

STB NO. MC-F-20902

COLORADO MOUNTAIN EXPRESS, INC., AND AIRPORT
SHUTTLE COLORADO, INC., d/b/a ASPEN LIMOUSINE
SERVICE, INC.--CONSOLIDATION AND MERGER--
COLORADO MOUNTAIN EXPRESS

Decided February 25, 1997

The Board accepts the Colorado Public Utilities Commission's late-filed comment as a petition to reopen this proceeding and denies it to the extent anything more than clarification was sought.

BY THE BOARD:

In a notice served November 27, 1996, and published at 61 Fed. Reg. 60,747-48 (1996), we tentatively approved the application of two motor passenger carriers, Colorado Mountain Express, Inc., and Airport Shuttle Colorado, Inc., for authority under 49 U.S.C. 14303 to consolidate or merge into a new entity, Colorado Mountain Express, and specified that the authority would become effective on January 13, 1997,¹ unless opposing comments were filed prior to that time. The Colorado Public Utilities Commission (CPUC) submitted comments on January 14, 1997. Because the tentative grant of authority had already become effective, permitting applicants to consummate the instant transaction, we are accepting CPUC's late-filed comment as a petition to reopen the proceeding and will deny it to the extent anything more than clarification was sought.

CPUC states that it does not generally oppose the instant transaction and does not question that applicants may merge their interstate certificates and operations, subject to our approval under 49 U.S.C. 14303. However, CPUC

¹ Under 49 U.S.C. 14303(d), written comments may be filed within 45 days after notice of the application is published in the *Federal Register*.

states that it does not interpret section 14303 as preempting state jurisdiction over purely intrastate matters, including authorization requirements for the merger, sale, or transfer of intrastate operating rights. It requests clarification as to whether and how our decision approving the proposed merger relates to the requirements placed on applicants under the pertinent aspects of Colorado State law that apply to intrastate certificates of public convenience and necessity (CPCN) and intrastate operations.²

If the participants to a finance transaction are motor carriers of passengers, subject to our jurisdiction under 49 U.S.C. 13501, then, under 49 U.S.C. 14303(f),³ they are subject to our exclusive and plenary jurisdiction in all matters relating to their consolidation, merger, and acquisition of control, and this extends to intrastate operating rights.⁴ This entitles them to carry out any Board approved or exempted finance transaction under section 14303, own and operate property, and exercise control without state approval, and, in doing so, they are specifically exempted from all state and municipal laws, as necessary.

Although applicants' regular route operations appear to be entirely within the State of Colorado,⁵ CPUC does not question, and appears to acknowledge, that they also operate in interstate commerce, and, at least as to their interstate operating rights, that they are subject to our jurisdiction for transactions

² CPUC states that applicants apparently do not intend to request any change in their Colorado CPCNs and do not intend to notify CPUC when a decision on their merger application is administratively final. It contends that regardless of our actions, it is not preempted from taking whatever action is required under Colorado law governing CPCNs.

³ The full text of section 14303(f) provides that: A carrier or corporation participating in or resulting from a transaction approved by the Board under this section, or exempted by the Board from the application of this section pursuant to section 13541, may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in the approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

⁴ Prior to the enactment of the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat 803 (1995), the Interstate Commerce Commission's authority, under former 49 U.S.C. 11341(a), was specifically described as exclusive. Although this specific terminology does not appear in 49 U.S.C. 14303, the language of section 14303(f) is derived from the former statute and has substantially the same effect.

⁵ In the November 27 decision we noted that applicants hold similar interstate and intrastate operating rights authorizing: (1) charter and special operations within Colorado; and (2) regular route service mostly between Denver and such points as Aspen, Avon, Beaver Creek, Glenwood Springs, Grand Junction, and Rifle, CO.

requiring approval under 49 U.S.C. 14303. Indeed, it is well settled that services within a single state may be in interstate commerce and subject to our jurisdiction when there is a through ticket or some other arrangement between the involved carriers for through transportation to or from a point in another state. See, *Kimball--Petition for Declaratory Order*, 131 M.C.C. 908, 916-18 (1980); *Portland Airport--Petition for Declaratory Order*, 118 M.C.C. 45, 47-48 (1973); *Wisconsin-Michigan Coaches, Inc.*, 124 M.C.C. 448, 450 (1976); *Midwest Transp., Inc., Common Carrier Application*, 98 M.C.C. 362, 363-364 (1965); *Motor Transp. of Passengers Incidental to Air*, 95 M.C.C. 526, 536 (1964).

