Decision No. 26263

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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ORIGINAL

In the Matter of the Application of FIALER'S INC., a corporation, for certificate of public convenience and necessity to operate a sightseeing limousine service.

) Application No. 18217

Douglas Brookman, and Abbott, Cannon, Appel & Daines; for Applicant

Richard T. Eddy and Earl Bagby, for Protestant, The Gray Line, Inc.

E. J. Foulds, for Southern Pacific Company,

Orla St. Clair and L. G. Markel, for Pacific Greyhound Lines, Inc.

WHITSELL, Commissioner:

OPINION ON REHEARING

Fialer's Inc., by its application herein, sought a certificate to operate a sightseeing limousine service covering three tours in the vicinity of San Francisco. After hearing thereon, the application was granted by the Commission in Decision No. 25227 issued October 3, 1932. The granting was protested by the Gray Line, Inc., which was already authorized to render a sightseeing service in the same territory. Upon petition filed by this protestant, the Commission granted a rehearing in the matter, and on February 23, 1933, received further testimony and argument thereon.

The position taken by the applicant throughout the proceeding was that no sightseeing service of the kind

and character of that proposed is now being rendered. It so alleged in its application, and at the hearings thereon it took the position that the Gray Line, Inc. was neither rendering nor authorized to render such a service. Considerable discussion developed as to the distinction between a "limousine" service and a "parlor-car" service. Fialer's Inc. directed its evidence to the public need for a limousine service, while the Gray Line, Inc. sought to prove not only that it is now authorized to render exactly the same type of service as that described in the new application, but also that it had actually operated limousines on the infrequent occasions that a demand arose for the use of such equipment.

In the decision first rendered the Commission found that the applicant's proposed sightseeing service was new and different from any now available to the public and that public convenience and necessity required the granting of the application.

At the hearing, the Gray Line, Inc. for the first time raised the question of the Commission's jurisdiction under Section 50½ of the Public Utilities Act to grant a new certificate under the circumstances here presented. It calls attention to the amendment to that section adopted in 1931 purporting to qualify the Commission's authority in granting certificates to passenger stage corporations when the proposed operation is in a territory already being served by a certificate holder. That proviso reads as follows:

> "provided that the railroad commission shall have power, after hearing, to issue said certificate when an applicant requests a certificate to operate in a territory already served by a certi-

ficate holder under this act only when the existing passenger stage corporation or corporations serving such territory will not provide the same to the satisfaction of the railroad commission.
* * *"

The protestant Gray Line, Inc. now contends, therefore, that the Commission exceeded its authority in granting a certificate to the new applicant. It denies that there was any evidence presented tending to show that it has not in the past rendered a satisfactory sightseeing service, or that it will not in the future be able to render a satisfactory service. It points out that the Commission found that it was rendering an excellent service by means of sightseeing buses. It sought to strengthen its position at the proceeding on rehearing by filing revised tariffs expressly designating the use of limousine as well as parlor-car equipment, thus offering to furnish in the future the same type of service as that proposed by the applicant, whether or not it had rendered or was authorized to render a service of that kind.

The Gray Line, Inc. claims, therefore, to be protected under the proviso above quoted, either by virtue of its existing certificate or by its present offer to render the same service, against the grant of a competing certificate. Before considering this contention, it is necessary to dispose of the question of the rights of the Gray Line, Inc. under its existing certificate.

At the rehearing the applicant moved the Commission to reject the revised tariffs filed by the Gray Line, Inc. on the ground that the latter's certificate does not permit the operation of any equipment other than parlor-cars or buses. The motion is denied. An examination of the operative rights of the Gray Line, Inc. reveals that some are prescriptive and

some derived by certification. The certificates granted authorize it to render an "automobile sightseeing service", or an "automobile sightseeing stage service". No restriction in the type of equipment has been imposed. Having acquired by prescription or by certificate a right to operate as a passenger stage corporation over particular sightseeing tours, no limitation may now be implied as to the type of equipment which it may use. It insists that it has such an operative right, and insists also that it has at times actually operated standard automobiles on its tours. Whether or not it has fully met the public need for that type of service is another question. It must be held that it is not circumscribed under its operative right in the type of equipment which it may employ.

