Decision No. 11674

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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WEST BERKELEY IMPROVEMENT CLUB, a voluntary civic and commercial organization, and divers citizens and taxpayers of Berkeley, County of Alameda, State of California, for an order authorizing the San Francisco-Oakland Terminal Railways, a corporation, to continue Dwight Way street car line northerly on Sixth Street, in the City of Berkeley and Sixth Street therein.	Case No. 1523
Complainants.	
-vs-	
SAN FRANCISCO-OAKLAND TERMINAL RAILWAYS, a corporation.	
Defendant.	

George Gelder for Plaintiffs.

Morrison, Dunne & Brobeck, by W. I. Brobeck and A. L. Whittle, for Defendant.

BY THE COMMISSION:

O P I N I O N

In this proceeding the West Berkeley Improvement Club, a civic and commercial organization, and ten citizens and taxpayers residing in West Berkeley join in a complaint against the San Francisco-Oakland Terminal Railways, a corporation, and allege that public convenience and necessity require the extension by defendant of a certain street car line of its system, known as the "Dwight Way Line", from its present terminus at the southerly intersection of University Avenue with Sixth Street in Berkeley, along and upon said Sixth Street in a northerly

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direction to the northern city limits of the City of Berkeley. The prayer of the complaint is for an order of the Commission compelling the defendant to extend and continue the existing car line from its present terminus at Sixth Street and University Avenue, Berkeley, along said Sixth Street to the northerly city limits of Berkeley, and to establish and thereafter maintain a regular service and schedule on such desired extension.

The defendant filed its answer herein denying the material allegations of the complaint and as an additional defense and answer alleging that this Commission has no jurisdiction over the subject matter of the complaint.

A public hearing on this proceeding was conducted by Examiner Handford at Berkeley, the matter was duly submitted upon the evidence and upon briefs filed by counsel for complainants and defendant, and is now ready for decision.

Mr. Joseph F. Chase, a witness for complainants, testified that he had been employed to make an investigation of the number of persons employed and residing in the territory bounded by University Avenue; by the west side of Ninth Street north to the Berkeley line; by the Berkeley city limits to the Bay; and by San Francisco Bay. In this territory witness found a resident population of 1173 persons, adults and minors, and 801 persons employed in factories or industrial plants, 426 of the factory employes being prospective patrons of the desired extension of the Dwight Way car line. The resident population was secured by inquiry of the witness at each dwelling and the number of employes and their prospective use of the desired extension by inquiry from officials at the several industrial plants.

Other witnesses for complainants, including the Mayor

and two of the members of the City Council of Berkeley testified as to the necessity for the proposed line to serve the residences and industrial plants in the West Berkeley District; as to interviews had by committees with the officials of defendant regarding the establishment of the proposed railway extension or the possibility of temporarily caring for the needs of the district by the operation of an automobile bus line over the route herein desired.

Defendant, San Francisco-Oakland Terminal Railways, presented as exhibits its estimate covering the cost of construction of the 5200 feet of track; a map showing all residences in the district and an estimate of the revenue to be derived from operation and the expense of conducting such service.

According to the map, filed as Exhibit "B" by defendant, there were at the time of the hearing 411 dwellings occupied by 1506 residents, including children, of which number 252 residents left their homes daily in connection with their employment. A portion of the territory included on the map filed as an exhibit is within three blocks of the University Avenue car line of the defendant, such portion including the territory bounded by University Avenue; San Francisco Bay; Virginia Street and Ninth Street. We are of the opinion, as heretofore expressed by the Commission in proceedings of this character, that a distance not exceeding three blocks is not unreasonable for the walk required to reach the service of a street car line. The territory beyond the three block distance from an existing car line contains 230 dwellings occupied by 848 residents (including children) of which number 166 leave the district daily by reason of their employment. Defendant estimates the cost of construction of the proposed

extension, using standard construction, as $58,160.17 which includes a single track line with one turn-out, all fully equipped with overhead line construction and oil macadam pavement. No car equipment has been included in this estimate.

This estimate has been checked by our engineers just prior to the making of this order. They estimate that a single track 4100 feet in length with a 300 foot passing track can be constructed for $35,000, this estimate also being predicated upon standard track construction, but using wood poles, including joint use of the existing poles along the east side of Sixth Street. Without this passing siding the estimate is $30,300.

