

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: June 1, 2005

On September 24, 2004, East West Resort Transportation, LLC, and TMS, LLC d/b/a Colorado Mountain Express, which do business under the single name of Colorado Mountain Express (CME) and will be referred to jointly as such here, filed with the Board, and served on the Colorado Public Utilities Commission (CPUC), a petition for a declaratory order. CME requested that the Board determine whether 49 U.S.C. 14501(a) preempts CPUC from regulating the rates which CME may assess for scheduled, regular-route, intercity motor carrier transportation of passengers in Colorado. CME stated that CPUC had commenced an enforcement action against CME, charging CME with having carried passengers on its vehicles at rates not on file with CPUC and having collected fares other than those prescribed by CPUC, in violation of Colorado law. CME claimed that it is a motor carrier engaged in interstate commerce over its authorized routes, and therefore that section 14501(a) preempts CPUC from requiring CME to file its rates with the state or charge state-prescribed rates. On October 14, 2004, CPUC filed a petition to intervene and request for an order establishing a procedural schedule.

By decision served on March 21, 2005, the Board granted CPUC's petition to intervene and instituted a declaratory order proceeding. By decision served on April 8, 2005, the due dates for CPUC's reply and CME's rebuttal were extended to June 10, 2005, and June 20, 2005, respectively, in order for CPUC to conduct discovery. On April 14, 2005, CME filed a motion for protective order, stating that the documents requested by CPUC in discovery contained proprietary and commercially sensitive information and that the public disclosure of that information could be competitively damaging. By decision served on May 19, 2005, the Board granted the motion for the protective order.

On May 25, 2005, and May 27, 2005, CPUC filed petitions requesting that the Board issue subpoenas requiring that representatives of the following two nonparty entities appear at deposition and produce documents: Vail Resorts Management Company (Vail Resorts) and S&L Travel Partners, Inc., which owns travel businesses including but not limited to Aspen Ski Tours, Inc. and Ski.com (collectively, Aspen Ski Tours). According to CPUC, both of these entities have or may have had contracts or

agreements with CME. CPUC requests that the Board subpoena Christopher Jarnot, Vice President for Marketing and Sales, Vail Resorts, and Susan Rubin-Stewart, Director of Reservations, Vail Resorts, to appear at depositions scheduled for June 2, 2005, and Mark Uhlfelder, Vice President, S&L Travel Partners, Inc., to appear at a deposition scheduled for June 7, 2005. CPUC contends that the depositions sought are needed to obtain a more thorough understanding of the representations made in the representatives' verified statements included in CME's Petition for Declaratory Order and to elicit sworn testimony regarding the process that led up to the preparation of those verified statements, and that the documents sought are necessary to answer the threshold question of the substantiality of CME's shuttle services.

By facsimiles submitted on May 27, 2005, and May 31, 2005, Vail Resorts and Aspen Ski Tours, respectively, have indicated that the representatives will be made available to be deposed in response to subpoenas from the Board.¹ Both Vail Resorts and Aspen Ski Tours, however, contend that, because they are not parties to this proceeding, and because the document production requests are unprecedented, unduly burdensome, and oppressive, they will file replies opposing CPUC's petitions insofar as they seek the production of documents.²

A non-party can be compelled to respond only to a subpoena issued pursuant to 49 U.S.C. 721(c). This provision allows the Board to subpoena "witnesses and records related to a proceeding of the Board." Under 49 U.S.C. 721(d)(1), a party "may take the testimony of a witness by deposition and may require the witness to produce records." If that witness "fails to be deposed or to produce records under paragraph (1), the Board may subpoena the witness to take a deposition, produce the records, or both." 49 U.S.C. 721(d)(2). Inasmuch as Vail Resorts and Aspen Ski Tours have stated that they will not allow their representatives to be deposed absent a subpoena by the Board, and because good cause has been shown regarding the need for the requested testimony, the Board will issue a subpoena at this time. The time for the deposition of Mr. Uhlfelder will be set by agreement of the parties.

However, inasmuch as the Board has not yet received a reply from Aspen Ski Tours to the request for a subpoena regarding documents, a subpoena ordering the production of documents will not be issued at this time. The parties are encouraged to work together to voluntarily come to an agreement regarding that issue. Any commercially sensitive materials can be protected through the protective order previously issued by the Board in this proceeding.

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

¹ Aspen Ski Tours states that Mr. Uhlfelder cannot be deposed on June 7, 2005, because counsel for CME is not available on that date. CPUC and Aspen Ski Tours are encouraged promptly to reschedule this deposition at a mutually agreeable time.

² Vail Resorts submitted that reply on June 1, 2005. Aspen Ski Tours has not yet replied.

It is ordered:

1. CPUC's motion for subpoena to appear at deposition is granted as regards Mr. Jarnot and Ms. Rubin-Stewart. Mr. Jarnot and Ms. Rubin-Stewart are directed to appear for depositions at the offices of Vail Resorts, 137 Benchmark Road, Avon, CO 81260, at 9:00 a.m., June 2, 2005, and 1:00 p.m., June 2, 2005, respectively.

2. CPUC's motion to subpoena Mr. Uhlfelder is also granted. Mr. Uhlfelder is directed to appear for deposition at a time mutually convenient to the parties.

3. CPUC's motions for subpoenas to produce documents will be addressed, if necessary, in a subsequent decision.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary