

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 2712

IN THE MATTER OF:

Served June 6, 1985

Application of YOUNG S. KIM T/A )  
WASHINGTON U.S. TOURS for a Certi- )  
ficate of Public Convenience and )  
Necessity to Conduct Charter )  
Operations )

Case No. AP-85-01

Application of YOUNG S. KIM T/A )  
WASHINGTON U.S. TOURS for Temporary )  
Authority to Conduct Charter )  
Operations )

Case No. AP-85-02

BACKGROUND

By separate applications simultaneously filed on January 2, 1985, Young S. Kim trading as Washington U.S. Tours seeks both temporary and permanent authority to conduct charter operations, transporting passengers and their baggage, in the same vehicle with passengers, over irregular routes, between points in the Metropolitan District, restricted (A) to transportation in vehicles with a manufacturer's maximum designed seating capacity of 24 passengers, excluding the driver, and (B) against transportation between points solely within Virginia. 1/ The applications were consolidated for handling on a single record and set for public hearing by Order No. 2654, served January 22, 1985, which is incorporated herein by reference.

After two postponements granted at applicant's request, 2/ a public hearing was held on March 26, 1985. The applicant and one

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1/ This description of the authority sought reflects the staff's clarification and re-phrasing of the language used on the face of the application, which was "to operate 15 or 24 passenger vans on a charter 'for hire' basis, on an as-needed basis, as directed by the charteror to all points within the Washington, D.C., Metropolitan area, including such operations as sightseeing, airport transfers, hotel and restaurant transfer, convention, business and social meetings, transportation, etc., for Korean-speaking people." See Order No. 2654, cited infra in text.

2/ See Order Nos. 2658 and 2670, served February 1 and February 26, 1985, respectively.

protestant, Beltway Limousine Service, Inc., appeared at the hearing and presented witnesses. 3/

#### PRELIMINARY MATTERS

During the course of the hearing, the presiding Administrative Law Judge raised two issues which require resolution before proceeding to a discussion of the evidence presented and our findings and conclusions based thereon.

First, the Administrative Law Judge pointed out that the restriction to 24-passenger vehicles imposed on the authority sought might be interpreted as being inconsistent with the applicant's intended mode of operation. As discussed in Order No. 2654, mentioned previously, the application as originally filed requested authority "to operate 15 or 24 passenger vans." As re-phrased and clarified by the staff, however, the application was restricted "to transportation in vehicles with a manufacturer's maximum designed seating capacity of 24 passengers, excluding the driver."

Clearly, applicant did not intend the restriction to limit him to using equipment seating exactly 24 passengers. To avoid any possible misinterpretation, we hereby re-phrase the restriction to read "transportation in vehicles with a manufacturer's designed seating capacity of 24 passengers or less, excluding the driver." This technical correction prejudices no one because the notice of the application actually published in a local newspaper described the authority sought as being "restricted to vehicles seating 24 passengers or less." 4/

Secondly, during the course of the hearing, applicant proposed to amend the application by adding a restriction "to the transportation of passengers moving in tour groups having an initial origin in Korea and a final destination in Korea." 5/ The protestant indicated such

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3/ Washington Tours, Inc. ("WTI" or "protestant"), filed a protest for the limited purpose of objecting to Mr. Kim's trading under the name "Washington U.S. Tours" on the ground that applicant's trade name is overly similar to protestant's corporate name. However, WTI presented neither evidence nor legal argument on this issue which, in light of our decision, has become moot.

4/ Quoted from the affidavit of publication in the Washington Post filed by applicant at the hearing. (Emphasis supplied).

5/ The "Korean-speaking people" limitation was thought to be difficult to enforce and perhaps discriminatory, and therefore was omitted from the description of the authority sought as re-phrased and clarified in Order No. 2654, supra. This had the effect of giving notice of the broadest possible interpretation and preserved the issue for treatment at hearing.

a restriction would satisfy its interests fully and allow it to withdraw from the hearing without presenting evidence in opposition to the application. The staff did not oppose the proposed amendment. The Administrative Law Judge, however, felt there was some doubt whether such a restriction ultimately would be acceptable to the Commission and, therefore, he refused to accept the applicant's proffered amendment stating, "if the Commission desires to go ahead with the restriction, since we have talked about it, there would be nothing to bar it, because that is the true desire of the applicant." <sup>6/</sup> For the reasons stated below, we shall accept the applicant's proposed restrictive amendment and dispose of the consolidated applications accordingly.

