

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 7948

IN THE MATTER OF:

Served April 20, 2004

CENTRAL AFRICAN WOMEN EMPOWERMENT)
ORGANIZATION CORP., Trading as)
CAWEO TRANSPORTATION SERVICES,)
WMATC No. 558, Investigation of)
Tariff and Lease Violations)

Case No. MP-2003-65

Application of CAWEO TRANSPORTATION)
SERVICES, INC., for a Certificate)
of Authority -- Irregular Route)
Operations)

Case No. AP-2003-148

This matter is before the Commission on the response of WMATC Carrier No. 558, Central African Women Empowerment Organization Corp., a Maryland corporation trading as CAWEO Transportation Services, ("CAWEO-MD"), and the response of CAWEO Transportation Services, Inc., a District of Columbia corporation, ("CAWEO-DC"), to Order No. 7457, served October 7, 2003, which directed CAWEO-DC and CAWEO-MD's directors to show cause why the Commission should not assess a civil forfeiture and revoke Certificate No. 558 for violations of the Compact and Commission Order No. 7021.

Also before the Commission is the application of CAWEO-DC for a certificate of authority, filed November 6, 2003. The two proceedings are being consolidated because the question of whether CAWEO-DC violated the Compact is central to both proceedings.

I. INVESTIGATION

The investigation in Case No. MP-2003-65 was initiated to determine whether CAWEO-MD violated the Compact and Commission regulations by providing contract passenger service in the Metropolitan District in non-owned vehicles without having filed any contract tariffs and without having filed any leases. When more serious violations were discovered, the Commission directed CAWEO-DC and CAWEO-MD's directors to respond. The order was directed at CAWEO-MD's directors instead of CAWEO-MD because CAWEO-MD's charter was forfeited at the time, as explained below.

A. Background and Recap of Order No. 7457

CAWEO-MD received Certificate No. 558 on August 17, 2000, and since then has had a tariff on file with the Commission covering transportation under a provider agreement with the DC Department of Health, Medical Assistance Administration ("DC Medicaid").

CAWEO-DC was formed by CAWEO-MD's president, Gerald Nkwako, on October 17, 2000, and since July 12, 2001, has had a contract for transporting clients of the DC Department of Human Services, Mental Retardation and Developmental Disabilities Administration ("MRDDA").

Mr. Nkwako signed a multi-year transportation contract with LogistiCare Solutions, LLC, on November 1, 2002. The contracting party was identified as "CAWEO MC" and Mr. Nkwako its president.

Certificate No. 558 was suspended on February 4, 2003, for CAWEO-MD's failure to maintain on file with the Commission a WMATC Certificate of Insurance and Policy Endorsement (WMATC Insurance Endorsement). The suspension was lifted on March 19, 2003, when an appropriate replacement endorsement was filed, but the replacement endorsement left a gap in coverage from February 4, 2003, through February 25, 2003.

Daily driver manifests produced by Mr. Nkwako reveal that transportation of MRDDA clients, LogistiCare clients and DC Medicaid clients continued between points in the Metropolitan District throughout the suspension period, including the twenty-two days CAWEO-MD had no insurance.

The signing of the LogistiCare contract and transportation of the three entities' clients during the suspension period all occurred while CAWEO-MD's charter was forfeited for failure to file a property return for 2001.

Order No. 7457 directed CAWEO-DC and CAWEO-MD's directors to show cause why the Commission should not assess a forfeiture and revoke Certificate No. 558 for operating without authority.

B. Response

Mr. Nkwako responded to Order No. 7457 by filing a copy of a certificate of good standing establishing that CAWEO-MD's charter has been revived as of October 10, 2003. Mr. Nkwako also filed a copy of a DC Automobile Insurance Plan application in CAWEO-MD's name for a policy that was to have taken effect on February 4, 2003, but was never issued. The application was allegedly signed by Mr. Nkwako on January 31, 2003, and Mr. Nkwako claims he attempted to confirm coverage the following week but was unable to reach the agent. Fearing something was amiss, he says he then contacted a new agent who succeeded in securing a policy effective February 26, 2003.

