Decision No. 36805

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of RICCARDO TUNZI, an individual, for authority to sell and transfer his highway common carrier operative rights to VALLEY AND COAST TRANSIT COMPANY, a corporation.

Application No. 25442

HARRY A. ENCELL, by Douglas Brookman, for applicant, Riccardo Tunzi.

DOUGLAS BROOKMAN and REGINALD L. VAUGHAN, for applicant, Valley and Coast Transit Company.

BEROL and HANDLER, by EDWARD M. BEROL, for Valley Express Company and Valley Motor Lines, protestants.

WILLIAM MEINHOLD for Southern Pacific Company and Pacific Motor Trucking Company, interested parties.

CLARK, COMMISSIONER:

O P I N I O N

By this application, Riccardo Tunzi, an individual, seeks authority to sell, and Valley and Coast Transit Company, a corporation seeks authority to purchase, a highway common carrier operative right authorizing the transportation of property between San Francisco, Chualar, Gonzales, Soledad, Greenfield, and other points in the Salinas Valley located on and adjacent to U. S. Highway No. 101, as hereinafter described. The agreed purchase price is $2,000; no equipment or other tangible property is involved in the transaction.

Public hearings were had at San Francisco, the matter was orally argued and thereafter submitted with the filing of briefs.

More specifically, the operative right proposed to be transferred now authorizes the vendor, Riccardo Tunzi, to transport property "between San Francisco and points on the highway (U.S. Highway No. 101) south of the southerly limits of Salinas, such points being Chualar, Gonzales, Soledad, and Greenfield, and all points intermediate between the southerly city limits of Salinas and the northerly limits of the City of King, together with the right to serve all the territory for a distance of seven miles on either side of the highway traversed between the southerly limits of Salinas and the northerly limits of the City of King."[1] The vendor testified that he was operating three complete units of equipment in a scheduled daily service between points covered by the above-described operative right.

The vendee, Valley and Coast Transit Company, operates over a rather extensive network of highways which, for the purposes of this decision, may be described as embracing the territory between the San Francisco Bay Area and Santa Barbara on the coast, and extending into the San Joaquin Valley, including Fresno and Bakersfield. The operative rights authorizing such transportation were derived from certificates of public convenience and necessity acquired from E. L. McConnell, a predecessor in interest, who for many years operated under the fictitious name of Valley and Coast

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(1) This operative right was originally granted to Riccardo Tunzi and Louis Costa, who engaged in a partnership enterprise (Decisions Nos. 18691 and 18811 of August 8 and September 14, 1927, respectively, in Application No. 13611). Following Costa's death, the operative right was transferred to Riccardo Tunzi (Decision No. 24837 of June 6, 1932, in Application No. 18155).

Transit Company,[2] and from certificates of public convenience and necessity subsequently acquired either by direct grant or by transfer of operative rights from other interests. Both on-call and scheduled operations are embraced within these rights, as are numerous restrictions on the extent and character of service authorized. The extent and scope of such operative rights have been challenged in an independent proceeding.[3] Hence, any discussion of the vendee's operative rights shall be construed only in the light of matters herein decided, and not as passing upon the operative rights themselves.

An officer of the vendee testified that he had conducted profitable operations during 1942. He submitted a statement of revenues and expenses for the year 1942 in corroboration of his testimony. It shows net income, before income taxes, of $17,362.94 and that after providing for such taxes, $8,440.90 was transferred to earned surplus. An analysis of the statement discloses that the carrier enjoyed an operating ratio of approximately 87% for the year. It is apparent from the record that if the transfer herein sought is authorized, the vendee proposes to mould the acquired right into its system operations.

Valley Express Company and Valley Motor Lines protested the granting of the application, and an officer of these companies testified in their behalf. Collectively, their position is that if the Commission authorizes the transfer herein sought, the vendee proposes to combine the transferred right with an operative right obtained from E. L. McConnell and which had its inception in Decision No. 19651, of April 21, 1928,

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(2) Decision No. 19262, dated January 18, 1928, in Application No. 14339. (31 C.R.C. 73)

(3) Case No. 4602.

in Application No. 18258, and that under the combined rights the vendee then proposes to render a freight transportation service between San Francisco and San Joaquin Valley points, in direct competition with protestants.(4)

The officer of the protesting companies outlined in some detail the transportation service rendered by these companies between San Francisco Bay points and San Joaquin Valley points. He testified that if such a service were inaugurated by the vendee, as is anticipated, a further diversion of existing traffic would occur, with the result that Valley Express Company and Valley Motor Lines' facilities and investments, constructed on the premise of retaining existing business, would be placed in jeopardy.

Cousel for protestants stated that his clients had no objection to the contemplated transfer if the vendee would continue to utilize the operative right here involved in the same

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(4) The decision referred to is reported in 31 C.R.C. 628. In granting the certificate and consolidation therein sought, the Commission stated (p.646):

> "In our opinion applicant has justified the proposed branches diverging from its main coast route, and has also established the necessity for service between points in the San Joaquin Valley and the coast. Our order authorizing this service, however, will embody the stipulation made at the hearing. The certificate granted, it must be understood, will authorize only an 'on call' or 'on demand' service over the routes described as such in the application, and applicant will not be permitted to transform this into a scheduled service without further authority from the Commission."

