WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 3079

IN THE MATTER OF:		Served October 9, 1987
GOLD LINE, INC.	)	Case No. FC-86-01
	)	
v.	)	
	)	
AMERICAN COACH LINES, INC., et al.	)	
	)	
Investigation of Compliance of AMERICAN COACH LINES, INC.	)	Case No. MP-87-08

This matter comes before us on a formal complaint of Gold Line, Inc. (complainant), alleging unauthorized operations, either separately or in concert, by American Coach Lines, Inc. (ACL); Sherman Coaches, Inc.; Carter Tours, Ltd.; Frank Sherman, Jr.; and Frank Sherman, Sr. (defendants) and, pursuant to petition by Gold Line, Inc., upon our own investigation of American Coach Lines, Inc., the District of Columbia corporation (ACL-DC); American Coach Lines, Inc., a Maryland corporation (ACL-MD); Sherman Coaches, Inc.; Carter Tours, Ltd.; Frank Sherman, Jr.; and Frank Sherman, Sr. (respondents or ACL et al.), to determine whether those persons have willingly violated the Compact or the Commission's rules, regulations, or orders, and whether ACL-DC's Certificate of Public Convenience and Necessity No. 1 should be suspended, changed, or revoked. As relief in the complaint proceeding, Gold Line seeks revocation of ACL-DC's WMATC Certificate No. 1, and direction by the Commission that the remaining defendants cease and desist from transporting passengers for hire in charter operations between points in the Metropolitan District. The two matters have been consolidated for hearing and decision.

PROCEDURAL MATTERS

Following disposition of defendants-respondents' motions to dismiss, evidentiary hearings were held on these matters on April 29-30 and June 4, 1987. The hearings were held pursuant to and for the purposes stated in Order Nos. 2984, 2995, 3000, and 3012, served March 3, April 3, April 17, and May 1, 1987, which orders are incorporated herein by reference. Complainant presented three witnesses, one of whom also testified for Commission staff and for all defendants-respondents. Defendants-respondents presented three witnesses in rebuttal. Briefs were filed July 31, 1987.

With their brief, ACL et al. filed a motion (letter) requesting oral argument before the full Commission pursuant to Rule No. 24-02 which provides that the Commission or the Administrative Law Judge may permit such argument where the complexity or the importance of the issues warrants. Gold Line opposes the motion on the grounds that an adequate record has been made and all parties have been afforded ample opportunity to argue a legal position on brief. In light of these facts, Gold Line asserts that no useful purpose would be served by oral argument other than delay of final disposition of these proceedings. We find Gold Line's position well-founded, and the motion is hereby denied. Three days of evidentiary hearing were held in this matter. Respondents-defendants were allowed one month to prepare their rebuttal case and two months to prepare briefs for submission. Defendants-respondents brief is replete with transcript references and carefully-crafted legal argument. In light of these facts as well as the permissive nature of Rule No. 24-02 and the availability under the Compact of reconsideration and appeal, oral argument would be superfluous.

By motion filed August 7, 1987, defendants-respondents request that the Commission withhold its decision in this case until the Interstate Commerce Commission renders a decision in its Case No. MC-C-30038, In Re American Coach Lines, Inc., Petition for Declaratory Order, in which ACL seeks a declaration that, contrary to the ICC's Order served February 24, 1986, ACL's ICC Certificate No. MC-149076 (Sub No. 2) (now Certificate No. MC-149076 [Sub No. 3]) is not restricted against transportation of passengers in charter and special operations between points in the Metropolitan District. According to ACL et al., if the ICC rules in its favor, then a finding of willfulness could not be made inasmuch as its operations throughout the Metropolitan District would have been lawfully conducted. Gold Line opposes this motion as dilatory. Gold Line relies on WMATC Order No. 3000 and notes that the complaint in this case pertains to "the patently unlawful operations of ACL(DC) and its affiliates in providing extensive shuttle service between points in the District of Columbia . . . . service [which] was unlawful when provided and will be unlawful regardless of any decision by the ICC in its Declaratory Order proceeding." The motion is hereby denied. As we noted in Order No. 3000, this case involves interpretation of our enabling legislation, a matter primarily and peculiarly within our jurisdiction, and related issues of fact, the determinations of which are required even if the ICC should reverse itself.

SUMMARY OF EVIDENCE

Charles Cummings, Gold Line's president and general manager, testified for complainant. Gold Line holds WMATC Certificate No. 14 which authorizes, inter alia, charter operations between points in the Metropolitan District. Gold Line maintains a 10-person charter department, five members of which are involved in direct sales. These

persons report to Mr. Cummings through a director of sales. Mr. Cummings, in addition to managing complainant's daily operations, personally engages in sales. Mr. Cummings finds that in order to secure a charter account, it is necessary to be familiar with the competitive situation in charter operations. The witness keeps abreast of competitors' activities through involvement in numerous local organizations such as the District of Columbia Chamber of Commerce and the Washington, D.C., Convention and Visitors Association.

Mr. Cummings considers ACL-DC a competitor in the local charter market. The two companies often do different parts of the same "job." Defendants-respondents' operations have been costly to Gold Line in lost revenues as well as legal fees incurred in proceedings over the last two years involving interpretation of the scope of ACL-DC's operating authority. Mr. Cummings personally participated in Case No. AP-85-36, Application of American Coach Lines, Inc., for a Certificate of Public Convenience and Necessity to Conduct Charter Operations between Points in the Metropolitan District. Although that case terminated with Order No. 2908, served September 10, 1986, directing ACL-DC to cease and desist from charter operations between points in the Metropolitan District, other than round-trip sightseeing or pleasure tours specifically authorized by its WMATC Certificate No. 1, Mr. Cummings has noticed no change in the company's operations. According to the witness, ACL-DC "continued doing what they were doing," including one-way airport transfers and convention shuttles. Gold Line is seeking revocation of ACL-DC's operating authority because that appears to be the only way to stop its unauthorized Metropolitan District operations.

Mr. Cummings sponsored an exhibit consisting of duplicate originals of portions of the Washington, D.C., 1987 Destination Planning Guide, an annual publication of the Washington, D.C., Convention and Visitors Association (WCVA). The publication is used by vendors, including bus companies, to solicit "convention-type" business. Mr. Cummings received the publication in 1986 in the ordinary course of business because Gold Line advertises in it. The exhibit contained advertisements by ACL. 1/ On page 63 American Coach Lines is listed under the heading "Ground Transportation: Buses/Limos/Mini-Vans" as providing "local and nationwide charter service, airport transfers, guided/lectured sightseeing tours, shuttle service for your convention with on-location convention coordinator." On page 65 under the heading "Scheduled Sightseeing Service," American Sightseeing/American Coach is listed as providing "eight guided lecture tours of Washington from 4 to 8 hours in length, charter transportation, transfers, shuttle service." Page 128 features an

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1/ When neither the Maryland corporation nor the District of Columbia corporation is specified by name or context, it shall be referred to as ACL.

advertisement by American Coach Lines, Inc., offering assistance "in the planning and the execution of your shuttle and spouse programs." Mr. Cummings testified that during the week prior to April 29, 1987, he received an abbreviated version of the same planning guide similarly depicting ACL's available services including convention shuttle services. Although Mr. Cummings does not know when ACL submitted the advertising copy for these publications to WCVA, it would not have been prior to July 1985.

