

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

214105



STB Docket No. MC-F-21008

EAST WEST RESORT TRANSPORTATION, LLC,
AND TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS
-PETITION FOR DECLARATORY ORDER-
MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

REPLY
OF
EAST WEST RESORT TRANSPORTATION, LLC,
AND TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS

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Dated: June 1, 2005

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Petitioners, East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express ("CME"), pursuant to 49 C.F.R. 1104.13(a), reply to the Petitions for Issuance of Subpoena to Appear at Deposition and Produce Documents, filed May 25 and 27, 2005, by the Colorado Public Utilities Commission ("CPUC"), as follows:

1. Attached to the Petition for Declaratory Order which CME filed September 24, 2004, were three supporting statements, those of S&L Travel Partners, Inc., Moguls Mountain Travel and Vail Resorts Management Company. None of them is a party to the instant proceeding.
2. The three supporting statements were similar to the 2,700 supporting statements which the applicants submitted with their application in STB Finance Docket No. 33388, CSX

Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases Agreements—Conrail Inc. and Consolidated Rail Corporation, filed June 23, 1997, and the 240 supporting statements which the applicants submitted with their application in STB Finance Docket No. 33556, Canadian National Railway Company, Grand Truck Corporation, and Grand Trunk Western Railroad, Incorporated--Control—Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company and Cedar River Railroad Company, filed July 15, 1998. Protestant did not seek to depose any of the affiants or have them produce documents in response to subpoenas issued by the Board, and what a jumble of redundant and irrelevant material would have cluttered the records in those proceeding if they had been granted leave to do so..

3. In the instant proceeding, however, CPUC has asked the Board for the issuance of Subpoenas ad Testificandum and Duces Tecum to require the appearance of the signers of two of the supporting statements and the production by them of tens of thousands of documents.

4. CPUC's reliance upon 49 C.F.R. 1113.2 as authority for the issuance of the requested subpoenas demonstrates CPUC's failure to understand the nature of the instant proceeding. This is not a proceeding set for oral hearing, in which subpoenas ad testificandum and duces tecum are freely issued. As the Board explicitly stated in its Decision, served March 21, 2005, "The Board will resolve this matter pursuant to the modified procedure rules at 49 CFR part 1112." In his letter to the Board, dated May 27, 2005, counsel for CPUC seems to find fault with the STB's modified procedure because "cross-examination of witnesses at an evidentiary hearing will not take place."

5. CPUC's complaint comes too late. The Board's modified procedure consistently has been

held to be fundamentally fair. American Transfer & Storage Co. v. Interstate Commerce Commission, 719 F.2d 1283, 1301 (5th Cir. 1983). That is particularly true in a case, such as the instant one, in which the ultimate issue for the Board's determination is whether the transportation in questions is in intrastate or interstate commerce—at its heart a legal determination. That was the question raised in Quaker Oats Company - Transportation Within TX and CA, 4 I.C.C.2d 1052 (1988), aff'd, sub nom., California Trucking Ass'n v. I.C.C., 900 F.2d 208, 211 (9th Cir. 1990), in which the reviewing court held:

The [modified] procedure followed by the ICC permitted all interested parties to file comments and participate in the fact-finding process. Under these circumstances the ICC was not required to hold a full oral hearing and give the participants the opportunity to conduct discovery [citations omitted].

More recently, the Board in its Decision in Finance Docket No. 34111, North San Diego County Transit Development Board—Petition for Declaratory Order, served August 21, 2002, said:

Included in the City's January 4, 2002 reply is a request for oral hearing and cross-examination. The City has offered no justification for either request. The City has not shown that it is unable to make its case on a written record, or that it requires an oral hearing for any other reason. Nor has the City shown any need to cross-examine any witnesses offered by NCTD. The statements of these witnesses were offered in written form, and the City has not shown why written replies would not suffice to provide adequate opportunity to challenge and rebut those statements. Accordingly, the request for oral hearing and cross-examination will be denied.

Accord, STB Finance Docket No. 34509, Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company, served May 3, 2005 (“We . . . will deny BLET's and UTU's requests for a hearing [to examine KRR's witness].”).

6. CPUC's requests for Subpoenas ad Testificandum to take the deposition of the signers of the supporting statements is nothing more than an ill disguised attempt to cross-examine them

and to circumvent the Board's modified procedure. This simply is not permissible. Mr. Christopher Jarnot, Vice President of Vail Resorts Management Company, and Mr. Mark Uhlfelder, Vice President of S&L Travel Partners, Inc., may have succumbed to the entreaties of counsel for CPUC so as not to alienate the Office of the Attorney General of the State of Colorado and to endeavor to be of assistance to the parties to this proceeding and, thus, have agreed, albeit reluctantly, to have their depositions taken. CME, however, does not concur and most strenuously urges that the requested Subpoenas ad Testificandum to permit the taking of their depositions not be issued.

7. The taking of the deposition of a nonparty is virtually unprecedented. See, STB Finance Docket No. 33381, Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)–Springfield Terminal Railway Company, Boston and Maine Corporation, and Portland Terminal Company, served June 18, 1997, May 14, 1997, and May 6, 1997. Indeed, the only time the Board ordered the deposition of a nonparty within the knowledge of CME is when the individuals were expert witnesses upon whose expertise a party had relied. STB Docket No. 42022., FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, served February 5, 1998. That is not the situation in the instant proceeding.