The restrictive amendment proposed here is analogous to the restriction imposed in Case No. AP-81-26, Japan Travelers Service, Inc. In that proceeding, the application as originally filed sought charter authority between points in the Metropolitan District. The section on the face of the application describing the authority sought contained applicant's further statement that "[a]t present, all of the applicant's customers and clients are groups originating in Japan (or Korea), consisting of Japanese (or Korean) speaking people only, for which groups applicant provides licensed Japanese or Korean speaking tour guides." Order No. 2275, served November 11, 1981, which set the case for hearing, specifically noted that the above-quoted language "cannot be interpreted as a proposed restriction of the authority sought." Accordingly, the published notice of the application showed applicant as seeking essentially unrestricted charter authority throughout the Metropolitan District.

Three carriers filed protests. They later withdrew their opposition after the first day of the hearing upon acceptance of applicant's proposed amendment restricting the size of equipment to be used in performing the service. By Order No. 2328, served April 8, 1982, the amended application was granted, and a further restriction was imposed limiting service "to transportation performed for bona fide travel agencies or tour brokers." (Footnote omitted.) In imposing this additional restriction, we said:

This grant of authority is consistent with the evidence of record and applicant's existing practices and avoids the discrimination and enforcement problems inherent in tailoring a certificate to a group defined by national origin or language affinity." (Order No. 2328, at page 5).

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<sup>6/</sup> Transcript, page 32.

The Japan Travelers precedent stands for two principles relevant to the present case. First, the Commission, in appropriate circumstances, will impose a restriction which limits service to a particular class of passengers. 7/ Second, the Commission disfavors such a limitation when the class of passengers is described in terms of nationality or language affinity. The restriction proposed by the applicant herein is acceptable under these principles.

Mr. Kim has proposed a voluntary restriction to a certain class of passengers, i.e., those passengers who are participating in a charter movement within the Metropolitan District as part of a tour that begins and ends in Korea. The record shows that this class of passengers encompasses 90 percent of the passengers applicant wishes to transport. The record further shows that the protestant would withdraw its opposition if applicant's voluntary restriction were accepted. Absent the restriction, protestant's position is that it is ready, willing, and able to provide any transportation that may be needed. In these circumstances, as in the similar circumstances of the Japan Travelers case, it is appropriate to accept the proposed restriction to a certain class of passengers.

The restriction proposed in this case does not attempt to define the involved class of passengers in terms of the passengers' nationality or language affinity. Rather, the class is defined in terms of the type of movement in which the passengers are participating, i.e., a charter movement that is part of a larger tour movement that begins and ends in Korea. Under a restriction framed in this manner, a person of any nationality or language affinity may be included in the class of passengers being transported. Similarly, the determination of whether a passenger is within the permitted class can be made reliably by reference to objective manifestations of the larger, international tour in which the passenger under scrutiny must be participating. Thus, enforcement of the restriction accepted here is no more difficult than enforcement of the "tour broker or travel agents" restriction imposed in Japan Travelers.

#### SUMMARY OF EVIDENCE

Mr. Young S. Kim, a sole proprietor, testified as the applicant in the consolidated applications. Mr. Kim came to the Washington area from Korea approximately 13 years ago. After obtaining a master's degree in sociology from American University, Mr. Kim worked as a D.C. cab driver for approximately five years. As a result of his

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7/ A restriction to transportation performed for travel agencies and tour brokers is, in reality, a restriction to a particular class of passengers. The only passengers who may be transported are those who are members of a group tendered by a travel agency or tour broker.

involvement in providing guide services for Korean tourists during this time, Mr. Kim came into contact with tour wholesalers in New York City, Los Angeles, and Hawaii. From these contacts he established business relationships which led him to form his own regional tour broker business approximately 18 months ago.

As a regional broker, Mr. Kim handles arrangements for groups touring the Washington metropolitan area. Almost 100 percent of the groups he deals with consist of Korean-speaking people, and 90 percent of those groups come into the Metropolitan District on tours that originate in Korea and return there. Mr. Kim meets each group upon arrival in the Metropolitan District, provides an interpreter-guide for each group, arranges the group's hotel and restaurant accommodations, and arranges the group's transportation in and around the Metropolitan District, both for sightseeing purposes and for point-to-point transfers.