Leonard Hanson, currently complainant's director of maintenance and formerly its special projects coordinator and director of operations, testified regarding the specific shuttle movement alleged in Gold Line's complaint. Mr. Hanson personally observed the incident reported in the complaint. On November 17, 1986, Mr. Hanson obtained a service schedule from Ms. Patrice Boulanger at the Washington Hilton Hotel, Washington, D.C. The schedule (Exhibit 5) was titled "AIF/ANS Annual Conference 1986" and subtitled "Shuttle Bus Service Between The Washington Hilton & Sheraton Washington Provided by Sherman & American Coach Lines." The schedule indicated that service between the hotels would be available as follows: Sunday, November 16, from 4 p.m. to 8 p.m.; Monday, November 17, from 8 a.m. to 8 p.m.; Tuesday, November 18, from 8 a.m. to 8 p.m.; and Wednesday, November 19, from 8 a.m. to 7:30 p.m. and from 9:30 p.m. to 11 p.m. The schedule notes "All arrivals and departures at the Washington Hilton are at the 'T' Street Entrance and the Sheraton Washington at the 24th Street Entrance." On November 17, Mr. Hanson observed buses, some of which were identified on the side as "American Coach" and some as "Sherman Coach," loading passengers at the Washington Hilton. Mr. Hanson followed one of these buses from the Washington Hilton to the Sheraton Washington and back to the Washington Hilton. Passengers disembarked at the Sheraton Washington. The witness observed nothing to indicate that any of the buses were leased and nothing to indicate whether the buses identified as "American Coach" were being operated by ACL-MD or ACL-DC. On November 18, 1986, Mr. Hanson observed American Coach bus number 408 leave the Washington Hilton at 9:12 a.m. The witness followed the bus over the same route as the previous day, first to the Sheraton Washington where it arrived at 9:17 a.m., and then back to the Washington Hilton. On November 19, 1986, Mr. Hanson followed Sherman Coach bus number 906 from the Washington Hilton to the Sheraton Washington and back to the Washington Hilton. On November 17 and 18, all buses observed carried signs in the windows indicating "Shuttle" and "AIF/ANS." On November 17, 18, and 19, Mr. Hanson saw passengers board American and/or Sherman buses at the Washington Hilton and disembark those same buses at the Sheraton Washington. On November 17, 18, and 19, Mr. Hanson observed additional American buses leaving the Hilton on a regular basis, in the same time frame, and in the same traffic pattern as the buses he followed.

Gold Line called Frank Sherman, Jr., as its final witness. Pursuant to prehearing arrangement, Mr. Sherman testified on behalf of

all defendants-respondents. According to the witness, Frank Sherman, Sr., owns Carter Tours, Ltd., and Sherman Coaches, Inc. Carter Tours holds authority from the Interstate Commerce Commission (ICC) to conduct charter and special operations between points in the United States except Alaska and Hawaii. Carter Tours owns eight coaches all of which are identified on the side as Sherman Coaches. ACL leases these buses paying a monthly fee to Carter Tours. Bus leases are kept for bookkeeping purposes only. Carter Tours performs "long haul" ICC work only. Examples of the work done by Carter were introduced in the form of Exhibit 10, a one-page document describing three trips, all of which included motor coach transportation, hotel accommodations, baggage handling, trip escort, and, on two of the trips, dinners and/or admissions for a set price. Sherman Coaches, Inc., holds operating authority from the Virginia State Corporation Commission authorizing transportation between Quantico, Va., on the one hand, and, on the other, points in Virginia. Sherman Coaches owns no revenue vehicles. Neither Frank Sherman, Jr., nor Frank Sherman, Sr., hold any operating authority as individuals.

Frank Sherman, Jr., is, according to his testimony, the sole officer, director, and shareholder 2/ of both ACL-MD and ACL-DC. He treats the corporations as a unit. In addition to WMATC Certificate No. 1, ACL-DC holds ICC authority to perform charter and special operations between points in the United States except Alaska and Hawaii. ACL-MD holds ICC Certificate No. MC-149076 Sub No. 2 which authorizes the following regular-route operations:

> (1) between Baltimore, MD, and Washington, DC, from Baltimore over U.S. Hwy 1 to Washington, DC, and return over the same route, serving all intermediate points; RESTRICTION: No traffic shall be transported which moves the entire length of the route between Baltimore and Washington; (2) between Baltimore, MD, and junction U.S. Hwy 1 and Alternate U.S. Hwy 1 near Cedar Heights, MD, and Baltimore, MD, over U.S. Hwy 1

2/ On examination by Commission counsel, Mr. Sherman testified that he owns 100 percent of the stock of ACL-MD and ACL-DC. He identified copies of ACL-DC Stock Certificate Nos. 17 and 18. Signatures on those certificates indicated that they had been transferred to Mr. Sherman on May 31, 1986, by endorsement. A copy of Stock Certificate No. 19 of ACL-DC indicated 100 shares issued to Frank Sherman. On June 20, 1986, that certificate and a correspondening certificate of ACL-MD had been endorsed back to Peter Picknelly and Louis Magnano. Mr. Sherman testified that the stock certificates had been used as collateral for a loan, the loan is now paid off, and there are new stock certificates showing Mr. Sherman as owner.

to junction Alternate U.S. Hwy 1, near Cedar Heights, MD, and return over the same route, serving all intermediate points; (3) between Frederick, MD, and Washington, DC, from Frederick, MD, over Maryland Hwy 355 (formerly alternate U.S. Hwy 240) to Washington, DC, and return over the same route, serving all intermediate points.

ACL owns 19 vehicles and leases three vehicles from S&P Leasing, a corporation owned by Messrs. Magnano and Picknelly. All 22 vehicles are registered to ACL.

Mr. Sherman testified that he is familiar with WMATC Certificate No. 1, knew it had been the subject of proceedings before this Commission, and is aware that ACL-DC has been under a cease and desist order. However, in Mr. Sherman's opinion ACL-MD is in compliance with that order because it holds from the ICC "a grandfather certificate which allowed me, as long as I crossed the state line making an interstate move, that I could do service within the boundaries of the Washington Metropolitan Area." Upon being asked whether the former principals of both ACL's had explained to him why they had never relied on the grandfather authority to support operations in the Metropolitan District, Mr. Sherman replied "I didn't ask them for any of their reasoning in the past. As long as I was doing legal moves, that is all I was concerned about . . . . I just wanted their company and I wanted to operate legally."

Mr. Sherman testified that he had no knowledge of Order No. 2738 interpreting WMATC Certificate No. 1 and directing ACL-DC to cease and desist from operations not consistent with that certificate. He testified that he was aware of Order No. 2908 and knew that it denied an application for "full authority" and directed ACL-DC to cease certain operations. This did not concern Mr. Sherman because his attorney had informed him that "he" could operate within the Metropolitan District pursuant to his ICC grandfather authority as long as "he" crossed a state line.