1. Charter revival

Under Maryland law, CAWEO-MD ceased to exist upon forfeiture of its charter on October 7, 2002, and all of its assets

were transferred by operation of law to its directors.¹ Upon revival of CAWEO-MD's charter, however, "[i]f otherwise done within the scope of its charter, all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them."²

CAWEO-MD's DC Medicaid tariff was filed with the Commission prior to the forfeiture of CAWEO-MD's charter and remained on file with the Commission throughout the forfeiture period, including while Certificate No. 558 was suspended. DC Medicaid billing records show services rendered by "CAWEO" from mid-February through mid-March of 2003. Several of those records match up with daily driver manifests produced by Mr. Nkwako. A notice from DC Medicaid to Mr. Nkwako in his capacity as CAWEO-MD's president announcing DC Medicaid's intent to deny reimbursement for transportation services provided to Medicaid beneficiaries while Certificate No. 558 was suspended reflects DC Medicaid's understanding of who was conducting that transportation. The evidence thus supports a finding that DC-Medicaid transportation was performed in the name of CAWEO-MD while Certificate No. 558 was suspended and that CAWEO-MD, therefore, may be held liable for that transportation.

The LogistiCare contract was not entered into in CAWEO-MD's name, but Mr. Nkwako filed that contract with the Commission as a CAWEO-MD contract tariff on January 13, 2003,³ and Mr. Nkwako signed an open-ended vehicle lease with LogistiCare on behalf of Carrier No. 558 commencing November 11, 2002. Although the 2002 annual report in CAWEO-MD's name does not list any readily identifiable LogistiCare vehicles, a December 13, 2002, list of transportation provider contacts furnished by LogistiCare identifies "Pius" as a "Caweo Transportation" contact, and Mr. Pius Awa, CAWEO-DC's current president, confirms that he acted as a liaison with LogistiCare while in CAWEO-MD's employ. The evidence thus supports a finding that transportation was performed under the LogistiCare contract in the name of CAWEO-MD while Certificate No. 558 was suspended and that CAWEO-MD, therefore, may be held liable for that transportation.

The MRDDA contract was not executed in the name of CAWEO-MD, and although Mr. Nkwako filed the MRDDA contract with the Commission as a CAWEO-MD contract tariff, he did not do so until August 1, 2003, and the contract tariff did not purport to become effective until August 8, 2003. Further, there is nothing in the record to indicate that Mr. Nkwako ever caused MRDDA officials to

¹ Cloverfields Improvement Ass'n, Inc., v. Seabreeze Properties, Inc., 362 A.2d 675 (Md. Ct. Spec. App. 1976), aff'd, 373 A.2d 935 (Md. 1977).

² MD. CORPS. & ASS'NS CODE ANN. § 3-512(1) (2003).

³ The tariff was rejected on January 16, 2003, and resubmitted on July 23, 2003.

believe that CAWEO-MD had any involvement in the MRDDA contract.⁴ And while the 2002 annual report submitted in CAWEO-MD's name lists one CAWEO-DC vehicle, and a vehicle list obtained from CAWEO-MD's insurer in June 2002 lists that vehicle and three other CAWEO-DC vehicles, there is no representation in the report or insurance list that CAWEO-MD was using those vehicles to perform the MRDDA contract. The evidence thus does not support a finding that any transportation was performed under the MRDDA contract in the name of CAWEO-MD while Certificate No. 558 was suspended.

2. DC Automobile Insurance Plan application

We are disinclined to place much exculpatory weight on the alleged DC Automobile Insurance Plan application. First, there is no evidence that it was ever submitted by the alleged agent to plan representatives. Plainly, Mr. Nkwako's lament is that it was not. Second, the copy furnished by Mr. Nkwako was not submitted under oath as required by Commission Rule No. 4-06. And third, while Mr. Nkwako claims that he is pursuing a refund of the \$23,283.75 deposit allegedly paid by cashier's check on January 31, 2003, and that he is also "filing a criminal case" against the now-vanished agent, there is no copy of the cancelled check in the record and no copy of the criminal complaint one would expect to have been filed by Mr. Nkwako immediately upon believing that he had been defrauded out of so much money.

This much is certain, however. Mr. Nkwako's allegation that he was thwarted in his attempt to secure commercial vehicle liability coverage until February 26, 2003, confirms that none of the vehicles operated by CAWEO-MD and CAWEO-DC were insured from February 4, 2003, through February 25, 2003.

