of this argument, Webb proffers (in conflict with Mr. Webb's testimony at the public hearing) that competition in the marketplace has declined. According to applicant, the two alleged dominating carriers are providing bad and inadequate service. Asserting a need for increased competition, Webb contends that there have been numerous mergers and firms leaving the local transportation industry. According to applicant, these defections offend the National Transportation Policy which encourages greater competition and less monopoly.

With respect to procedural aspects of the case, Webb maintains that the Commission erred in not having the presiding administrative law judge issue findings and a proposed order in this proceeding. This error was allegedly compounded by the Commission's denial of the carrier's request for oral argument. Webb asserts that our failure (a) personally to preside at the hearing, (b) to require the hearing examiner to issue findings of fact and weigh the evidence, and (c) to allow reply briefs or oral argument, denied applicant a fair hearing.

POSITION OF PROTESTANT GOLD LINE

Gold Line urges that there are two principal matters that must be addressed in response to Webb's reconsideration application. The first is the allegation that Gold Line controls 95 percent of the charter sightseeing market, which Gold Line vigorously disputes.

The second point Gold Line raises regards the issuance of authority by the I.C.C. to Webb. Gold Line points out that the statutory requirements regarding fitness differ considerably between the I.C.C. and this Commission. Under the Bus Regulatory Reform Act of 1982, the only standard of proof imposed on certain applicants before the I.C.C. is that of fitness, and, with respect to that issue, the only two matters which may lawfully be considered are the safety record (or compliance with Department of Transportation Safety Regulations) and compliance with I.C.C. insurance regulations. It is asserted that illegal operations or violations of the rules and regulations are no longer an issue to be considered, as they still are with WMATC pursuant to the Compact, Title II, Article XII, Section 4(b).

Gold Line urges the Commission to deny Webb's reconsideration application because of the repeated violations of the certificate requirements of the WMATC and I.C.C., and the failure of Webb to charge rates contained in its published WMATC tariff.

POSITION OF PROTESTANT BELTWAY

In its reply, Beltway Limousine Service, Inc., states that Webb ". . . confuses and commingles the positions of the two protestants and the Commission's staff . . . ." Gold Line and the staff both stressed the fitness issue in their post-hearing briefs. Beltway, on the other hand, relied primarily upon Webb's failure generally to prove that the public convenience and necessity requires approval of its application, although Beltway also concurred on the fitness issue. Beltway specifically contends that Webb has failed to produce any evidence that the public needs more van or minibus charter service than is presently available. This issue, however, is not even raised by Webb in its application for reconsideration.

The argument concerning the per-seat cost comparison is misleading, Beltway asserts, because of the large seating capacity of a double-deck bus as opposed to a van and because the services provided by the carriers are so different. Finally, this protestant objects to Webb's allegations ". . . that Beltway and Gold Line have conspired to monopolize the Washington transit market." Beltway emphasizes that no evidence of any such conspiracy was presented, because none ever existed. Beltway urges that the Commission deny Webb's application for reconsideration.

POSITION OF WMATC STAFF

The staff, in its reply, notes the distinction drawn by Gold Line between the standards to be applied by I.C.C. and WMATC in determining fitness. Further, it points out that, "[a]s stated [in Order No. 2404, the Commission found] that Webb is financially fit and that its operational fitness is satisfactory." The staff also correctly says that "[o]perational fitness is a separate consideration from our determination that the carrier failed to establish its compliance fitness."

Inexplicably, however, the staff goes on to suggest that we attach more significance to the I.C.C. grant of authority, and that finding Webb unfit may be "unduly punitive." It further suggests that we "modify" our unfitness finding and "grant expanded special operations authority consistent with the showing of need therefor." Here the staff falls into double error. Modification of our finding with regard to fitness is not warranted by the decision of I.C.C., and, even if it were, the evidentiary deficiency with regard to public convenience and necessity remains uncured on this record.