Mr. Sherman identified charter order #7396 as covering the November 1986 movement referred to in Gold Line's complaint. The order indicates that the movement was performed for Atomic Industrial Forum, Inc., at the request of its representative, Patrice Boulanger. Buses used to perform the move were to have been identified by window signs indicating "AIF/ANS Shuttle." Points to be served were the Sheraton Washington Hotel and the Washington Hilton Hotel with pick-ups made at the T Street entrance to the Washington Hilton followed by shuttle service to the Sheraton Washington. Under the heading special instructions is the following notation: "We will be providing a daily airport transfer from National, (Main Terminal) to Washington Hilton." The group was billed, and paid, $2,905 for the entire movement, a rate of $35 an hour according to Mr. Sherman. A work sheet prepared by

Mr. Sherman and attached to the charter order indicated that the group was originally to be billed $2,765. The amount was calculated by Mr. Sherman as follows: one bus for four hours on November 16 ("SW-WH") at $140; four buses for five hours ("8 a.m. - 1 p.m.") at $700 and one bus for five hours ("1 a.m. - 6 p.m.") at $175 on November 17; four buses for five hours ("8 - 1") at $700 and one bus for five hours at $175 on November 18 ("1 - 6"), one bus for 10 hours ("8 - 6") at $350 and three buses for five hours at $525 ("6 - 7:30 - 9:30 - 11 p.m.") on November 19. A letter from Ms. Boulanger dated July 2, 1986, requests a continuous shuttle between the Washington Hilton and the Sheraton Washington as follows: one bus from 4 p.m. to 6 p.m. on Sunday, November 16; four buses from 8 a.m. to 1 p.m. and one bus from 1 p.m. to 6 p.m. on Monday, November 17; four buses from 8 a.m. to 1 p.m. and one bus from 1 p.m. to 6 p.m. on Tuesday, November 18; and one bus from 8 a.m. to 6 p.m. plus three buses from 6 p.m. to 7:30 p.m. ("shuttle as directed from Sheraton Washington to Washington Hilton") and three buses from 9:30 to 11:00 p.m. ("shuttle as directed from Washington Hilton to Sheraton Washington") on Wednesday, November 19. The total inclusive fee noted by Ms. Boulanger as having been quoted by Carter Tours for this service was $2,765. A revised schedule attached to the charter order indicates that on Monday, November 17, and Tuesday, November 18, one bus would be needed from 1 p.m. to 8 p.m. rather than from 1 p.m. to 6 p.m. The charge for these four additional hours was noted as $140. According to Mr. Sherman, this move was performed by ACL pursuant to its ICC grandfather authority.

Gold Line introduced an analysis of 130 charter orders reviewed during discovery and covering the period September 7, 1986, through December 31, 1986, plus March 1987. Copies of 19 of the orders analyzed were also introduced. The type of transportation evidenced by the orders included non-lectured sightseeing (both round-trip and one-way); airport transfers (both alone and in combination with non-lectured sightseeing), and other point-to-point transportation. Non-lectured sightseeing was defined by Mr. Sherman as transportation in which the driver was not paid to lecture. All points served were in the Metropolitan District. Mr. Sherman's justification for these moves was that at some point a state line was crossed. The rate charged for non-lectured sightseeing was $40 an hour, for transfers to Washington National Airport (some with "non-lectured sightseeing") $125, for transfers to Washington Dulles International Airport (some with "non-lectured sightseeing") $175. Shuttle moves and other point-to-point transportation were also billed at $40 an hour. Several of the point-to-point moves involved transfers to RFK Stadium. Mr. Sherman admitted that ACL provided only transportation on those moves -- not parking or tickets. All points served were in the Metropolitan District.

Over 70 additional charter orders were introduced by Commission counsel as Exhibits 14 and 15. Mr. Sherman conceded that all charter orders in those exhibits represented moves performed or booked by ACL,

although he was unable to state whether ACL-MD or ACL-DC performed any given move. These orders were of various types and included one-way airport transfers, multiple airport transfers, point-to-point transportation, intra-Virginia transportation, shuttle moves, one-way non-lectured sightseeing, and one-way lectured sightseeing. With three exceptions, all points served were within the Metropolitan District.

Charter order #9244 was introduced by both Gold Line and Commission staff. It covered transportation over a two-day period between points wholly within the District of Columbia. The instructions received from the chartering party requested transportation from the Hyatt Regency Hotel to the Senate Office Building, from the Hyatt Regency to the Russell Office Building, from the Hyatt Regency to the Kennedy Center and return on March 5, 1987. On March 6, 1987, the group requested transportation to various embassies. The charter order described this as a tour of embassies, tour service to be provided as directed by group.

ACL-MD's ICC Tariff ANCB 400, effective February 3, 1986 (Docket No. MC-149076) was introduced as Exhibit 9. Page 26 of that tariff indicates charges are based on either time (minimum $255 for the first seven hours) or mileage ($1.75 per mile), whichever is greater, with the exception of transfers to National Airport ($160), and Dulles Airport ($190).

According to Mr. Sherman, ACL employees are instructed to book any move which involves crossing a state line. Such moves, e.g., College Park, Md., to RFK Stadium, Washington, D.C., are considered routine. Employees have been instructed not to perform moves which are intra-DC unless done in combination with an airport transfer or some other interstate transportation. Large moves for which ACL is competing with other carriers are reviewed by Mr. Sherman personally with the assistance of counsel, Lawrence Lindeman. Since June 1986, ACL has declined approximately 10 requests for charter transportation due to lack of appropriate operating authority. All those moves involved intra-Washington transportation for business purposes. Mr. Sherman has read Commission Order No. 2908, knows that it defines sightseeing and pleasure tours and directs ACL-DC to cease and desist from transportation in the Metropolitan District which is not consistent with that order, and he concedes that ACL-DC is bound by the order. Mr. Sherman testified that ACL-DC and/or ACL-MD would probably perform a multi-day move consisting of airport transfers to a District of Columbia hotel on day one, followed by a convention shuttle on day two, followed by a transfer to dinner and the Kennedy Center. Mr. Sherman would not consider transporting a group to dinner to be a pleasure tour. This would be the type of move for which he would consult counsel providing it involves "a good volume of business." ACL-DC and/or ACL-MD would perform the following charter transportation: (1) broker-arranged transportation to and from hotels and restaurants, (2) non-lectured sightseeing (group provides the guide

and the itinerary) either alone or in combination with airport transfers and transportation to dinner, and (3) a transfer to RFK Stadium, Washington, D.C., from College Park, Md., when tickets are supplied by the group, then on a sightseeing tour at the direction of the group's guide, followed by shopping, provided the moves were all on a single itinerary.

Mr. Sherman testified regarding ACL-MD's regular-route operations. Currently ACL-MD provides transportation only between Elkridge, Md., and Washington, D.C. Mr. Sherman did not know the exact route the bus followed, and there is no published routing other than "Route One and a list of stops." When asked how the driver was instructed regarding the route, Mr. Sherman responded that the driver, Mr. Burley, had actually developed the route. Mr. Burley lives in Jessup and initiates the route from his home twice a week. There is a written schedule indicating that the bus leaves Elkridge at approximately 6:45 a.m. and arrives at its final stop in Washington (Dupont Circle) at approximately 7:55 a.m. Mr. Sherman testified that, prior to his assuming management of ACL-MD, between 10 and 15 people used this service. In the last three weeks the ridership had approached 35 passengers. For an unspecified period prior to that, between 15 and 20 persons were using this service. Mr. Sherman testified that ACL-MD sells tickets through an unnamed gift shop. If someone asks for a schedule, it would be typed-out on stationery for that person. Mr. Sherman was unable to specify the rates for the regular-route service.