C. Findings

A person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation; each day of the violation constitutes a separate violation.⁵ The Commission may suspend or revoke all or part of any certificate of authority for willful failure to comply with a provision of the Compact, an order, rule, or regulation of the Commission, or a term, condition, or limitation of the certificate.⁶

⁴ Indeed, notwithstanding the August tariff filing, Mr. Nkwako signed an extension of the MRDDA contract on September 25, 2003, in his capacity as president of CAWEO-DC, with no evident mention to MRDDA of CAWEO-MD.

⁵ Compact, tit. II, art. XIII, § 6(f).

⁶ Compact, tit. II, art. XI, § 10(c).

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.⁷ The terms "willful" and "willfully" do not mean with evil purpose or criminal intent; rather, they describe conduct marked by careless disregard whether or not one has the right so to act.⁸

Certificate of Authority No. 558 carries a bold disclaimer on its face, as all WMATC certificates of authority do, warning that the certificate is not valid unless the holder is in compliance with the Commission's insurance requirements. The record shows that CAWEO-MD's vehicle liability insurance terminated February 4, 2003. Mr. Nkwako understood that was the critical date because he personally applied for insurance on January 31 to become effective February 4. Mr. Nkwako was careless in disregarding the need to check with the Commission prior to February 4 to ascertain whether the requisite WMATC Insurance Endorsement had been filed on CAWEO-MD's behalf⁹ -- especially since Mr. Nkwako admits he understands it "normally takes about six weeks to get a policy from the insurance company assigned to you."

Furthermore, the record shows that a copy of Order No. 7021 instructing CAWEO-MD not to transport passengers for hire under Certificate No. 558, unless and until otherwise ordered by the Commission, was received in CAWEO-MD's offices on February 6, 2003, just about the time Mr. Nkwako says he became concerned that he was unable to reach the insurance agent to confirm placement of the DC Automobile Insurance Plan policy. Indeed, had he taken the next step and contacted the plan representative, Mr. Nkwako could have confirmed what he must have feared -- there was no commercial vehicle insurance policy covering CAWEO-DC's MRDDA operations and CAWEO-MD's LogistiCare/DC Medicaid operations.

We find that CAWEO-MD, at the direction of Mr. Nkwako, knowingly and willfully violated Article XI, Section 6(a), of the Compact, by transporting DC Medicaid and LogistiCare passengers for hire between points in the Metropolitan District on February 4-15, and 18-28 of 2003, and on March 3-4, 11-13 and 17 of 2003, without authority from this Commission. We shall assess a forfeiture of \$250 per day¹⁰ for twenty-nine days of unauthorized operations, or \$7,250.

⁷ In re Advance Care Servs., Inc., No. MP-03-46, Order No. 7332 (July 24, 2003).

⁸ Id.

⁹ See In re Capital Tours & Transp., Inc., t/a Suburban Airport Shuttle, No. MP-95-88, Order No. 4765 (Feb. 13, 1996) (carrier's failure to check insurance status deemed willful).

¹⁰ See Order No. 7332 (assessing \$250 per day for unauthorized operations).

We find that CAWEO-DC at the direction of Mr. Nkwako, knowingly and willfully violated Article XI, Section 6(a), of the Compact, by transporting MRDDA passengers for hire between points in the Metropolitan District on February 4-7, 10-14, 19-21 and 24-28 of 2003 without authority from this Commission. We shall assess a forfeiture of \$250 per day for seventeen days of unauthorized operations, or \$4,250.

On the issue of revocation, we note that when the signatories and Congress approved the Compact, they designated noncompliance with Commission insurance requirements as the single offense that would automatically invalidate a certificate of authority. They could not have sent a clearer message that maintaining proper insurance coverage is of paramount importance under the Compact. CAWEO-MD put its passengers and the public at risk of not receiving just compensation for any injuries or property damage CAWEO-MD might inflict during the period from February 4, 2003, to February 26, 2003. That is completely unacceptable and more than justifies revoking CAWEO-MD's certificate of authority.¹¹

II. APPLICATION

CAWEO-DC seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, including the driver. The application is unopposed.

The Compact, Title II, Article XI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission. If an applicant does not make the required showing, the application must be denied under Section 7(b).