8. Moreover, the dates for the deposition were not cleared in advance with counsel for CME, as simple courtesy would suggest and the Board's Canon of Ethics, 49 C.F.R. 1103.27, require. As it turns out, counsel for CME is to undergo minor surgery in Denver on June 6, 2005, and, therefore, it is impossible for him to attend the deposition of Mr. Uhlfelder, which counsel for CPUC proposes to take in Aspen, 240 miles away, beginning at 10:00 a.m. the following day, June 7, 2005. CPUC has had more than two months, since its intervention in the instant

proceeding was granted by the Board's decision, served March 21, 2005, to file its petitions with the Board seeking the Subpoenas ad Testificandum and Duces Tecum compelling the appearance for deposition and the production of documents by Messrs. Jarnot and Uhlfelder. CPUC, however, chose to wait until May 25 and 27, 2005, respectively, almost on the eve of the June 10, 2005, due date for CPUC's Reply, to file its petitions, giving Vail Resorts Management Company five working days and S&L Travel Partners, Inc., six working days to prepare for the depositions and to coral the documents which were to be produced at the time of the depositions..

10. Both Vail Resorts Management Company and S&L Travel Partners in their letters to Secretary Williams, dated May 27 and 31, 2005, respectively, stated that counsel for CPUC at no time indicated that he intended to have the deponents produce any documents at their depositions. As it turned out, in his request for the Subpoenas Duces Tecum, counsel for CPUC asked for literally tens of thousands of documents. These would be on top of the approximately 12,000 documents which CME itself produced in response to CPUC document production requests, supplemented by the production, largely as a matter of courtesy, of additional documents, following CPUC's all-day deposition of CME's President, Mr. Jay Ufer. CME shall leave it to Vail Resorts Management Company and S&L Travel Partners to detail how overly broad, burdensome and oppressive the document productions requests are for each of their companies. CME, however, submits that CPUC must have known that the document production requests would be opposed and that CPUC would seize upon the non-parties' inability or refusal to produce the requested documents as the grounds for asking the Board for an extension of the June 10, 2005, date by which CPUC is to file its Reply.

11. The dates for the requested production of documents, six working days in advance of

the June 10, 2005, due date in the case of Vail Resorts Management Company, and three working days in advance of the June 10, 2005, due date in the case of S&L Travel Partners, Inc., render it evident that counsel for CPUC simply was setting up the document production requests so as to try to bludgeon the Board into extending the due date for CPUC's Reply. Even if CPUC's requests for the Subpoenas Duces Tecum were unopposed and the documents somehow were made available for CPUC's immediate inspection when requested, there is no way that counsel for CPUC physically could review the tens of thousands of documents he asked to be produced and synthesize the data they contain for inclusion in CPUC's Reply due June 10, 2005. Thus, he presumably would ask for an extension of the due date to permit hi to analyze the documents and prepare an appropriate Reply.. Alternatively, if the Requests for the Subpoenas Duces Tecum were granted but Vail Resorts Management Company and S&L Travel Partners, Inc., failed to produce all of the tens of thousand of documents which counsel for CPUC asked to be produced, he likely would file a motion to compel and, pending Board action on the motion, ask for an extension of the due date for filing CPUC's Reply. This, then, is a plainly transparent effort by CPUC to circumvent the Board's Decision limiting the time for discovery to 60 days, rather than the 120 days which CPUC had sought, and to try to achieve indirectly what CPUC was unsuccessful in accomplishing directly.

12. If only CPUC and CME had an interest in the timely conclusion of this proceeding, CME probably would not be all that concerned with the extension of the June 10, 2005, due date for CPUC's Reply. As the Board heretofore has been apprized, however, there is a companion proceeding pending in Civil Action No. 04-B-0105 (MJW), East West Resort Transportation, LLC, d/b/a Colorado Mountain Express, et al. v. The Public Utilities Commission of the State of

Colorado, et al., before the United States District Court for the District of Colorado. The Court has been advised of the instant proceeding, and, CME not unexpectedly has asked that the Court not render its decision until it has had the benefit of the Board's views as to whether CME's prearranged scheduled, regular-route transportation of passengers between the Denver and Eagle County airports and the hotels and ski resorts in Eagle, Summit and Pitkin Counties in 2003 were in intrastate or interstate commerce-- a stay request which has been energetically opposed by CPUC . Obviously, the Court will wait only so long to hear from the Board, and CPUC's certain-to-be-filed extension request is a crude but cynical means of denying the Court the timely decision of the Board.

WHEREFORE, Petitioners, East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express, ask that the Petitions for Issuance of Subpoena to Appear at Depositions and Produce Documents, filed May 25 and 27, 2005, by the Colorado Public Utilities Commission be denied.

Respectfully submitted,

EAST WEST RESORT TRANSPORTATION, LLC,
and TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS

By their attorneys,

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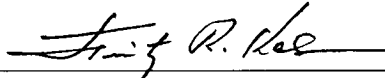
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Dated: June 1, 2005

CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Reply upon the Respondent and non-parties by facsimile transmitting copies to counsel for the Colorado Public Utilities Commission, David A. Beckett, Esq. (303) 866-5395; Vail Resorts Management Company, Mark E. Manley, Esq. (970) 845-2667, and S&L Travel Partners, Inc., Mr. Harry Peisach (970) 429-3061.

Dated at Washington, DC, this 1st day of June 2005.



Fritz R. Kahn