Mr. Sherman identified documents, introduced by Commission counsel as Exhibit 13, as copies of the regular-route driver's pay envelopes and regular-route tickets. For the months of August through November 1986, the route was described variously as "Washington to Beltsville," "Washington to Laurel," "Tuxedo to Laurel," "Tuxedo to Washington/Laurel." Each envelope indicated that the driver had been paid for four hours' work, the minimum payment made to drivers for four hours or less. There was no more than one envelope for any one day. Some tickets remained with the envelopes. All were punched Washington and Laurel, Beltsville, or Savage. All fares collected were $23.15, the amount ACL-MD's ICC tariff, effective February 3, 1986, shows as the fare for 10 rides between Beltsville, Md., and Washington, D.C.

Mr. Sherman conceded that ACL-MD performed bare charter transportation between points in the Metropolitan District where crossing a state line was involved. In answer to a hypothetical question, Mr. Sherman testified that if 35 people were transferred from National Airport to a hotel in the District of Columbia on Monday and a convention shuttle was provided for 10,000 people on Tuesday through Friday among District of Columbia hotels and the Convention Center, the move could be done legally by ACL provided one airport transfer a day was also performed. Mr. Sherman admitted that although ACL has no intra-Virginia authority, it performed two intra-Virginia moves within

the time-frame of the subpoena. Finally, Mr. Sherman conceded that on 95 percent of the charter orders introduced into evidence the hourly charge, except when drivers lectured, had been $40 an hour, the rate prescribed by WMATC Tariff No. 6, effective April 7, 1986. Transfers to National Airport had been billed at $125, transfers to Dulles at $175, ACL-DC's WMATC rates. No charter order contained a National Airport transfer at $160 or a Dulles International Airport transfer at $190, ACL-MD's ICC transfer rates. No charge of $36 an hour with a minimum of $225 had been made, ACL-MD's charter rates.

Lawrence E. Lindeman, counsel for defendants-respondents, testified on their behalf. Mr. Lindeman is an attorney admitted to practice in Virginia and the District of Columbia. He considers his specialty to be representing transportation companies, especially passenger carriers, before the ICC. His experience includes two years as attorney-advisor for the ICC and 11 years with a Washington law firm which did "a lot" of transportation work. Currently Mr. Lindeman is a sole practitioner in Alexandria, Va. Mr. Lindeman's clients have included Trailways, Inc.; independent Trailways companies such as Carolina Coach; and some companies unaffiliated with the Trailways system such as Rockford Bus Company and Carter Tours, Ltd. Mr. Lindeman has also appeared before this Commission on behalf of Safeway Trails, American Bus Lines, Washington Motor Coach, J&J Bus Service, and H&M Bus Service.

Mr. Lindeman began representing ACL when Frank Sherman, Jr., took over its management in June 1986. Prior to that date Mr. Lindeman had represented Mr. Sherman and his father in other matters for several years. Mr. Lindeman also represented Mr. Sherman, Jr., in negotiations surrounding his ultimate acquisition of ACL-MD and ACL-DC.

In mid-April 1986, Mr. Lindeman reviewed the existing operating authorities of both corporations. Thereafter, Mr. Lindeman rendered a written opinion to Mr. Sherman regarding the ICC regular-route certificate of ACL-MD, and oral opinions concerning ACL-DC's WMATC Certificate No. 1. No opinion was given regarding the remaining ICC certificate held by ACL-DC. Mr. Lindeman's written opinion (Exhibit 18) consists of a one and one-quarter page letter dated May 29, 1986. In that letter Mr. Lindeman defines incidental charter and special operations authority as meaning that "the holder thereof can conduct charter and special operations from all points on the regular route, in the areas served by the regular route, to points in the United States and return." Mr. Lindeman further informed Mr. Sherman:

> It is my opinion that this certificate enables American Coach to conduct incidental charter and special operations between points located entirely within the Washington Metropolitan Area Transit Commission zone. This opinion is based on the case of Baltimore and Annapolis R. v. Washington

Metropolitan Area Transit Commission, 642 F.2d 1365 (1980). The facts involved in that case are identical to the facts involved in your case. B&A held a[n] ICC regular route certificate and was conducting operations within the Washington Metropolitan Area Transit Commission zone pursuant to the incidental charter authority which went along with that certificate. The Commission ordered B&A to cease and desist on the basis that the operations were not exempt, but the U.S. Court of Appeals for the District of Columbia overruled the Commission and held that the incidental operations were exempt, and that B&A could continue to conduct them.

The only caveat to this opinion is that American Coach must conduct bona fide, interstate regular route operations in order to retain the right to the incidental authority.

Mr. Lindeman testified that he became aware in April 1986 of a "rumor" that the ICC had "issued a decision" which would inhibit the ability of ACL-MD to conduct incidental charter operations. Mr. Lindeman gave no credence to the so-called "rumor" for two reasons: (1) it was his understanding that the ICC could not sever incidental charter authority from the underlying regular-route authority and (2) Mr. Harris (counsel for ACL at the time) told him that in his opinion there was nothing to substantiate the rumor. Accordingly, Mr. Lindeman did not investigate whether the ICC had issued a written decision, and he did not read the ICC order regarding this matter until January 1987 after counsel for Gold Line mentioned it in his response to defendants-respondents' motions to dismiss.

Mr. Lindeman's oral opinions regarding ACL-DC's WMATC Certificate No. 1 rested on the criteria laid out in Bingler. 3/ In this connection Mr. Lindeman testified that he has read Order No. 2908. 4/ In his opinion that decision does not define round-trip

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3/ Asbury Park-New York Transit Corp. v. Bingler Vacation Tours, Inc., 62 M.C.C. 731 (1954) aff'd, Bingler Vacation Tours, Inc. v. United States, 132 F.Supp. 793 (D.N.J. 1955).

4/ Mr. Lindeman testified that he first read Order No. 2908 in January 1987. He waited until then because he had no idea that order had come out. He said he had never received a copy of the order. He did not recall a telephone call to Commission counsel in which he requested an extension of the briefing date in Case No. AP-85-36 in order to file a brief on behalf of his client who was in the process of buying ACL-DC.

sightseeing and pleasure tours and charter operations and special operations because "It talks about round-trip sightseeing or pleasure tours and basically just restates the criteria that you will find in Bingler. But at least to my reading it doesn't specifically say charter or special." According to his reading of the Commission's cease and desist order, ACL-DC had been ordered not to conduct any operations which violated the terms of WMATC Certificate No. 1 which, according to Mr. Lindeman, authorizes ACL-DC to conduct round-trip sightseeing and pleasure tours in charter and special operations between points in the Metropolitan District, except operations solely within Virginia. 5/ Mr. Lindeman conceded that this meant that ACL-DC was required to confine its WMATC operations to sightseeing and pleasure tours. Mr. Lindeman testified that his impression of WMATC Order No. 2908 page 19 defining round-trip sightseeing and pleasure tours was that it consisted basically in a restatement of Bingler which he also uses to distinguish between bare transfers on the one hand, and, on the other, round-trip sightseeing or pleasure tours.

Mr. Sherman sought Mr. Lindeman's advice regarding the legality of specific moves. On approximately six occasions Mr. Lindeman informed Mr. Sherman that ACL held no authority to perform a specific move. These moves included contract carriage and transportation between points in Washington, D.C. Mr. Sherman and Mr. Lindeman discussed the previously described AIF/ANS shuttle, and Mr. Lindeman informed his client that the addition of an airport transfer would legitimize the move by making it an interstate charter analogous to one performed by Carolina Trailways some years ago with the approval of Commission counsel. 6/ In that move Carolina Trailways brought a group by bus to Washington, D.C., from the Tidewater region of Virginia. Carolina Trailways performed shuttle services for that group within the District of Columbia. After several days Carolina Coach returned the group to the Tidewater region. According to Mr. Lindeman

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5/ Also excepted from WMATC Certificate No. 1 are intrastate operations between points within Maryland.

6/ That approval was properly given and consistent with our long-standing position as upheld by the U.S. Court of Appeals for the District of Columbia in D.C. Transit System, Inc. v. WMATC (420 F.2d 226 [D.C. Cir. 1969]). In that case it was stipulated that the charter trips under consideration were only those which originated outside of the Metropolitan District and lasted for several days, during which time passengers were provided overnight hotel accommodations in Washington and went sightseeing in the District and Virginia, all passengers departed and returned on the same bus at each stop, and no passengers were added or subtracted during the term of the charter. Defendants-respondents' airport transfers in combination with convention shuttle service obviously falls far short of meeting these criteria.

"if you could take an interstate trip up here and shuttle people back and forth to lobby their congressman, you could do the same thing on an interstate trip to and from the airport, because interstate was interstate and the length of the trip would seem to me to be irrelevant." According to Mr. Lindeman, if there is an interstate aspect to the move, then it would be covered by ACL-MD's incidental charter authority. His rationale would authorize a move consisting of a single transfer from National Airport to the District of Columbia followed by a shuttle between points in the District of Columbia of several thousand people, provided that the move were written up on a single charter order, all persons transported were members of the same group, and the transportation is provided for the benefit of the group. Presumptions underlying Mr. Lindeman's advice were that ACL-MD could legitimately conduct incidental charter operations and that ACL-MD would charge rates on file with the ICC.

Finally, Mr. Lindeman testified regarding his activities on behalf of both ACL's since the initial hearing day herein on April 29, 1987. ACL-MD had been merged into ACL-DC and Articles of Merger and a Plan of Merger, after having been approved by the two corporations, had been filed in Maryland and the District of Columbia. Mr. Lindeman had also filed an application with the ICC to transfer the operating authority held by ACL-MD to ACL-DC. New tariffs had been filed with the ICC making ACL's ICC charter rates identical with those on file with this Commission. In addition ACL's regular-route tariff had been amended to reflect rates of $2.50 one-way and $23.15 for a 10-ride commuter book. These fares would apply between any point in Washington, D.C., and any point in Maryland. Finally a copy of a WMATC application for charter authority was introduced. The application had not been accepted for filing because it was incomplete. Mr. Lindeman testified that the purpose of the application was to supplant ACL's incidental charter authority with WMATC authority, and, thus, to avoid future complaints of unauthorized operations.

On cross-examination Mr. Lindeman denied that the ICC had specifically held that ACL-MD would, by virtue of acquiring the certificate formerly held by U.S. Bus, not have the right to conduct charter or special operations within the Metropolitan District. According to Mr. Lindeman that was "mere dicta," never having been an issue in the transfer case. The order was never appealed by any party, and Mr. Lindeman conceded that ACL had never claimed the right before in WMATC actions. Mr. Lindeman conceded that, if ACL lacks incidental charter authority, the company could not have performed moves pursuant to ICC authority, and, if a move does not qualify as a round-trip sightseeing or pleasure tour, then ACL could not have performed it pursuant to WMATC Certificate No. 1. Mr. Lindeman conceded that the ICC requires a published rate for every move and requires the carrier to assess and collect the published charge.

Frank Sherman, Jr., was recalled and testified on rebuttal. Mr. Sherman affirmed that he is currently ACL's president and sole stockholder. He has been associated with ACL since May 31, 1986. Prior to that time he had been involved in the family bus business, Carter Tours. Mr. Sherman has never worked for any other bus company or motor carrier.

Mr. Sherman offered to purchase both ACL's in April 1986 in order that Carter Tours might provide local charter service. Carter Tours was also interested in ACL's maintenance facility. On May 31, 1986, Mr. Sherman took charge of both ACL's pursuant to a management contract which remained in effect until June 23, 1986, when, financing having been secured, the management contract was cancelled and the corporations' stock transferred.

Mr. Sherman testified both that he relied on Mr. Lindeman for advice as to "authority authorizing charter service" and that there was no question in his mind as to the extent of ACL-MD's "incidental operating authority." Mr. Sherman directed Mr. Lindeman to review ACL's operating authorities, including that of ACL-MD. Mr. Sherman was not advised that there was an ICC decision interpreting ACL-MD's certificate, and he first found out there was some question regarding that authority when this proceeding started. Mr. Sherman saw a copy of the decision interpreting ACL-MD's incidental rights for the first time when he was asked by complainant's counsel to read a portion of it on the witness stand. ACL has since filed a Petition for Declaratory Order and Petition to Reopen that ICC proceeding.

Mr. Sherman also testified regarding his activities since the April 29 hearing day herein. Since that date Mr. Sherman had consulted the Compact to determine the boundaries of the Metropolitan District. 7/ In addition, Mr. Sherman instructed Mr. Lindeman to make certain tariff filings with the ICC. Such filings were subsequently introduced as Exhibits 22 and 23. Mr. Sherman also instructed Mr. Lindeman to draw up Articles of Merger and a Plan of Merger (Exhibits 19 and 20) for the purpose of unifying ACL-MD and ACL-DC. 8/ Mr. Sherman participated in the directors' and shareholders' meetings of the two corporations concerning these items.

7/ At hearing on April 29, 1987, Mr. Sherman testified that the Metropolitan District includes the following "a portion of Montgomery County, Prince George's County, a small -- the other counties Anne Arundel, down Route 5 — I think to Upper Marlboro . . . . It goes to the counties in Virginia, I am not as familiar with. I know it is Alexandria and then of course the District of Columbia."

8/ For clarity, references to ACL-DC after the merger will be to ACL-DC/MD.

Mr. Sherman sponsored a pledge agreement dated May 30, 1986, and assigning a security interest in all shares outstanding and future in ACL-DC and ACL-MD to Messrs. Magnano and Picknelly. According to Mr. Sherman the agreement was executed to provide security for a $200,000 note towards the purchase of the two corporations and a $75,000 note for the purchase of two buses. Amounts are still due on both notes, although Mr. Sherman expects the pledge to be released by the end of August 1987. 9/

Mr. Sherman testified that ACL operates a regular route daily between Elkridge, Md., and Washington, D.C. According to Mr. Sherman, his drivers have reported to him that passengers feel they are getting the most reliable service of any bus company that has owned the certificate, including Greyhound. ACL has extended the route from its former point of origin, Jessup, Md., and has discussed with Prince George's County, Md., the possibility of extending ACL's service to Baltimore. ACL plans to continue the current route.

On cross-examination Mr. Sherman testified that he started in the motor carrier business with Carter Tours, an interstate carrier, and worked in all aspects of the company. As a result of this experience Mr. Sherman was aware of the necessity of having a tariff and charging tariff rates. When he took over management of ACL, Mr. Sherman asked the sales department what the tariff rates were. He did not, however, review the tariff. He conceded that if ACL charged the ICC tariff at any time prior to May 1987, it would have been purely accidental. Mr. Sherman also testified that he was aware there were WMATC proceedings going on when he purchased the corporations. However, he was unconcerned by the proceedings because he had been told by counsel what his ICC and WMATC certificates meant. Despite this advice he never asked why ACL-DC was applying for WMATC authority if the ICC incidental charter rights held by ACL-MD covered the authority being sought then. In September 1986, Mr. Sherman was in charge of ACL at 5500 Tuxedo Road, Tuxedo, Md.