The instant applications are an outgrowth of Mr. Kim's tour broker business. For groups of more than 13 passengers Mr. Kim's practice is now -- and, if these applications are granted, would continue to be -- to hire transportation from an existing carrier. However, for groups of a dozen people or less, Mr. Kim desires to use his own vehicles. By using his own vehicles to transport small groups, Mr. Kim hopes to achieve greater flexibility in pricing his tour broker services so as to be able to handle smaller groups at a profit. 8/

Mr. Kim explained that the price for his services in undertaking the arrangements for a group tendered by a tour wholesaler is a matter of negotiation between him and the wholesaler. The price negotiated varies from group to group, and is always stated in terms of a flat price per person. Because of the effect of fixed costs including minimum hourly charges to hire vehicles from existing

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8/ The evidence is contradictory concerning the point at which the size of a group compels Mr. Kim to use his own vehicles instead of hiring an independent carrier. In his post-hearing brief, Mr. Kim asserts the critical point is 23 people or less -- a number which corresponds to the vehicle restriction included in the authority sought. At the hearing, however, Mr. Kim testified that "all under 13 or 12 people, or 10 people, I use my 15-passenger van for the transportation," and the illustrations he gave of his so-called "budget problem" related to groups of 10 people. Other testimony indicated that the budget problem may also exist for groups as large as 15 people. Mr. Kim testified, however, that "for small groups, around 15 people, I make reservation for the International Limousine Service, or Checker mini-bus service." From this confusing testimony, we are led to conclude that Mr. Kim's need to use his own vehicles arises when the size of the tour group is 13 passengers or less. See Transcript, page 9.

carriers, the spread between Mr. Kim's costs incurred in handling a group and his price to the tour wholesaler becomes smaller as the size of the tour group declines. At the level of 13 persons or less, the spread is so small that unless Mr. Kim is able to decrease his costs in some manner, he is unable to handle the group at a profit and, thus, as a rational businessman, he must refuse that business.

Mr. Kim seeks to cut his costs, in effect, by providing transportation for small groups himself. Although the cost of providing the transportation presumably would be in the same range for applicant as for existing carriers, the difference would be that Mr. Kim would retain the profit generated by his own transportation operations. This would enable Mr. Kim to price his tour broker services at a rate low enough to be acceptable to the tour wholesalers, yet high enough to be remunerative to him.

At the time of the hearing, Mr. Kim had no small tour groups scheduled for the months of April or May. Mr. Kim indicated, however, that small groups usually come to him on less than one week's notice. During the 1984 peak season, he handled 25 to 30 groups a month, 20 to 30 percent of which were small enough to be transported in a van or smaller vehicle.

The vehicles Mr. Kim would use to provide the proposed transportation service are a 15-passenger van and a station wagon. Both vehicles are regularly maintained and are in good condition. Mr. Kim might acquire a larger, 24-passenger vehicle in the future if his financial situation warranted it. However, at the time of the hearing Mr. Kim had no plans to acquire such a vehicle in the foreseeable future, nor had he gathered any information as to its cost.

Mr. Kim stated that, at least at the outset, he would act as the driver in the proposed service. As indicated previously, Mr. Kim holds cab driver and tour guide licenses and has had experience as a cab driver. Additional qualified drivers would be hired as necessitated by the expansion of business.

Mr. Kim candidly admitted that during the 1984 season he had operated his proposed transportation service without the benefit of appropriate operating authority issued by the Commission. He was stopped by the U.S. Park Police in December 1983 and warned at that time of the need for WMATC authority. At that point, however, he had just started his tour broker business and was unsure whether he would be interested in handling small groups in the future. Over the ensuing winter months he "forgot" about the need for WMATC authority. When the peak season of 1984 came and small groups were tendered by wholesalers, he accepted them.

In August 1984 Mr. Kim was stopped again by the U.S. Park Police. This time he received a citation. As a result of this incident, he contacted the Commission, was furnished a copy of the Compact and the Commission's rules and regulations, and was advised of the nature of the application process. Upon being advised to do so by the Commission's staff, Mr. Kim ceased conducting any transportation himself. He also began to put together the present applications, which were eventually filed in January 1985. Mr. Kim stated that if these applications are granted, he would familiarize himself with all applicable regulations and operate his proposed service within the ambit of the law.

