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SERVICE DATE – JANUARY 31, 2007

SURFACE TRANSPORTATION BOARD

DECISION

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

Decided: January 30, 2007

By petition filed September 24, 2004, East West Resort Transportation, LLC and TMS, LLC, doing business as Colorado Mountain Express (CME) seek an order from the Board declaring that 49 U.S.C. 14501(a) preempts the Colorado Public Utilities Commission (CPUC) from regulating the rates CME may assess for scheduled, regular-route, intrastate motor carrier transportation of passengers in Colorado. CME and CPUC are parties to a related lawsuit before the United States District Court for the District of Colorado (District Court), but that court has stayed proceedings pending a Board decision on the preemption issue.<sup>1</sup> For the reasons discussed below, we will deny the petition and discontinue the proceeding.

BACKGROUND

CME is a motor passenger carrier that is registered with the Secretary of Transportation to provide interstate transportation pursuant to 49 U.S.C. 13902. Consequently, CME is authorized to provide regular-route intrastate transportation over the routes over which it provides interstate service. See 49 U.S.C. 13902(b)(3). CME also holds operating authority from CPUC to conduct intrastate transportation over routes that duplicate CME's interstate routes. However, CME states that it elects to perform its intrastate transportation over its interstate routes pursuant to the incidental intrastate operating rights conferred by section 13902(b)(3).

In October 2003, CPUC commenced an enforcement proceeding against CME and fined it for advertising and/or carrying passengers at rates different from those CME had filed with CPUC. CME did not pay the fines, and instead filed suit in a United States district court with jurisdiction to provide appropriate relief. Later, CME filed a petition for declaratory order with the Board seeking a determination that 49 U.S.C. 14501(a) preempts the authority that CPUC might otherwise have under state law to penalize CME for advertising rates different from those on file with CPUC. The Board instituted a

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<sup>1</sup> See East West Resort Transportation, LLC v. Sopkin, 371 F. Supp. 2d 1253 (D. Colo. June 3, 2005).

proceeding in March 2005 and granted CPUC's motion to intervene. The parties have engaged in discovery and completed briefing on the petition for declaratory order.

## DISCUSSION

This controversy revolves around the effect of the statutory provisions found at 49 U.S.C. 13902(b)(3) and 14501(a). Section 13902(b)(3) provides that a registered interstate motor carrier is automatically authorized to conduct regular-route intrastate operations on routes "over which the carrier provides interstate transportation of passengers." Accordingly, the federal license under which CME continues to operate contains an express condition providing that CME "is authorized to provide intrastate transportation service on a route under this certificate only if the carrier provides regularly scheduled interstate transportation service on the route."<sup>2</sup> Section 14501(a) provides that, for federally authorized intrastate motor carrier transportation performed over a federally licensed interstate route, states may not regulate scheduling, rate-setting, or charter bus operations, except that a state may require up to 30 days' notice of scheduling changes.

Pursuant to 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate controversy or remove uncertainty with respect to matters that are within its jurisdiction. Prior to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), our predecessor, the Interstate Commerce Commission (ICC), had jurisdiction over licensing and other activities by motor carriers operating in interstate commerce. When Congress eliminated the ICC, it altered or removed some of the motor carrier provisions that had been administered by the ICC, and it transferred the administration of some of the remaining motor carrier regulatory responsibilities to the Board and others to the Secretary of Transportation.

Congress assigned to the Secretary jurisdiction over all motor carrier functions except those specifically assigned to the Board. See 49 U.S.C. 13301(a). Those functions that were specifically assigned to the Board included supervision of collectively set rates and ratemaking activities (49 U.S.C. 13703), pooling (49 U.S.C. 14302), mergers (49 U.S.C. 14303), and through-route requirements (49 U.S.C. 13705). No licensing functions were assigned to the Board.

Based on the evidence and argument that have been presented, it is now clear that what CME seeks is a finding that the ICC precedents for determining the quality and quantity of interstate operations necessary to preempt state regulation of intrastate services are no longer applicable, given the statutory changes to what is now section 13902(b)(3) that were made in the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (STURA), and later in ICCTA. Alternatively, CME seeks a finding that its interstate operations conducted pursuant to its federal license are substantial enough that, even under the case law preceding ICCTA and

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<sup>2</sup> See Exhibit 2 to CPUC Reply filed Sept. 21, 2005.

STURA, its intrastate operations over the same route come within the reach of the authority conferred by section 13902(b)(3) for intrastate service.

These issues concern provisions of the statute that, under section 13301(a), come under the jurisdiction of the Secretary, not the Board. Indeed, to support its position that CME does not provide adequate interstate service, CPUC appends letters from officials in the U.S. Department of Transportation (DOT) that, it argues, show that, if DOT were to consider this matter, DOT would interpret the statute in such a manner that CME's intrastate services would not be covered by CME's interstate operating authority.

While we cannot be certain how DOT would rule on these particular facts, those letters underscore the fact that the Board is not the appropriate Federal agency to address the reach and effect of the federally issued authority.<sup>3</sup> Accordingly, we must dismiss this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CME's petition for a declaratory order is denied and this proceeding is dismissed.
2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary

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<sup>3</sup> The fact that, in one of those letters, a DOT official indicates that the Department generally does not conduct evidentiary proceedings when a carrier's intrastate operations are challenged by a competitor or a state agency does not mean that the Board can therefore step in to resolve the issues in this case. The parties may pursue the matter before the district court, which has jurisdiction over the matters before it.