The main question here presented, then, is whether the Commission is prohibited by Section 50½, as amended, to grant to a new applicant a certificate for a passenger stage service when an existing operator is authorized to render a like service. If the proviso added in 1931 is to be so construed, then all existing passenger stage corporations have obtained certificates or rights which are virtually exclusive. Regardless of the accepted policy of this state prohibiting the grant of exclusive franchises or privileges, this proviso, if so construed, would, in the field of motor bus transportation, abrogate such policy and in effect grant to existing carriers of this class virtual monopolies in their respective fields. It is evident that such a construction of the statute should not be accepted unless the language used compels that conclusion. But it is as clearly evident from the enactment itself that such was not the intention underlying the legislative action.

Before considering the application of this proviso to the facts presented in this particular proceeding, it is proper that the Commission express its views clearly on the general application of this new declaration of principle governing the granting of certificates of public convenience and necessity. Since it purports to limit the Commission's jurisdiction in the granting of new operative rights and serves as a further grant or protection to existing certificate holders, the construction to be given the proviso must be such as to reserve to the public body the utmost authority consistent with the reasonably implied legislative intent.

It must be presumed that in the enactment of this proviso the Legislature had in mind the precedents theretofore established in cases arising under Section 50¼ and other sections empowering the Commission to grant certificates of public convenience and necessity. If it was intended that any of those precedents be overthrown, it may be presumed that the language employed would have clearly indicated such intention. The Legislature must have borne in mind that the Commission has repeatedly held that a grant of a certificate is not exclusive, and that it is free to grant, when public convenience and necessity requires, another certificate competitive wholly or in part with the first. But the Legislature has not said that this may not hereafter be done. Nor has it declared that hereafter the Commission shall not find that public convenience and necessity require the granting of a new certificate, regardless of the past conduct of the existing operator so long as he promises to adequately perform his public obligation in the future. On the contrary, it is clear from the proviso itself that the legislative intent was to leave the

Commission free to determine in each case whether the public will be best served by the existing operator or operators only, or by the institution of an additional service.

It must be held, therefore, that the Commission is still free to follow the principle first announced in the Great Western Power Company case (1 C.R.C. 203), and when called upon to determine the ability of the existing utility to satisfactorily serve the public in the future, may judge it as of the day the newcomer knocks at the door. When public convenience and necessity require that there be more than one carrier in the field, the Commission has in the past permitted competition, and must in the future be unlimited in its power so to do. The abandonment of this fundamental principle of utility regulation would be inimical to the public interest.

To hold that the Commission has not been thus circumscribed by the amendment to Section 50½ in the granting of competing operative rights when the public convenience and necessity demand, is not to hold that the amendment is without any effect whatever, or that it may not reasonably be construed as a declaration of policy beneficial both to existing passenger stage companies and to the public.

It should be noted that the amendment does not expressly relate to applications for certificates where the proposed service is competitive with an existing operation. For the reasons above developed, a construction which implies such element of competition should, then, be avoided. The language employed indicates, rather, that the proviso was intended to relate to applications for a new and different

service from that presently rendered or which the existing operator or operators are entitled to render. The words employed clearly indicate that reference was intended to a new service not now certificated. Certificates granted to passenger stage corporations prescribe the routes to be followed and points to be served. But the Legislature in this proviso has referred only to applications to operate in "a territory" already served. A territory may be served in whole or in part by various operators and in various ways, yet the services rendered by each may be only in part or not at all competitive.

With this approach, the true meaning of the proviso may, we believe, be more easily discovered. It is proper that when public convenience and necessity require the inauguration of a new stage service, any existing operator within the territory should be first in right to undertake such a service. The applicant first in time should not necessarily be first in right. An applicant for a certificate frequently proposes to undertake a service in a territory already served, but which differs from that presently rendered, and of a kind which the existing certificate holder has no authority to render without himself applying for and obtaining an enlargement or extension of his operative right. In such a case the existing operator in a territory should be, and is under this proviso, permitted to undertake the same service as that proposed by the new applicant if public convenience and necessity require that the new service be established. If no operator already serving in the territory affected desires thus to become in effect an applicant for the right to render such a service, or is found unable to render the service satisfactorily, then

only, if public convenience and necessity require, may the first application be granted.