William Sylvester Burley, bus driver for ACL, testified on behalf of defendants-respondents. Mr. Burley drives a regular route from Elkridge to Washington and return. The current route begins in Elkridge at an unspecified point. From Elkridge the route extends over U.S. 1 to Laurel where there is a deviation over Md. Routes 198 and 197 with a return to U.S. 1 over Muirkirk Road, then over U.S. 1 and U.S. 1-A to Bladensburg Road, over Bladensburg Road to H Street, over H Street to North Capitol Street, over North Capitol Street to Louisiana Avenue, "around the bend" to Independence Avenue, to 17th Street, over 17th Street to K Street, over K Street to 14th Street, where the route ends. Mr. Burley begins the route at Elkridge at 6 a.m. He follows

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9/ This statement contrasts with Mr. Sherman's earlier and emphatic testimony that the loan had been paid and new stock certificates issued.

the schedule as presented on Exhibit 35. He began following that schedule in August 1986. Prior to that time he began his route in Jessup according to the schedule introduced as Exhibit 34. Mr. Burley operates one round trip each weekday. On Sunday night he picks up a bus at ACL's offices in Tuxedo, Md., and he returns it to Tuxedo on Friday evening.

Mr. Burley sells individual tickets and 10-ticket books on the bus. He identifies each book by writing his name and the price in it. He also punches Beltsville and Washington as a further means of identification. "If they get on in Savage, I punch it the same way. That is to identify my tickets because we have a set price." Since he began driving the bus, the number of passengers has dropped from a high of 15 to his current load of between eight and nine persons.

On cross-examination Mr. Burley testified that he started with either U.S. Bus or VIP driving charters. He had never operated a regular route for either company. He began operating a regular route from Jessup to Washington approximately three months before Mr. Sherman took over management of both ACL's. No one ran the route before that. The day Mr. Burley testified, eight people had ridden the bus. One got on at the junction of Md. Rts. 197 and 198, a point Mr. Burley described as just north of Beltsville or southeast of Laurel. The second passenger boarded on U.S. 1 just outside Beltsville. Inside Beltsville, one passenger boarded at "Vet's Liquor Store," three to five passengers boarded at the Chestnut Hill Shopping Center, and one boarded at "Pete's Liquor Store." All passengers disembarked in the District of Columbia. The most northern point at which a passenger has ever boarded is Savage, Md. That person relocated and has not ridden the bus for two or three months. Passengers can find out about ACL's service by seeing the bus which has a sign indicating, depending on whether it is inbound or outbound, "Washington via Laurel" or "Laurel via Washington."

DISCUSSION AND CONCLUSIONS

Both cases now before us present the same issues: whether any or all defendants-respondents engaged in illegal operations within the Metropolitan District and whether any or all defendants-respondents otherwise willingly violated the Compact or the Commission's rules, regulations, or orders.

After a thorough review of the entire record in this case we find that defendants-respondents have:

1. knowingly and willfully conducted charter operations between points in the Metropolitan District which were not restricted to round-trip sightseeing and pleasure tours in violation of the Compact, Title II, Article XII, Section 4(a); WMATC

Certificate No. 1; and Order Nos. 2738, 2908, and 2984;

2. knowingly and willfully charged rates other than those on file with the Commission in violation of the Compact, Title II, Article XII, Section 5(d) and Regulation No. 55-08;

3. knowingly and willfully operated vehicles which were leased and for which no lease agreements were on file with the Commission in violation of Regulation No. 69; and

4. knowingly and willfully consolidated and merged motor carrier properties into one person for ownership, management, and operations, without Commission approval in violation of the Compact, Title II, Article XII, Section 12(a).

Charter orders introduced by complainant and Commission staff indicate that unauthorized operations have been frequent and purposeful. Defendants-respondents concede that all charter orders introduced as evidence represent moves booked or performed by ACL. These include the charter order for the move specified in Gold Line's complaint. ACL's representative was unable to specify whether any given move was performed by ACL-MD or ACL-DC because a decision was made to treat those two corporations as one. 10/ In fact the evidence indicates that the boundaries separating ACL-MD, ACL-DC, Carter Tours, and Sherman Coaches are permeable at best. To the public the boundaries are non-existent. Carter Tours owns buses, identified as Sherman Coaches, which it leases to ACL. Charter orders carry the identifiers American Coach Lines, Carter Tours, and Sherman Coaches. According to Mr. Sherman, Sherman Coaches does no transportation; Carter Tours does ICC long-haul work only; and anything local is performed by ACL. Nonetheless, Patrice Boulanger in her letter confirming the move which is the subject matter of Gold Line's complaint expresses confidence "that Carter Tours will do an excellent job." During the course of the hearing ACL-MD and ACL-DC were formally merged in a single corporation, and evidence of the merger was

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10/ This testimony is particularly interesting in light of ACL et al.'s initial claim in their motions to dismiss that any sightseeing or pleasure tour within the Metropolitan District is performed by ACL-DC pursuant to WMATC Certificate No. 1, and that any bare charter transportation within that District is performed by ACL-MD pursuant to ICC incidental charter authority. Consistent with this initial theory is the fact that half of the buses identified as "American" were marked WMATC No. 1 and half were marked with an ICC number.

introduced. Taking official notice of our records, we find no approval obtained or even sought for this merger. Moreover, because of this corporate commingling, we are forced to apply our findings to all defendants-respondents.

All these violations occurred after Order Nos. 2738, 2908, and 2984 had been issued directing ACL-DC to cease and desist from transportation between points in the Metropolitan District except as authorized by WMATC Certificate No. 1, which certificate was specifically and painstakingly interpreted in Order No. 2908. 11/ Moreover, all violations occurred under ACL's current management. 12/ Some of the violations occurred after Order No. 2984 which reaffirmed the cease and desist order as it applied to ACL-DC and directed all other defendants-respondents to cease and desist from Metropolitan District operations. That order was issued after considering defendants-respondents' defense as presented in their motions to dismiss. The evidence in this case has added little to the basic defense of ACL et al. other than a sense that great pains have been taken to avoid understanding that which they did not care to hear. 13/

ACL et al. assert that any charter move performed in the Metropolitan District was actually legal because it was either a sightseeing or pleasure tour and thus performed pursuant to WMATC Certificate No. 1, or it was not a sightseeing and pleasure tour and thus was performed pursuant to ICC incidental charter authority. This position was presented more specifically in ACL et al.'s motion to dismiss (denied by Commission Order No. 2984) wherein counsel for defendants-respondents argued that, if a charter move turned out to be a round-trip sightseeing or pleasure tour, it was performed by ACL-DC pursuant to WMATC Certificate No. 1; and that, if a move turned out to be something other than a round-trip sightseeing and pleasure tour, then it was performed by ACL-MD pursuant to ICC incidental charter authority. Defendants-respondents adhere to this claim despite the

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11/ This order was served on ACL after Mr. Sherman had assumed responsibility for its management and on his counsel. Mr. Sherman conceded that he was aware of the order. Nonetheless, a decision was made not to seek appeal of that order.

12/ As was the case previously, ACL's management consists of persons familiar with Bingler and experienced in offering sightseeing and pleasure tours through other companies, specifically Carter Tours.

13/ We are unimpressed by Mr. Sherman's self-serving statements that his only interest was in operating legally. This is not credible in light of his failure to familiarize himself (until confronted on the witness stand) with such elementary principles as the geographic boundaries of the Commission's jurisdiction.

fact that the ICC has expressly interpreted ACL-MD's Certificate No. MC-149076 Sub No. 2 to exclude any incidental charter rights within the Metropolitan District. There are many reasons why the ICC might have made this interpretation, including a plain reading of the applicable statutes in combination with the specific factual situation surrounding the transfer of operating authority from U.S. Bus to ACL-MD (since transferred to ACL-DC/MD). Whatever its reasons, the ICC, after considering legal argument on the matter, determined that no irregular-route operating authority within the Metropolitan District passed to ACL-MD. We have addressed this legal argument in Order Nos. 2984, 2995, and 3000, served March 3, April 3, and April 17, 1987, respectively, and those orders have been incorporated herein by reference. The fact that ACL-MD (now ACL-DC/MD) sought reversal of that interpretation by filing both a Petition for Declaratory Order and a Petition to Reopen in no way changes the finality of the ICC's order. 14/ Nor does it affect the primary purpose of this hearing which, as we stated in Order No. 3000, was to determine specific facts.

Neither Mr. Lindeman's nor Mr. Sherman's purported ignorance of this interpretation has any effect on the fact of its existence. Both displayed an astonishing lack of curiosity regarding the matter. Although Mr. Lindeman had reason to believe a decision had been rendered which might adversely affect property his client was preparing to purchase, he claims never to have checked the record in the transfer case. Also, Mr. Sherman claims not to have read the ICC decision in the transfer case even after being informed of it by complainant's response to ACL et al.'s motion to dismiss. More importantly, knowledge of that order, despite its finality, has in no way affected the scope of work performed by either ACL-DC or ACL-MD within the Metropolitan District. 15/

We find Gold Line's complaint of unauthorized operations to be well-founded. Furthermore, the Commission's investigation indicates numerous instances of willful violations of Compact provisions and Commission regulations. In Order No. 2908, we stated that any further violations would result in revocation of WMATC Certificate No. 1. However, the record supports defendants-respondents' claim that they relied on advice of counsel in determining what operations could legally be performed within the Metropolitan District. Although

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14/ ACL-DC/MD's Petition for Declaratory Order is still pending. However, by Order served August 5, 1987, the ICC denied ACL-DC/MD's Petition to Reopen.

15/ ACL et al.'s defense that all non-sightseeing and pleasure tours are actually ICC moves is not aided by the fact that, in instances where a tariff rate was charged, the rate was ACL's WMATC tariff rate not its ICC rate.

reliance on erroneous advice of competent counsel does not absolve an individual or corporate entity from responsibility for its actions, particularly when those actions are in direct defiance of lawful orders issued in a judicial capacity, it may be considered a mitigating factor in determining an appropriate remedy in response to those actions. See Woolfolk v. Brown, 358 F.Supp. 524, 534 (E.D.Va. 1973), aff'd in part, reversed and remanded in part (on other grounds), 538 F.2d 598 (4th Cir. 1976); In Re La Varre 48 F.2d 216 (S.D.Ga. 1930); Reliance on Advice of Counsel, 70 Yale L.J. 978 (1961).

In light of these considerations, we shall attempt, one final time, to rehabilitate ACL. Rather than revoking, we shall suspend operating authority for three months. Suspension will be followed by a six-month period during which all charter orders, records, drivers' logs, and books of account will be periodically audited by an agent of the Commission at ACL-DC/MD's expense pursuant to the Compact, Title II, Article XII, Sections 10(d) and 19(a). The purpose of this nine-month period is not punitive but rehabilitative. We anticipate that during that time, ACL et al. will purge themselves of all violations, including ACL-DC/MD's ongoing violation of the Compact, Title II, Article XII, Sections 12(a)(1) and 12(c). In order to allow ACL-DC/MD the necessary time to prosecute its application for approval of merger in Case No. AP-87-27, filed October 1, 1987, we hereby grant temporary approval pursuant to the Compact, Title II, Article XII, Section 12(d).

We turn now to the matter of ACL-DC/MD's regular-route operations. As we noted in Order No. 3000, certain findings regarding these operations are made even more necessary in light of ACL-MD's (now ACL-DC/MD's) Petition for Declaratory Order now pending before the ICC. After a thorough review of the entire record in this case, we find:

> that ACL-DC/MD holds a valid regular-route certificate of public convenience and necessity issued by the ICC;
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> that transportation of passengers for hire performed pursuant to that certificate begins and ends within the Metropolitan District; and
>
> that the primary purpose of ACL-DC/MD's entire operations is mass transit within the Metropolitan District.

We shall begin by explaining the legal and historical framework which makes these findings relevant.

By Order No. 366, served June 17, 1964, the Commission dismissed the "grandfather" application, filed pursuant to the Compact, Title II, Article XII, Section 4(a) of four carriers: The Greyhound Corporation; Safeway Trails, Inc.; Virginia Stage Lines, Inc.; and

Baltimore and Annapolis Railroad Company. In stating its rationale for dismissal, the Commission found the transportation for which these carriers sought WMATC authority was "exempt from the jurisdiction of the Commission pursuant to Section 1(a)(4), Article XII, Title II, of the Compact, as amended." In relevant part Section 1(a)(4) provides:

> 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, except-
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> . . .
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> (4) transportation performed in the course of an operation over a regular route, between a point in the Metropolitan District and a point outside the Metropolitan District, including transportation between points on such regular route within the Metropolitan District as to interstate and foreign commerce, if authorized by certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any carrier whose only transportation within the Metropolitan District is within this exemption shall not be deemed to be a carrier subject to the Compact; provided, however, if the primary function of a carrier's entire operations is the furnishing of mass transportation service within the Washington Metropolitan Area Transit District, then such operations in the Metropolitan District shall be subject to the jurisdiction of the Commission;

Taking official notice of Application Nos. 37, 61, 87, and 96 as originally filed by the carriers named in Order No. 366, we note that all conducted extensive regular-route operations throughout the Metropolitan District pursuant to certificates of public convenience and necessity issued by the ICC. Each certificate carried with it incidental charter and special rights, and the applications indicate that all four grandfather carriers were conducting some charter and/or special operations within the Metropolitan District. Thus, having found that the named carriers were exempt from WMATC's jurisdiction, the Commission in Order No. 366 properly observed that the named carriers retained whatever ICC authority they had to perform incidental charter and special operations. In an equally proper fashion, the Commission retained jurisdiction over applications by dismissing them without prejudice to their refiling "in the event a subsequent determination is made that the transportation for which authority is sought comes within the jurisdiction of the Commission."

By dismissing Application Nos. 37, 61, 87, and 96 because the transportation involved was exempt, while retaining jurisdiction, the Commission was merely recognizing that although at the time it issued Order No. 366 all conditions required by Section 1(a)(4) had been met by applicants, such might not remain the case. Specifically by dismissing the applications pursuant to Section 1(a)(4), the Commission found that all applicants (1) were performing transportation over a regular route between a point in the Metropolitan District and a point outside the Metropolitan District, (2) were doing so pursuant to certificates of public convenience and necessity issued by the ICC (which certificates also authorized certain incidental transportation), and (3) had as their primary function something other than the furnishing of mass transportation service within the Metropolitan District. In retaining jurisdiction, the Commission provided for the possibility that factual circumstances might change such that the nature of the regular route, its underlying authority, or the focus of a carrier's operations might change with the result that the carrier would no longer be exempt. At such time as that happened, the carrier would be required to seek WMATC authorization in order to transport passengers within the Metropolitan District.