DISCUSSION, FINDINGS, CONCLUSIONS

With respect to Webb's request that the Commission take official notice of the above-cited items (supra, p. 2), the Commission does take notice of I.C.C. issuance of authority to Webb, although no specific finding of fitness is a part of the I.C.C. order. The other two matters cited by Webb are matters already of record at the Commission.

In its application for reconsideration, Webb points to new information -- that the I.C.C. has now issued to Webb "authority to perform charter and special operations throughout the United States," such a decision implying that the I.C.C. has found Webb fit. We are asked to take notice of that finding, and we have. The staff, too, suggests this is sufficient basis for us to change our finding as to fitness and, on the strength of that, to change, in part, our finding as to the issue of public convenience and necessity. Whereas Webb believes a grant of its entire application is warranted, the staff recommends a more limited grant of new authority. We disagree with both points of view.

As protestant Gold Line points out in its reply:

> . . . the statutes under which applications filed with the I.C.C. and the WMATC are to be judged by those two regulatory commissions are no longer similar, as previously was the case. Instead, under the Bus Regulatory Reform Act of 1982, the only standard of proof imposed upon an applicant for charter and/or special operations authority is that of fitness, and with respect to that issue, the only two matters which the I.C.C. may lawfully consider are the safety record of the applicant or its compliance with the Safety Regulations of the Department of Transportation and compliance with the I.C.C.'s insurance Regulations.
>
> * * *
>
> Contrary to the above, Section 4(b) of Article XII of the Compact, which is the statutory provision under which this and all similar applications must be decided by this Commission, provides as follows:
>
> "When an application is made under this section for a certificate, except with respect to a service being rendered upon the effective date of

> this Act, the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the tranportation covered by the application, if it finds, after hearing held upon reasonable notice, that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the [rules, regulations] and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise such application shall be denied." (Emphasis supplied by Gold Line.)

Our decision with regard to Webb's fitness was not based upon allegations of I.C.C. violations, as Webb argues. Rather, it was specifically based on WMATC standards and WMATC violations. As we said:

> With respect to Webb's operational fitness, we find that applicant operates safe, well-maintained equipment and has no history of operational complaints from users of its service. Similarly, we find that Webb is financially fit; in fact the company is in its best financial posture since commencing operations.
>
> We further find that Webb has failed to establish that it is fit, willing and able properly to comply with the provisions of the Compact and the rules, regulations and requirements of the Commission thereunder. (Order No. 2404, at p. 18, emphasis supplied.)

Then, after citing three specific instances of WMATC certificate violations and noting WMATC tariff violations in Case No. MP-82-11 (resolution of which is still pending), we further said:

> Accordingly, we find that Webb has demonstrated a blatant disregard for the requirements of the Compact and this Commission's rules and regulations thereunder. (Order No. 2404, at p. 19, emphasis supplied.)

The statutory standards imposed on applicants before WMATC clearly differ from those of I.C.C. In our view, this applicant does

not meet WMATC standards, and this situation is not changed by our taking official notice of I.C.C.'s findings under its standards.

Webb's assertions of error concerning the Commission's failure to consider the public interest, market domination by protesting carriers and the decline of competition in the local market are misplaced. Allegations concerning numerous mergers and a shrinkage in the number of local carriers are not only wholly unsupported but erroneous as well. In fact, this Commission has granted authority to about fifty new carriers since Webb's initial certificate was issued. Numerical arguments regarding alleged percentages of market share or per-seat costs, without appropriate foundation or proof, offer no additional substance to Webb's application. The market share assertion is unsubstantiated. The per-seat cost comparison is totally meaningless when unaccompanied by corresponding evaluations of the types of services involved, the load factors, and the availability and expenses of the involved carriers. Merely alleging that there has been a decline in competition in the local market, without any probative evidence, is worthless. Whereas applicant asserts that protestants control and dominate their respective markets, it could also be said that Webb controls and dominates the double-deck bus market. The evidence of record, including Commission records and Mr. Webb's own testimony, indicates that substantial competition exists.

