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ORIGINAL

Decision No. 9892

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of WESTERN MOTOR TRANSPORT COMPANY for certificate of public convenience and necessity to operate auto stage line for transportation of passengers between Rodeo-Livermore, and intermediate points.	Application No. 5274
In the Matter of the Application of Walter Williams, Albert Pietronave and Percy L. Blise, doing business under the fictitious name and style of BAY SHORE STAGE COMPANY, for a certificate of public convenience and necessity to operate auto stage line for transportation of passengers between Oakland and Martinez.	Application No. 5361

Sanborn & Roehl, by H.H. Sanborn, and DeLancy C. Smith, for Western Motor Transport Company.

Jesse H. Steinhart, for San Francisco-Sacramento Railroad.

Arthur L. Levinsky, for Central California Traction Company.

John T. York, for San Francisco, Napa & Calistoga Railway Co.

Clarence M. Oddie, for American Short Line Railway Association.

Harry A. Encell and H. W. Kidd, for Motor Transit Company.

Frank Karr, for Pacific Electric Railway Company.

D. J. Hall, for City of Richmond.

E. J. Sinclair, for Ward's Auto Bus Line.

Morrison, Dunne & Brobeck, by Herbert W. Clark, for San Francisco-Oakland Terminal Railways.

Warren E. Libby, for Pickwick Stages and White Star Auto Stages.

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Rollin L. McNitt, for Hamilton & Wilson, Lusby Lines.

E.E. Rodabaugh, for Boulevard Express.

J. E. McCurdy and Charles F. Wren, for Pickwick Stages, Northern Division.

N. C. Folsom and F. D. Howell, for Motor Transit Company and Motor Carriers Association.

F. B. Austin and L. N. Bradshaw, for Southern Pacific Company.

J. E. McCurdy, for Motor Carriers Association.

A. L. Whittle, for San Francisco-Oakland Terminal Railways.

E. W. Camp and Paul Burks, for The Atchison, Topeka and Santa Fe Railway Company.

Jesse H. Steinhart and John J. Goldberg, for San Francisco-Sacramento Railroad.

LOVELAND, Commissioner:

OPINION AND ORDER DENYING REHEARING

Under Application No. 5274, the Western Motor Transport Company applied for a certificate declaring that public convenience and necessity require the operation by said Transport Company of an auto stage between Rodeo and Livermore and certain named intermediate points.

Under Application No. 5361, certain individuals operating as partners under the name of Bay Shore Stage Company, sought similar authorization to operate between Oakland and Martinez.

The two applications were combined for hearing and decision, and by the Commission's Decision No. 7340 the prayer of both applicants was granted, subject to certain

conditions and limitations, which are unnecessary to notice here.

Prior to obtaining this operative right between Rodeo and Livermore, the Western Motor Transport Company had obtained an operative right between Oakland and Rodeo, hence, it was apparent that by combining these two routes, it became physically possible to establish a through operation between Oakland and Livermore and intermediate points. The terms of the Commission's Decision No. 7340 did not expressly authorize such through operation, neither did it expressly prohibit it. However, the San Francisco and Sacramento Railroad, a protestant in the proceeding, anticipating the possibility of such through service which would involve competition with its line, filed a petition for rehearing and a request for modification of the certificate granted under Decision No. 7340, by an express condition prohibiting the linking up of the new route with the old one, so as to put in a competitive through service. This protestant also urged that similar conditions be imposed upon a certificate granted to the Bay Shore line. The issue was thus presented to the Commission of whether or not operating rights over the component parts of a through route can be linked up by the holder of such rights for the purpose of instituting a through service without application first having been made to the Commission and authorization obtained for each through service.

The Commission held special hearings for the consideration of this question at both San Francisco and Los Angeles, in which Application No. 5928 was joined because a similar issue had developed in that proceeding. This proceeding, Application No. 5928, had no other connection with the matters now under discussion, and will not be further referred

to herein. The principles herein set forth, however, may be considered applicable to the decision in that case.

In addition to oral argument had upon the question of whether or not the parts can be combined to make a through service, briefs were filed on behalf of applicant and San Francisco-Oakland Terminal Railways, the San Francisco and Sacramento Railroad and Southern Pacific Company. The matter, therefore, has been fully presented.

The correct determination of the question here involved depends in large measure upon a correct understanding of the legal significance of a certificate of public convenience and necessity granted by the Commission to transportation companies. It has been contended that this certificate operates to grant a right similar to a franchise held by street railroads to use and occupy streets, and it was further urged that the transportation companies would have the same right to link up their operative rights under certificates that railroads have to extend their lines by combining different franchises linking up the rights granted thereunder to occupy different streets within a city. This argument proceeds upon an erroneous assumption, and the result reached by it is not sound. The certificate of public convenience and necessity is distinctly different from the grant of a franchise to use and occupy streets. The former is strictly a regulatory measure, while the latter is a grant of a limited property right for the use of public streets, and may have nothing whatever to do with regulation of the utility to which such grant is made. The distinction between the two was clearly indicated by the Supreme Court in its decision in the case of Oro Electric Corporation v. Railroad Commission, 169 Cal. 466. In that case the Court was considering a certificate of public convenience and necessity granted by the Commission under section 50(a) of the Public

Utilities Act, to an electric company desiring to extend its lines into the City of Stockton. The particular issue was whether the granting of this certificate would impair the right of the City of Stockton to grant a franchise to such company. At page 475 of the opinion the Court says:

> "Before proceeding to an analysis of these provisions," (the Charter of the City of Stockton), "it will be well to refer briefly to the distinction drawn by counsel against the petitioner, between a franchise or grant of a right to engage in the business of furnishing electric current, and the narrower grant of a right to occupy the streets of the city in carrying on that business * * *. The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public. (See People v. Willcox, 207 N.Y. 86, etc. * * *) This is an entirely different question from that of the local control of the streets, and power over the two subjects may well be vested at the same time in different governmental bodies, without the one in any way clashing with or interfering with the other. The railroad commission might grant a certificate authorizing a public utility to engage in its business in a given city, but the certificate would not authorize the use of the streets, unless the right to so use them had been given by the authority vested with the power to grant such right."