Defendant submitted estimates of expected revenues and the cost of operation of the proposed extension, the earnings being estimated as follows:

Estimated earnings based on actual count of residents (Sec. "B" only A $9.00 per Capita per year.848	$7,632.00
From Factory Workers, 200 rides per day for 300 days per year	3,600.00
Total	11,232.00

This estimate has also been examined with the result that we think the probable additional revenue would be only $8700.00. This figure is predicated upon the 850 residents residing in the territory now situated more than three blocks from the existing car lines of the defendant each riding one hundred times per year more than they now do and that from the 426 factory workers in the district there could be expected one hundred to ride 600 times per year; both classes of traffic to provide six cents in additional revenue per ride.

Defendant also submitted an estimate of operating expenses predicated upon one-man car operation as follows:

Operating Expenses, Return upon investment, Depreciation, and Taxes

Operating expenses based on 18 car hours per day (One-man car) @ $1.50 per car hour, 365 days per year	$9 855.00
Return upon investment @ 8%	5 172.81
Depreciation @ 4%	2 586.40
State Taxes @ 5¾% of Gross Revenue	589.68
	$18 203.86

This statement is not, of course, a proper statement of operating expenses, as it includes items which are not properly chargeable under this heading. Restated, defendant's estimates show a loss of $1799.08 available for return on the basis of one-man operation and $4799.08 on two-man operation. The extension of the existing Dwight Way line using the same number of cars now operated does not appear feasible, because of the necessity of increasing the headway from ten minutes to approximately fifteen minutes, a service condition which would be unsatisfactory to that portion of the public using this line. The cheapest practical service for this extension would be by means of a one-man car operated in shuttle service between University Avenue and Gilman Street, from which it is estimated there would be a return of $785 or 2.6% on the $30,300 new capital expenditure required. Two-man operation would change this small profit to a loss.

With reference to the use of the one-man car in the City of Berkeley: By resolution No. 9550 N.S. of the City Council it is recorded that the use of one-man cars is undesirable, impracticable and unsafe and the terms of this resolution have been construed by defendant to prohibit the use of one-man cars in Berkeley and no such cars are operated in this City.

Bus operation has also been considered and would, under our estimates of revenue, result in a loss, but under defendant's estimate of revenue, in a small profit on an investment of $6600

for an additional bus.

The defendant in its answer, at the hearing and by its briefs filed herein has taken the position that the jurisdiction of the Commission does not extend, under the statutory law, to the right to make its order for the construction of the track extension herein prayed for by complainants; that the construction of the track extensions would require as a condition precedent thereto a franchise from the City of Berkeley and that the Commission has no power to compel the granting of a franchise, such power vesting wholly in such municipality; that the Commission has no jurisdiction to order an extension of a railroad into new territory; that the construction of the proposed extension and its subsequent operation would increase the present accruing deficit of the defendant's system.

A number of citations appear in the defendant's brief supporting the foregoing contention and particular reference is made to the ruling of the Supreme court in the case of

> Atchison, Topeka & Santa Fe Railway Company, (1916) 173 Cal. 577, P.U.R. 1917 B 336, & A.L.R. 975,160 Pac 828.

as follows:

> "The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it shall engage in a new and additional enterprise, is one of policy to be determined by its directors. To compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not desire to construct or operate is to take its property."

While the soundness of this ruling is, of course, unquestioned, we think it is not applicable to the present case. The issues herein presented are not dissimilar from those presented to the Commission in Case 1714, an application of the Hollywood Chamber of Commerce for an order for certain car lines

of the Los Angeles Railway Corporation to be extended northerly into Hollywood territory (Decision No. 10929, as decided December 1, 1922).

In the above quoted case similar contentions were made by the Los Angeles Railway Company and the following portions of the Commission's opinion in such proceeding appear applicable to the instant case:

> "The street railway is a common carrier of passengers. It carries all persons who desire to ride. Though it obtains its franchises from the city, it cannot exercise those franchises without the consent of the state expressed through the Railroad Commission. Section 50 (b) of the Public Utilities Act provides that,
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> 'No public utility of the class specified in subsection (a) hereof (this includes street railways) shall henceforth exercise any right or privilege under any franchise or permit hereafter granted * * * * without having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege.'
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> "Under this section the Los Angeles Railway could not extend its lines if it desired to do so and had obtained the necessary franchises without first obtaining the consent of the Railroad Commission. The city could grant the franchises but the railway company could not use them unless the Commission found that public convenience and necessity required the extensions. The City's power has to do with the use and occupation of the street, the Commission's power deals with the necessity for the extension itself. If the company must apply to the Commission for consent to make the extension we think the reverse of this is true and the Commission has power to order the company to make the extension.
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> "It is urged by the Los Angeles Railway Company that under the city charter the terms of any franchise which the city could grant are onerous and even confiscatory and that the company could not be compelled to accept such a burdensome franchise even though the city is willing to grant it. We do not think it is necessary to pass upon the validity of the franchise provisions of the city charter. We may assume that these provisions are valid and the company may be required to operate under them. It may be added, however, that the company cannot be required to operate at a loss; but would be entitled to collect a rate which will produce a fair

return on all new capital which might be required to carry out the extensions, should they be ordered.