Webb's contentions regarding Commission procedures describe no action contrary to this Commission's Rules of Practice and Procedure or contrary to established administrative procedure. The existing rules of procedure have been adopted to give all parties before the Commission equal opportunity to present their evidence, to have the record considered properly by the duly appointed members of the Commission and, if so desired, to present claimed errors first before the Commission and then the United States Court of Appeals.

Webb has asserted that Commission procedure is violative of due process inasmuch as the staff's post-hearing brief assertedly was adopted by the Commission verbatim, without any demonstration of independent study or analysis. This bold allegation has absolutely no element of factual support. The suggestion that members of this Commission are shirking their duties is neither valid nor appreciated. Each record before us is carefully studied, and the fact that staff counsel presents recommendations less biased than the proposals of interested parties is not unusual.

A comparison of the staff's post-hearing brief and order No. 2404 itself undercuts Webb's allegations, and the changes made to the staff's proposed order were the result of a thorough review of the record and serious debate among the Commissioners. Counsel for Webb is

hereby advised that animadversions of conspiracy by other carriers and lack of diligence by the Commission are highly improper when unsupported by any evidence of record. Counsel is advised to reread carefully Commission Rules of Practice 3-04 and 3-05.

The Commissioners personally and carefully studied the record, independently forming the basis for their decision. While that, in itself, is sufficient, in this particular case the Commissioners met and discussed the case face to face. Even then we chose to give the matter further independent study before reaching a decision. When a (unanimous) decision was reached, we directed substantial and significant changes to the staff's proposed order, rather than adopting it verbatim as applicant here charges. The two documents at issue speak for themselves in this regard. Even where we do adopt the staff's proposed orders verbatim, as we certainly have done, those decisions are taken deliberately and after careful independent consideration.

We find nothing in the application for reconsideration to indicate that there was any error in Order No. 2404, our original decision in this case. We are convinced that our findings, conclusions and decision in that order were correct with regard to the evidence presented on the issues of public convenience and necessity and the fitness of the applicant.

One further point with regard to equipment: There is a provision in Webb's charter authority permitting the use of "leased conventional bus vehicles" in charter operations when double-deck buses are inoperative. The record in this case now indicates that Webb holds an I.C.C. certificate, and Webb's WMATC annual report indicates that it now owns some conventional buses, presumably to operate its I.C.C. authorized service. Under these circumstances we see no point in limiting Webb to the use of "leased" conventional bus vehicles when its own conventional buses may be available. Accordingly, we shall eliminate the words "leased" and "leasing" from the vehicle restriction in Webb's charter authority.

Finally, on May 20, 1983, Webb filed a reply to staff counsel's reply to Webb's application for reconsideration. By statute (Compact, Title II, Article XII, Section 16) we have 30 days to deal with an application for reconsideration, and our rules (see Rule 28, Reconsideration of Orders) do not provide for this latest pleading by Webb. However, our Rule 30, Waiver of Rules, provides:

> 30-01. The Commission may in its discretion waive any of the provisions of these Rules in any proceeding after duly advising the parties of its intentions so to do.

If we waive this rule for Webb, we must "duly" advise the parties who will surely want their opportunity to file another pleading. We have a very limited time remaining to deal with this matter. In light of the 30-day requirement, the line must be drawn somewhere. In fairness to all parties, we must draw that line where our rules draw it. Webb's reply shall be rejected.

THEREFORE, IT IS ORDERED:

1. That the staff motion for leave to file a reply out of time is hereby granted.

2. That the motion of Webb Tours, Inc., for inclusion in the record of specified new matters, as set forth above, is hereby granted to the extent that the Commission takes official notice of the Interstate Commerce Commission decision in MC-160925, served April 4, 1983, and is hereby denied to the extent not granted.

3. That the application for reconsideration of Webb Tours, Inc., is hereby denied.

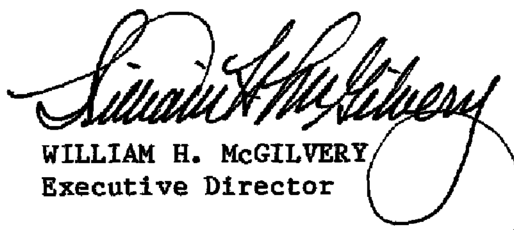
4. That the above-noted vehicle restriction in Certificate No. 33 shall be amended to exclude the words "leased" and "leasing."