An applicant for a certificate of authority must establish financial fitness, operational fitness, and regulatory compliance

¹¹ Id. See In re ACEP Group Inc., No. MP-02-128, Order No. 7069 (Mar. 4, 2003) (declining to reinstate authority where respondent was uninsured while operating under invalid certificate); In re Baron Transportation, Inc., No. MP-02-42, Order No. 7067 (Mar. 4, 2003) (same); In re Safe Haven, Inc., No. MP-02-14, Order No. 6762 (Aug. 7, 2002) (declining to reinstate authority where respondent was underinsured while operating under invalid certificate); see also In re VGA Enters. Inc., No. AP-02-34, Order No. 6736 (July 22, 2002) (application denied where applicant continued to operate while suspended and uninsured).

fitness.¹² A determination of compliance fitness is prospective in nature.¹³ The purpose of the inquiry is to protect the public from those whose conduct demonstrates an unwillingness to operate in accordance with regulatory requirements.¹⁴ Past violations do not necessarily preclude a grant of authority but permit the inference that violations will continue.¹⁵

When an applicant has a record of violations, the Commission considers the following factors in assessing the likelihood of future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.¹⁶

We find that the violations committed by CAWEO-DC, as described above, were serious, extensive, flagrant and persistent. We see no mitigating circumstances. If we ended our inquiry there, the decision to deny would be clear. We note, however, that CAWEO-DC underwent a change in ownership and management October 31, 2003, after the violations described above took place. We shall consider what difference that makes, if any.

Applicant's current president and sole shareholder, Mr. Pius Awa, states that he was not a shareholder, director or executive of CAWEO-DC when the violations were committed, and although Mr. Awa was employed by CAWEO-MD at that time, he states that he "never held an executive position or ownership interest" in CAWEO-MD and is no longer employed by CAWEO-MD. On this record, we cannot say that Mr. Awa was complicit in the violations uncovered by our investigation, but it does not appear that Mr. Awa has done any better than his predecessor Mr. Nkwako at avoiding violations of the Compact since assuming control of CAWEO-DC.

When Mr. Awa assumed control of CAWEO-DC, he inherited a MRDDA contract that had been extended from October 18, 2003, to October 19, 2004. He also inherited a subcontract and nine-vehicle lease agreement with ACHU Services Group LLC, trading as American Transportation Unlimited, WMATC No. 658, whereby ACHU agreed to perform the MRDDA contract using CAWEO-DC's vehicles for some

¹² In re Adventures By Dawn L.L.C., No. AP-99-68, Order No. 5837 (Mar. 14, 2000).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. at 5-6.

unspecified period of time, presumably until such time as CAWEO-DC obtained a WMATC certificate of authority.

ACHU filed the MRDDA subcontract and CAWEO-DC lease on or about the effective date of the MRDDA extension, as required by Commission Regulations Nos. 55, 56 and 62, but both the subcontract and lease were rejected as unacceptable for filing. ACHU then resubmitted the subcontract on November 21, 2003, together with a new nine-vehicle CAWEO-DC lease signed by Mr. Awa, but these too were rejected. CAWEO-DC then entered into a similar subcontract and lease arrangement with Charity Transportation, Inc., WMATC No. 483. Charity filed both documents with the Commission on December 29, 2003. Charity's filing was rejected on January 6, 2004. It was not until January 30, 2004, that an acceptable MRDDA subcontract and CAWEO-DC lease were filed with the Commission by ACHU.¹⁷ Hence, not until January 30, 2004, at the earliest would any of the transportation performed under the MRDDA contract have been lawful. The question is, who performed that transportation? Mr. Awa says that ACHU and/or Charity performed it, but the evidence does not support that assertion.

To be viewed as the carrier in a lease transaction, a lessee must control, direct and dominate vehicle operations and assume the responsibilities, risks, duties and burdens of transportation.¹⁸ The lessee's status under the lease is not that of a bona fide carrier if the lessor rather than the lessee is actually controlling and directing the transportation service.¹⁹ "Regardless of the nature of the paper provisions, it is the economic reality behind the arrangements, and not their form, which is crucial in the determination of the status of a specific operation."²⁰

There is no evidence that ACHU took exclusive possession of any of the CAWEO-DC vehicles listed in the leases signed by Mr. Awa or hired any drivers to operate those vehicles, as the leases themselves require. On the contrary, a vehicle list obtained from ACHU's insurance company on February 13, 2004, lists only one vehicle. The description of that vehicle does not match the description of any of the CAWEO-DC vehicles in the leases signed by Mr. Awa. Considering that the leases signed by Mr. Awa contemplate ACHU would need nine

¹⁷ The subcontract was signed by Mr. Awa on January 29, 2004, and the lease, which was also signed by Mr. Awa specifies an effective date of January 29, 2004.