That situation actually arose in the case of Baltimore and Annapolis Railroad Company (B&A). Twelve years after WMATC dismissed B&A's application, that carrier filed, under protest, an application to perform charter operations between points in the Metropolitan District. As reason for its protest, B&A claimed its operations were exempt by virtue of the Compact, Title II, Article XII, Section 20(a)(2). At the time the application was filed B&A was operating a regular route between Fort George G. Meade, Md., and Washington, D.C., serving all intermediate points except those between Laurel, Md., and Washington, D.C. The record in that case indicates that B&A ran a bus over the route once a week with no paying passengers. 16/ However, at the same time B&A was conducting charter operations between points in the Metropolitan District. All except two charter orders introduced into evidence in the application filed under protest covered transportation which was wholly within the Metropolitan District.

In Order Nos. 1528, 1870, and 1899, served July 30, 1976, August 8, 1978, and October 4, 1978, the Commission held that B&A was not exempt from WMATC jurisdiction. The Commission further held that Section 20(a)(2) was not applicable to B&A inasmuch as its ICC certificate had never been suspended, the necessary operation to trigger the preservation of incidental charter and special rights under

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16/ B&A also may have been conducting regular-route operations between two points in Maryland, Fort George G. Meade and Baltimore-Washington International Airport (then Friendship Airport) a distance of 3.5 miles. These points are outside the Metropolitan District.

that Compact section. Order Nos. 1870 and 1899 were appealed by B&A. The Court of Appeals for the District of Columbia vacated those orders because they failed to state reasons for overruling precedent. The orders were remanded to the Commission for such further proceedings as were consistent with the Court's opinion. In those orders, although WMATC enunciated a result as to B&A and enunciated an interpretation of Section 20(a)(2) to the extent necessary to dismiss that Section as it applied to B&A, WMATC did not enunciate with sufficient clarity its rationale for its result as applied to B&A. In failing to enunciate that rationale and in stating "there is no . . . exception for service performed [by B&A] solely within the Metropolitan District whether . . . incidental to ICC authority or not," it was made to appear that WMATC had changed its interpretation of Section 1(a)(4). This was an unintended result inasmuch as it was the Commission's intent to enforce its earlier interpretation in light of the changed circumstances of B&A's operations. To the extent that the Commission appeared to have made two inconsistent interpretations of its enabling legislation, further proceedings in the nature of a rulemaking were in order. This was not undertaken but will be now by means of a separate order.

As a successor in interest to a portion of an ICC certificate, formerly held by The Greyhound Corporation (Greyhound), ACL-MD (now ACL-DC/MD) has been found to hold incidental charter and special rights outside the Metropolitan District. Should the ICC alter its interpretation of ACL-DC/MD's ICC certificate, then we must decide whether that carrier is exempt under the Compact, Title II, Article XII, Section 1(a)(4). 17/

The record in this case proves that ACL-DC/MD operates a single regular route for five round-trips a week transporting eight passengers between points in the Metropolitan District. No effort is made to publicize this service. The company does not print schedules, and the company's controlling officer does not even know the exact route followed or where the bus picks up and discharges passengers. These facts in combination with ACL-MD's written advice of counsel indicate that, far from performing charter operations incidental to a regular route, ACL-DC/MD performs a regular route which is incidental to its

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17/ As we stated in Order No. 1582, served July 30, 1976, Title II, Article XII, Section 20(a)(2) applies only to carriers holding ICC certificates which were suspended by operation of the Compact. For those carriers, Section 20(a)(2) preserved any incidental charter and special authority within the Metropolitan District provided application was timely made under Title II, Article XII, Section 4(a) of the Compact. This situation is unlike ACL-DC/MD's. ACL-DC/MD's ICC certificate is not suspended. However, because all the elements of Section 1(a)(4) do not pertain, neither is it exempt from WMATC jurisdiction.

charter operations. 18/ This result is contrary not only to the purpose intended by the authors of the Compact, but it is contrary to established ICC case law. Based upon evidence adduced by the regular-route driver (the usual driver of the route and the only person with demonstrated knowledge of the actual service provided on that route), it is manifest that ACL-DC/MD's entire regular route passenger service is performed within the Metropolitan District since that is where all passengers board as well as disembark. Thus, under the Compact, that route is not exempt from WMATC jurisdiction. As a result no incidental charter rights can attach to the route. Incidental charter rights are activated under 49 U.S.C.S. §10932(c) only by the transportation of passengers, not the possession of operating authority or the operation of a vehicle over that route. See, e.g., In Re Stilz, Inc., Investigation and Revocation of Certificate, 74 M.C.C. 401, 405 (1958). Moreover, such operations are substantially at variance with the operations presented to the Commission by Greyhound in Application No. 61, and, therefore, would dictate a different finding even if the transportation performed over the route extended beyond the Metropolitan District. Mr. Sherman's own testimony in combination with the charter orders introduced in this case indicate that ACL-DC/MD does virtually nothing but transport passengers for hire between points in the Metropolitan District. This is exactly the type of operation intended to be brought under WMATC jurisdiction by Section 1(a)(4) irrespective of any bit of ICC authority that a carrier might hold or inherit. For these reasons, we find that ACL-DC/MD is not exempt from our jurisdiction.

THEREFORE, IT IS ORDERED:

1. That WMATC Certificate No. 1 is hereby suspended for 90 days, such suspension to begin 30 days after the date of this order.

2. That all defendants-respondents named in these cases hereby remain ordered to cease and desist from transporting passengers for hire between points in the Metropolitan District except as specifically authorized by this Commission.

18/ An examination of those operations alleged to be performed pursuant to 49 U.S.C.S. §10932(c) indicates that most represent trips between Washington and Virginia often in combination with intra-District of Columbia operations thereby showing a lack of mutuality between the traffic being served by ACL-DC/MD's regular route and that served in the claimed incidental charter territory. Thus, we doubt that such operations would be considered incidental to ACL-DC/MD's regular route even if that route were performed between a point outside the Metropolitan District and a point inside the Metropolitan District. See Alexandria, B&W Transit Co. v. Atwood Transport, 86 M.C.C. 399, 405 (1961); Greyhound Lines v. Red-Yellow Cab d.b.a. Buckeye Stages, 115 M.C.C. 844, 853-854 (1971).

3. That pursuant to the Compact, Title II, Article XII, Section 19 defendants-respondents are hereby jointly and severally assessed $1,572, the costs in these proceedings to date, and are hereby directed to pay to the Commission, no later than 30 days after the date of this order, $572, the amount not yet assessed or paid pursuant to Order No. 2984, served March 3, 1987.

4. That this investigation shall remain open as discussed herein until further order of the Commission, provided, however, that the reconsideration period for this Order No. 3079 shall expire 30 days after the date, of this order.

5. Pending the determination of the application for approval of merger in Case No. AP-87-27, filed October 1, 1987, temporary approval is hereby granted pursuant to the Compact, Title II, Article XII, Section 12(d), effective through Wednesday, April 6, 1988, unless otherwise ordered by the Commission.

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

William H. McGilvery
Executive Director