5. That an appropriately revised Certificate of Public Convenience and Necessity No. 33 be reissued to Webb Tours, Inc., in accordance with the directives of this Order and Order No. 2404, served March 30, 1983.

6. That Webb Tours, Inc., is hereby directed to pay to the Commission the sum of $854.80, said sum being the balance due to cover the cost of its hearing, pursuant to the Compact, Title II, Article XII, §19, no later than Friday, June 10, 1983, at 12 noon.

7. That the reply of Webb Tours, Inc., filed May 20, 1983, is hereby rejected.

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



WILLIAM H. McGILVERY
Executive Director

Reissued May 27, 1983
Pursuant to Order No. 2423

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

NO. 33 *

WEBB TOURS, INC.

WASHINGTON, D. C.

By Order Nos. 1536, 1563, 1659, 2404 and 2423 of the Washington Metropolitan Area Transit Commission served April 15 and June 1, 1976, March 11, 1977, and March 30 and May 27, 1983;

AFTER DUE INVESTIGATION, it appearing that the above-named carrier is entitled to receive authority from this Commission to engage in the transportation of passengers within the Washington Metropolitan Area Transit District as a carrier, for the reasons and subject to the limitations set forth in Order Nos. 1536, 1563, 1659, 2404 and 2423;

THEREFORE, IT IS ORDERED that the said carrier be, and it is hereby, granted this certificate of public convenience and necessity as evidence of the authority of the holder thereof to engage in transportation as a carrier by motor vehicle; subject, however, to such terms, conditions and limitations as are now, or may hereafter be, attached to the exercise of the privilege granted to the said carrier.

IT IS FURTHER ORDERED that the transportation service to be performed by the said carrier shall be as specified below:

<u>IRREGULAR ROUTES</u>

A. CHARTER OPERATIONS, round-trip sightseeing or pleasure tours, between points in the Metropolitan District.

B. SPECIAL OPERATIONS, limited to sightseeing or pleasure tours,
   (1) between points in the District of Columbia, City of Alexandria, Virginia, and Arlington County, Virginia;

   (2) from points in the District of Columbia to Mount Vernon, Virginia, and return.

C. SPECIAL OPERATIONS, limited to shuttle service for patrons of sightseeing or pleasure tours authorized in B above, as an incidence thereto and not to include any sightseeing, from points in the Metropolitan District to join such sightseeing or pleasure tours as authorized herein, and return.

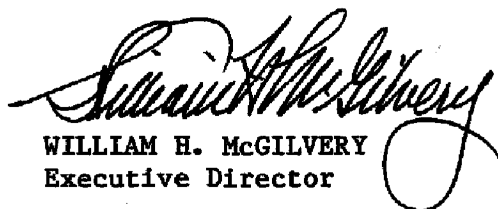
RESTRICTIONS

1. Service authorized in A and B above is restricted to the performance of such operations in British style double-deck buses; provided, however, that performance of such operations may be in conventional bus vehicles when British manufactured double-deck buses are inoperative, and further provided that the carrier file with the Commission, within five days of each occasion of use of conventional equipment, a written statement setting forth the data and service for which the conventional equipment was used and the reason therefor.

2. Service authorized in C above is restricted to the performance of such operations in vehicles with a manufacturer's designed maximum seating capacity of not more than 15 passengers, excluding the driver.

AND IT IS FURTHER ORDERED and made a condition of this certificate that the holder thereof shall render reasonable, continuous and adequate service to the public in pursuance of the authority granted herein, and that failure so to do shall constitute sufficient grounds for suspension, change or revocation of the certificate.

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



WILLIAM H. McGILVERY
Executive Director

* This Certificate cancels and supercedes Certificate No. 33 last reissued on March 11, 1977, pursuant to Order No. 1659.