Similarly, CPUC does not suggest that the transaction is intended only to effect a merger of applicants' intrastate operating rights without their having to seek state approval. See, *North Alabama Exp., Inc. v. I.C.C.*, 62 F.3d 361 (11th Cir. 1995) (*North Alabama*). Indeed, as noted, CPUC does not question, and seems to acknowledge, that applicants operate in interstate commerce and that this aspect of their operations properly is subject to our jurisdiction. Once interstate jurisdiction over the motor passenger carrier participants is established under 49 U.S.C. 13501, Federal law under 49 U.S.C. 14303(f) specifically preempts any state action that would interfere with the consummation of a Board approved or exempted merger, consolidation, or acquisition of control, regardless of the extent of the participating carriers' operations in intrastate commerce.⁶

Additionally, there are two other preemptions from state regulation that relate to operations and are conferred independently under the statute and do not

⁶ While CPUC does not argue that the transaction may violate the principles announced in *North Alabama*, with respect to the transfer of intrastate certificates, we have reviewed the transaction in that context and find that it is consistent with those principles, as well. Under *North Alabama*, intrastate operating rights may be transferred, without considering state law, if a transaction we approve represents a bona fide transaction involving operations in interstate commerce, as well as interstate operating authorities, and the intrastate operating rights transferred are related to the approved interstate transaction. Because this is a merger and consolidation of competing carriers, both operating in interstate commerce over very similar routes, the transaction, by its very nature, will result in an actual change in interstate operations. Moreover, because applicants' interstate and intrastate routes basically are coextensive and their transportation services presumably are used simultaneously by passengers traveling both in intrastate and interstate commerce, the transfer of the intrastate operating rights is directly related to the interstate transaction and treating it otherwise would interfere with our approval of the interstate aspects of the transaction.

result from our jurisdiction over a specific transaction under 49 U.S.C. 14303. Specifically, with respect to interstate and intrastate transportation (other than intrastate commuter bus operations) by motor passenger carriers on interstate routes, 49 U.S.C. 14501(a)⁷ provides that states may not regulate either: (1) operating schedules (except that states may require not more than 30 days' notice of schedule changes); or (2) rate changes in regular-route or charter operations. Also, 49 U.S.C. 13902(b)(3)⁸ provides that interstate motor passenger carriers, subject to our jurisdiction under 49 U.S.C. 13501 (and registered with the Secretary of Transportation), are automatically authorized to provide intrastate, regular-route passenger transportation over any route they use to provide interstate passenger transportation.

Accordingly, Colorado may not take any action affecting state licensing or certification that would in any way interfere with the applicants' consummation of the instant transaction. Nor may it purport to regulate the transfer of intrastate operating rights which we have authorized to be transferred in connection with our approval of applicants' request to merge their interstate and intrastate operations. With respect to intrastate transportation on interstate routes by applicants and any other motor passenger carriers in regular route or charter service (other than intrastate commuter bus operations), Colorado may require up to 30 days' notice of regular route schedule changes but may not otherwise regulate operating schedules or rate changes. Because CPUC did not comment in opposition to the instant transaction, we will deny its petition to reopen, to the

⁷ The full text of section 14501(a) provides that:

No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations.

⁸ The full text of section 13902(b)(3) provides that:

A motor carrier of passengers that is registered by the Secretary of Transportation under subsection (a) is authorized to provide regular-route transportation entirely in one State as a motor carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier provides interstate transportation of passengers.

extent anything more than clarification was sought, and discontinue the proceeding.

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

It is ordered:

1. The petition to reopen is denied to the extent anything more than clarification was sought.
2. This decision is effective on February 28, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.