"A more serious objection is that to order these extensions would be to require the company to perform a new public service which it has never undertaken to render. This raises the question of whether the proposed service comes within the scope of the undertaking which the railroad company has assumed. There is no doubt as to the legal principle that a public utility cannot be required to dedicate its property to a new and additional enterprise not theretofore undertaken by it. (Atchison, Topeka and Santa Fe Ry. vs. Railroad Commission, 173 Cal. 577.)

"It is argued that when a company is required to have separate franchises for each street upon which a car line is operated, the undertaking to serve is defined and limited by these franchises. In other words, that the obligation to serve cannot be extended beyond the rights which have been granted. No authority is cited which would justify such a narrow construction of the law as this. The Santa Fe and Del Mar cases hold that a utility cannot be required to engage in an entirely new undertaking but they do not hold that the present undertaking is limited by, and coincident with, the exact franchise rights held by the utility. We do not think that franchise rights are the correct measure of the scope of a utility's undertaking. When a street railway has entered a given territory, it may, by declarations made to the city council or by other acts or statements, have signified its intention to serve all of that territory. The fact that it does not have franchises to serve all such territory would not relieve it of its obligation. If it has entered and undertaken to serve a community it must make all extensions necessary to fully perform that service.

"A different situation arises when a territory has never been entered at all and the utility has never signified its intention of serving it or has always signified its intention of not serving it. In that event there can be no doubt that an order requiring extensions into such territory would be invalid. It is claimed by the railroad companies that this is the situation here."

A situation exists in this proceeding where defendant has signified its intention of serving the territory by an extension of the street car line as herein prayed for by the complainants. The evidence in this proceeding shows testimony of city officials and others who were present at interviews with the vice-president and general manager of the defendant company and this Commission in its decision on Appli-

cation No. 3219 in the matter of the Application of San Francisco-Oakland Terminal Railways for an order readjusting its passenger fares between points in Alameda County and points in Alameda and Contra Costa County, Decision No. 5687 as decided August 13, 1918 (Opinions and Orders of the Railroad Commission of California, Vol. 15, pages 1072, 1077) authorized an amount of $31,600 as a portion of the rate base, such amount to be expended for the construction of the identical extension herein prayed for. The defendant by such claim for an amount to be expended in the construction of this line to a district at such time termed by the company as being inadequately served, has certainly signified its intention of serving the particular territory and could be required by this Commission to make the extension.

It is concluded, however, from our investigation, that the installation of the street car service as prayed for by the complainants is not justified, especially taking into consideration the general question of extensions in the territory served by defendant. Although there is no doubt in our mind that many extensions are justified, defendant has made practically no extensions in the last ten years, largely because of the alleged unsatisfactory franchise conditions. Having in mind the whole East Bay territory we are convinced that order to install street car service as prayed for herein is not justified and one important consideration leading to this conclusion is the problematical gross revenue upon the accuracy of which depends the question of the return to be earned. There is also an important question as to operating expenses, as the necessity for two men on the cars may also be the factor which determines whether or not rail service is justified.

On the other hand, bus service should be considered

for this line. It has the advantage of small capital expenditure not restricted to this locality; the operating costs are not influenced by the question as to the number of men required and may be estimated with reasonable accuracy and if installed and operated for a reasonable time will determine quite closely what additional revenue is to be derived from the territory to be served. There is certainly an obligation upon the defendant to render some sort of service in this district and it is suggested to defendant that it apply to the municipal authorities for a permit to operate a bus and that it install such service as a trial to determine whether or not the continued operation of motor transportation is justified and also whether or not installation of rail service is required.

With this suggestion this complaint should be dismissed without prejudice.

O R D E R

A public hearing having been held in the above entitled proceeding, the matter having been duly submitted following briefs filed by counsel,

IT IS HEREBY ORDERED, that the complaint herein be and it is hereby dismissed without prejudice.

Dated at San Francisco, California, this 16th day of February, 1923.

C. L. Seavey
H. E. Benedict
Irving Martin
J. L. Whittaker
Commissioners.