Applicant's only public witness was Ms. Eursook Moon, proprietor of the Hoban Restaurant located in Arlington, Va. She testified that her restaurant specializes in Chinese and Korean cuisine. In the 18 months she has done business with applicant, he has brought an average of 200 persons a month to the Hoban Restaurant during the months of May through August.

Testifying in opposition to the consolidated applications was Mr. Jack Robertson of Beltway Limousine Service, Inc. Beltway holds authority under WMATC Certificate of Public Convenience and Necessity No. 25, Part B, to conduct charter operations as follows:

1. From Dulles International Airport, Chantilly, Va., and points in the District of Columbia and Prince George's and Montgomery Counties, Md., to points in the Metropolitan District and return.
2. From points in the part of the Commonwealth of Virginia located within the Metropolitan District (except Dulles International Airport) to points in the Metropolitan District and return.

RESTRICTED against transportation solely within the Commonwealth of Virginia and further restricted, in Part B 2 only, (a) to the performance of such operations in vehicles having a manufacturer's designed seating capacity of 15 passengers or less (including the driver) and (b) to the performance of such operations to and from Washington National Airport only when related to a prearranged charter movement by the same party between at least two other points within the Metropolitan District.

As pertinent here, Beltway operates a fleet consisting of twenty 15-passenger vans and twenty-eight 21-passenger vehicles. It incurred operating losses in excess of \$67,000 in calendar year 1983, and it expects to report losses of a similar magnitude in 1984. These losses are due, in part, to the loss in 1984 of government

transportation contracts which had generated annual revenues of \$618,000.

The shrinkage of Beltway's government contract business has idled thirteen 15-passenger vans and nine 21-passenger vehicles on a daily basis as of the date of the hearing. All of this equipment is available for service, and Beltway actively solicits business in an effort to make use of its idle equipment to the fullest extent possible. Beltway opposes the consolidated applications filed by Mr. Kim on the basis that any passengers attracted to Mr. Kim's proposed service are potential passengers diverted from Beltway at a time when it needs to participate as fully as possible in all available traffic to maximize the use of its revenue equipment. Beltway employs drivers who are licensed tour guides. Beltway has experience working with interpreters accompanying tour groups, and it would like to work with Mr. Kim.

#### DISCUSSION AND CONCLUSIONS

Separate standards prescribing different burdens of proof pertain to the consolidated applications presented for decision. The temporary authority application is governed by Title II, Article XII, Section 4(d)(3) of the Compact, whereas the permanent authority application comes under Title II, Article XII, Section 4(b).

Temporary authority may be awarded pursuant to Section 4(d)(3) "[t]o enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need." An applicant for temporary authority therefore must prove two things: (1) an immediate and urgent need for transportation service; and (2) a lack of carrier service capable of meeting such need. Even assuming, without deciding, that there is an immediate and urgent need for transportation service such as Mr. Kim proposes under temporary authority, it is an inescapable fact that such service is presently available from at least one carrier -- namely, the protestant, Beltway. Accordingly, we find that the circumstances of this case do not justify an award of temporary authority.

With respect to the application for permanent authority, a different standard applies. Section 4(b) mandates an award of a certificate to conduct a proposed transportation service if an applicant proves it "is fit, willing and able to perform such transportation properly and to conform to the provisions of [the Compact] and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity." The applicant's burden, once again, is to prove two things: (1) its fitness; and (2) public convenience and necessity requiring the proposed transportation. We have consistently interpreted the "public convenience and necessity" standard to mean that an applicant must prove that a proposed new service is responsive



to a genuine public demand or need, and that existing carriers are unable to meet such demand or need as satisfactorily as the applicant proposes to do with the new service. If the applicant succeeds in meeting this burden of proof, the burden then shifts to the protestants, if any, to prove that authorization of the new service will have an adverse impact on existing carriers of such magnitude as to be contrary to the public interest. Cf. Pan American Bus Lines Operation, I.M.C.C.190, 203 (1936).

For the reasons discussed below, we find that the applicant has failed to carry its burden of proving public convenience and necessity, and the permanent authority application, therefore, must be denied. The failure is attributable to an absence of substantial evidence of public need. The only evidence on this point was that offered by Mr. Kim on his own behalf. While Mr. Kim's testimony is admissible, standing alone it is insufficient to support a grant of operating authority.

The testimony offered by Ms. Moon is not relevant. Ms. Moon runs a restaurant. Mr. Kim's tour patrons eat at her restaurant. We fail to see how these facts indicate the existence of a public need for Mr. Kim's services as a carrier. There is nothing in Ms. Moon's testimony to indicate that it makes any difference if Mr. Kim's tour patrons travel to her restaurant via Mr. Kim's own carrier service or via the services of some other carrier hired by Mr. Kim. Presumably, since Mr. Kim chiefly relies on the services of certificated carriers, most of the diners at Ms. Moon's restaurant arrived there by that means.

Mr. Kim testified that, absent a grant of the authority sought, he will be unable to afford to handle small tour groups. He argues that this fact establishes a public need for his proposed service. The argument depends entirely on the conclusion that without the availability of his carrier service, tour wholesalers will send fewer tourists to the Metropolitan District than would otherwise be the case. We do not agree that this is the correct conclusion to draw from the proof of Mr. Kim's "budget problem."

We are not persuaded that the tour wholesalers will forego entirely the opportunity to send small tour groups to the Washington area unless Mr. Kim's application is granted. We think it more likely that the wholesalers will either accept a higher price demanded by Mr. Kim and pass it along to their tour patrons, or else consolidate the small tour groups into larger ones that Mr. Kim can handle at an agreeable price, as he already does. To the extent that Mr. Kim is seeking to testify on behalf of the tour wholesalers that they will forego small tour groups if this application is denied, we must consider that: (1) Mr. Kim is an interested witness, and his testimony may be influenced by his own self-interest; (2) such testimony is inadmissible hearsay not within any known exception to the hearsay

rule; (3) such testimony is uncorroborated; 9/ and (4) the asserted reaction of the tour wholesalers is improbable, as noted earlier. Compare White Glove Building Maintenance, Inc. v. Brennan, 518 F.2d 1271 (9th Cir. 1975).

Mr. Kim also testified that many small tour groups arrive in the Metropolitan District on less than one week's notice. He asserted that existing carriers are unable to provide equipment on short notice to transport such groups. In the past, however, Mr. Kim has not called upon the protestant, Beltway, to provide service. Beltway has shown that it is familiar with providing the type of service Mr. Kim needs, that it desires to work with Mr. Kim, and, more importantly, than it has large amounts of suitable equipment sitting idle every day which it is attempting to utilize to the fullest extent possible. In these circumstances, we do not find that Beltway's service is inadequate to meet Mr. Kim's need for service on short notice, nor do we find that the addition of Mr. Kim's carrier service will result in other benefits to the public that are unavailable from existing carriers. 10/

In sum, the evidence offered by Mr. Kim fails to establish the basic elements of a prima facie case. The applicant having failed to meet its threshold burden of proof, we do not reach the issue of whether the protestant would be harmed by a grant of authority, nor do we reach the issue of the applicant's fitness. Our denial of this application is without prejudice to the filing of another application, in which Mr. Kim may be better able to marshal public support for his proposed service. Further, we are concerned about the lack of evidence concerning Mr. Kim's actual costs of providing carrier service, which is necessary to determine whether his proposed rate for carrier service is just and reasonable.

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9/ The absence of testimony or affidavits from the tour wholesalers themselves is significant when this case is compared to other similar cases. For example, at the time it applied to the Commission for its Certificate of Public Convenience and Necessity, Japan Travelers Service purported to handle Korean-speaking tour groups. In support of its application, JTS presented five public witnesses, including two tour brokers, one of whom came from New York City. See Order No. 2328, served April 8, 1982.

10/ Even if Beltway's protest is considered as having been withdrawn upon acceptance of applicant's proposed restriction to tours beginning and ending in Korea, the evidence given by Beltway remains a part of the administrative record and may properly be considered in reaching a decision on the merits.

THEREFORE, IT IS ORDERED that the applications in Case Nos. AP-85-01 and AP-85-02 of Young S. Kim t/a Washington U.S. Tours seeking permanent and temporary authority, respectively, are hereby denied.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS WORTHY, SCHIFTER, AND SHANNON.

  
WILLIAM H. MCGILVERY  
Executive Director