The foregoing quotation from the decision in the Oro case is particularly in point by reason of the fact that the provisions of the Auto Stage and Truck Transportation Act as originally enacted (Statutes 1917, Chapter 213) vested the two powers above referred to in different governmental bodies. Under section 3 of the Act of 1917, cities and counties were given the power of local control of the streets and highways to be used by transportation companies. At the same time, under the provisions of section 5 of that act, the Railroad Commission was given the power of determining whether or not it was in the interest of the general public that the enterprise of carrying persons or property as a transportation company should be prosecuted over the highways as to which the local authorities granted the right of use.

By the amendment of 1919 (Statutues of 1919, Chapter 280), section 3 ofcthe act was repealed, thus eliminating all powers theretofore vested in local authorities by virtue of this act to grant or withhold the right to occupy the streets of the particular locality for the purpose of operating a transportation company. There remained, and still remains, vested in the Railroad Commission, the power of granting or withholding a certificate declaring that public convenience and necessity require the proposed operation of such transportation company. As pointed out by the court in the above quoted decision, this is an exercise of the power of the State to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public. Many considerations enter into a determination of whether or not such certificate should be granted. Important among these is the extent to which the communities proposed to be served are already provided with means of transportation by other public utilities. Under regulation, the power to protect from unnecessary competition, a public utility which is doing its full duty to the public is correlative to the power to require reasonable rates and adequate service.

In granting a certificate, the Railroad Commission must find and declare that public convenience and necessity require the operation by the applicant of an auto stage between fixed termini or over a regular route. The finding by the Commission that such public convenience and necessity require operations between the various termini of the component parts of a through route, is not the same thing as finding that public convenience and necessity require the operation between the ultimate termini of the through route itself. To illustrate by using the facts of this case: The Commission having found that public conveni-

ence and necessity require the operation of an auto stage from Oakland to Rodeo, and granted certificate therefor, and by a later proceeding found and declared that public convenience and necessity required the operation of a transportation company between Rodeo and Livermore, it cannot be soundly contended that the Commissionmhas, in effect, found and declared that public convenience and necessity require the operation of an auto stage from Oakland to Livermore. In considering the proposed operation from Oakland to Rodeo, and from Rodeo to Livermore, no consideration at all may have been given to the necessity or convenience of an operation from Oakland to Livermore. Thus an existing operative right between Oakland and Livermore by the more direct route, which does not pass through Rodeo, might be seriously affected by a new operation through Rodeo, yet in the granting of the certificates from Oakland to Rodeo, and Rodeo to Livermore, no opportunity would be given to this existing carrier to present protest and introduce evidence showing that the traveling public between Oakland and Livermore are adequately and well served by the existing means of travel.

We think it is clear from what has been shown that operative rights under certificates separately granted cannot be lawfully combined for the establishment of a through service without first obtaining from the Railroad Commission a certificate of public convenience and necessity authorizing the through service. In the practical application of this legal requirement it is to be borne in mind that the Commission's powers are of sufficient latitude to meet any variety of circumstances that may be presented. Section 5 of Chapter 213, Statutes of 1917 as amended, provides:

> "The railroad commission shall have power, with or without hearing, to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought and may

attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require."

When the establishment of a through service by the linking up of local operations is the sole object sought to be obtained by an application, due consideration must, of course, be given to this circumstance as one factor in determining public convenience and necessity. In some instances it may be unnecessary to hold a hearing, but in all cases it is necessary--and the act clearly provides--that the Commission, as a regulatory body of the State, shall first determine, after a consideration of all the facts and circumstances, that public convenience and necessity require the operation before any service may be undertaken different from that originally authorized.

It is recognized that the present operations of many transportation companies may be affected by this decision. Therefore, in the interest of constructive regulation, the Commission will allow a reasonable time within which application for certificates of public convenience and necessity may be filed to place all operations on a basis consistent with the principles herein laid down. This will be done by a general order or other proper measure outside of the present proceedings. It is referred to here, however, for the purpose of making clear the attitude of the Commission in laying down the basis for subsequent application of the law as herein interpreted.

In the proceedings here under consideration, the Commission was asked to grant a rehearing for the purpose of modifying its prior order by imposing an express restriction against the possible future linking up of local operations to form a through route. In view of what has been said, such express inhibition is unnecessary. In the absence of such express authorization, the linking up and combining of local operations is not lawful. The petition for rehearing will, therefore be denied.

<u>O R D E R</u>

IT IS HEREBY ORDERED that the petition filed herein by the SAN FRANCISCO AND SACRAMENTO RAILROAD on April 22, 1920, for a rehearing and for modification of the order heretofore made herein on April 3, 1920, be, and the same is hereby, denied.

The effective date of this order is hereby fixed and designated as the 10th day of January, 1922.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 20d day of December, 1921.

H. W. Brundige
H. D. Loveland
Irving Martin
Chester H. Rowell

Commissioners.

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