Such a construction of the above quoted amendment does not violate the fixed policy of this state against the grant of exclusive privileges, yet expresses a salutary principle of utility regulation in respect to the granting of new operative rights. It is a construction reasonably found in the language of the statute itself, and one not contrary to the public interest. The procedural problems involved in carrying out the legislative intention expressed in this amendment need not here be discussed.

Applying these conclusions to the facts presented in the instant case, it becomes apparent that the proviso now contained in Section 50¾ may not be invoked by the Gray Line, Inc. to defeat the granting of the application of Fialer's, Inc. The Gray Line, Inc. correctly contends that it possesses and has at all times possessed an operative right permitting the use of motor vehicles other than buses. Its offer now to operate standard type limousines as well cannot, then, be taken as a counter application for a right to render the same service as that proposed by Fialer's, Inc. Although the record contains some evidence to the effect that it at times has rendered such a service, it must be concluded that it has failed to perform its full duty in that respect. The evidence offered by the applicant tended to prove that there has existed and now exists a public need for a sightseeing operation with this type of equipment. The Commission does not find any reason to reverse its first judgment to the effect that public con-

venience and necessity require the granting of the new application.

The order first made must, therefore, be affirmed. In one respect, however, that order should at this time be clarified in order to avoid any difficulty of interpretation in the future. The applicant sought a certificate only for the operation of sedan and limousine automotive equipment on certain prescribed sightseeing tours. It did not seek the right nor attempt to prove the necessity for the operation of so-called parlor-cars or buses. The Commission's order granted it the right "to operate a sightseeing limousine service". Therefore it should be made clear by the order herein that such right permits the operation of only standard types of passenger sedan or limousine motor vehicles seating not more than seven passengers, and does not permit the use of specially constructed sightseeing equipment of greater seating capacity.

I suggest the following form of order.

ORDER ON REHEARING

A rehearing having been held on the above entitled application, the matter submitted, and now being ready for decision, and basing its order on the findings and conclusions set forth in the foregoing opinion on rehearing,

IT IS HEREBY ORDERED, that a certificate of public convenience and necessity be and the same is hereby granted to Fialer's, Inc., a California corporation, to operate a sightseeing transportation service by means of standard type sedan or limousine motor vehicles seating not more than seven passengers, between San Francisco and (a) points on the San

Francisco peninsula including Stanford University, (b) Oakland, Piedmont and Berkeley, and (c) Muir Woods and Mt. Tamalpais, as a common carrier of passengers, subject to the following conditions:

1. Applicant shall file its written acceptance of the certificate herein granted within a period not to exceed ten (10) days from the date hereof.

2. Applicant shall file, in triplicate, and make effective within a period of not to exceed thirty (30) days from the date hereof, on not less than ten days' notice to the Commission and the public a tariff or tariffs constructed in accordance with the requirements of the Commission's General Orders and containing fares and rules which, in volume and effect, shall be identical with the fares and rules shown in the exhibit attached to the application insofar as they conform to the certificate granted herein.

3. Applicant shall file, in duplicate, and make effective within a period of not to exceed thirty (30) days from date hereof, on not less than five (5) days' notice to the Commission and the public, time schedules, according to form provided in General Order No. 83, covering the service herein authorized, in a form satisfactory to the Railroad Commission.

4. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been secured.

5. No vehicle may be operated by applicant herein unless such vehicle is owned by said applicant or is leased by it under a contract or agreement on a basis satisfactory to the Railroad Commission.

The foregoing Opinion and Order on Rehearing are hereby approved and ordered filed as the Opinion and Order on Rehearing of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 21st day of August, 1933.

Commissioners.