¹⁸ W. V. & M. Coach Co. v. Scenic Coach Rental, Inc., No. 165, Order No. 837 at 5 (July 10, 1968). See also In re Chika Transport Serv., Inc., No. MP-02-124, Order No. 7173 (May 7, 2003); In re LAM Assocs., Inc., No. AP-01-74, Order No. 6398 (Oct. 22, 2001) (carrier is person who assumes risk and responsibility of conducting passenger transportation operations).

¹⁹ Order No. 837 at 5.

²⁰ Id. at 6.

vehicles to operate the MRDDA subcontract, it does not seem possible that ACHU could have performed that subcontract with only one.

As for Charity, the Commission's January 6, 2004, letter rejecting the MRDDA subcontract and CAWEO-DC lease explained that prior to operating CAWEO-DC's vehicles, Charity would need to mark them in accordance with Commission Regulation No. 61, which requires that each revenue vehicle display the operating carrier's name and WMATC number, in this case Charity's name and number. Charity was then instructed to contact Commission staff to schedule an inspection of the vehicles identified in the CAWEO-DC lease, but Charity did not comply. The evidence of exclusive possession of those vehicles thus is lacking with respect to Charity, as well.

We find that CAWEO-DC has not met its burden of proof on the issue of regulatory compliance fitness. The application accordingly must be denied.

THEREFORE, IT IS ORDERED:

1. That Cases Nos. MP-2003-65 and AP-2003-148 are hereby consolidated.

2. That the Commission hereby assesses a civil forfeiture against Central African Women Empowerment Organization Corp. and Gerald Nkwako, jointly and severally, in the amount of \$7,250 for knowingly and willfully violating Title II of the Compact, Article XI, Section 6(a), and that Central African Women Empowerment Organization Corp. and Gerald Nkwako shall pay to the Commission within thirty days of the date of this order, by money order, certified check, or cashier's check, the sum of seven thousand two hundred fifty dollars (\$7,250).

3. That the Commission hereby assesses a civil forfeiture against CAWEO Transportation Services, Inc., and Gerald Nkwako, jointly and severally, in the amount of \$4,250 for knowingly and willfully violating Title II of the Compact, Article XI, Section 6(a), and that CAWEO Transportation Services, Inc., and Gerald Nkwako shall pay to the Commission within thirty days of the date of this order, by money order, certified check, or cashier's check, the sum of four thousand two hundred fifty dollars (\$4,250).

4. That pursuant to Article XI, Section 10(c), of the Compact, Certificate of Authority No. 558 is hereby revoked for respondent's willful failure to comply with Article XI, Section 6(a), of the Compact while uninsured.

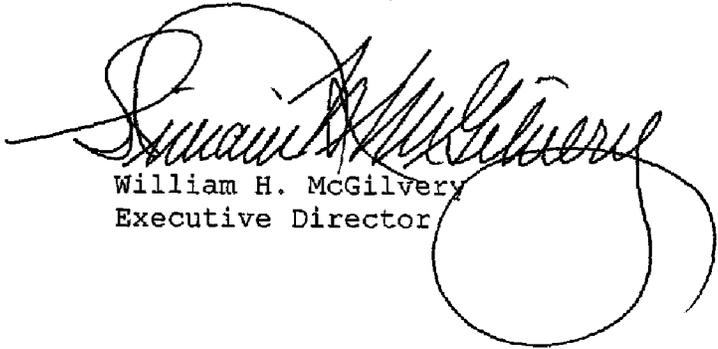
5. That within 30 days from the date of this order Central African Women Empowerment Organization Corp. shall:

- a. remove from its vehicle(s) the identification placed thereon pursuant to Commission Regulation No. 61;

- b. file a notarized affidavit with the Commission verifying compliance with the preceding requirement; and
- c. surrender Certificate No. 558 to the Commission.

6. That the application of CAWEO Transportation Services, Inc., for a certificate of authority, irregular route operations, is hereby denied.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES, MILLER, AND MCDONALD:



William H. McGilvery
Executive Director