The order entered therein contained the stipulation referred to in the following language (p. 652):

> "Applicant shall transport no freight between any point or points upon its lines in the San Joaquin Valley, herein authorized to be established, on the one hand, and any point or points upon its coast lin-s, north of and including King City, herein authorized to be established, on the other hand."

manner and to the same extent as had the vendor, Riccardo Tunzi. In any event, he urged that the Commission make certain that no extension or combining of operative rights would result by imposing a restriction in any transfer that might be authorized similar to that prescribed by Decision No. 19651, supra.

In the absence of specific restriction, he stated that in his opinion the combining of operative rights, feared by his clients, would result from an attempt to take advantage of the 1941 amendment to Section 50-3/4 of the Public Utilities Act providing that:

> "Any one highway common carrier may establish through routes and joint rates, charges, and classifications between any and all points served by such highway carrier under any and all certificates or operative rights issued to or possessed by such highway common carrier." (Stats. 1941, Ch.612)

In the main, the oral argument and briefs of both applicants and protestants were addressed to the application of this amendment.

Counsel for protestants contends that under Section 50-3/4 of the Public Utilities Act the vendee could not, by reason of such amendment, extend service so as to perfect a through operation between San Francisco and San Joaquin Valley points. To remove any doubt in the matter, however, he urged that the restriction mentioned be imposed so as to foreclose any extension of service once the transfer of the Tunzi operative right has been completed.

In substance, protestants' position was that the amendment merely authorizes establishment of through routes and joint rates consistent with restrictions or impairments that might be found in the operative rights held by anyone seeking to take advantage of

the amendment. Applied to the matter in issue, counsel contends that the restriction originally imposed in Decision No. 19651, supra, bars establishment of through routes and joint rates between San Francisco and San Joaquin Valley points.(5)

Specifically, protestants contend that Section 50-3/4 should be considered as a whole and its various provisions harmonized, to avoid repugnancy if possible. That section, it was pointed out, authorized the Commission, in granting certificates to highway common carriers, to impose conditions deemed warranted by public convenience and necessity. To construe the amendment as operating to nullify such a condition immediately upon the transfer of the certificate, and as having stripped the Commission of power to perpetuate such a restriction, they assert, would be unreasonable--a construction to be avoided if possible. Moreover, it must be presumed, protestants claim, that the legislature, in enacting the amendment, was familiar with judicial and administrative interpretation of the statute, including the Commission's rule of decision under which the consolidation of distinct operative rights without its consent was forbidden. Assertedly, the legislature, had it intended to abrogate this rule, would have said so specifically.

Adverting to the propriety of imposing a restriction against extending service, protestants assert that not only has the Commission power to impose such a restriction, but that it is

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(5) He also cited other provisions of decisions involving vendee's operations, which, he asserted, must be given effect in applying Section 50-3/4, as amended. Inasmuch as the lawfulness and propriety of such provisions and restrictions are not here involved and do not amplify the proposition already stated, they will not be alluded to further herein.

one which should here be imposed in the public interest. Although the transfer provisions of Section 50-3/4 contain no legislative standards designed to guide the Commission in the administration of the law, nevertheless, it is claimed, the standard of consistency with the public interest should be read into those provisions by implication. Such assertedly has been the rule applied by the Commission in passing upon applications of this character. And the statute, so construed, it is said, would be consistent with the federal law (Interstate Commerce Act, Part I, sec. 5(b) and (c)), which expressly enjoins upon the Interstate Commerce Commission the observance of a similar standard in considering the transfer of motor carrier operative rights. Under such an interpretation of the law, counsel contends, the Commission, in the public interest, could protect existing carriers in the field to the end that an adequate transportation service would be preserved. Otherwise, the Commission would be confined to the unconditional granting or denial of a transfer application, which assertedly might result at times in injustice or in lack of responsiveness to the public interest.

Applicants' views are diametrically opposed to those of the protestants. They contend that by the 1941 amendment to Section 50-3/4 of the Public Utilities Act, "the Legislature saw fit to wipe out any limiting conditions that the Commission had theretofore imposed, and nullify completely the powers asserted by the Commission to impose such limiting conditions..." Their position is that the restrictions imposed by the Commission in granting the operative rights of Valley and Coast Transit Company, which would otherwise bar unlimited operation into and out of the

San Joaquin Valley, have been cast aside by legislative act.(6)

The legislature, it is claimed, has withdrawn in part the authority with which it formerly had invested the Commission, and has itself resumed these powers. The granting of a certificate of public convenience and necessity, assertedly is a legislative function, exercisable by the legislature itself or by the Commission, as its delegate. By the amendment, it is claimed, the legislature granted directly to the holder of two or more connecting certificates the right to consolidate the service between all points served, thus abrogating the Commission's power to prevent such a result. Had the legislature intended that the Commission's rule of decision should survive, it would have said so explicitly, applicants contend. No longer may limitations be imposed, they assert, upon the points to be served under two or more certificates held by a highway common carrier.

Respecting the contention of protestants that the Commission should impose a condition prohibiting the vendee from using the Tunzi operative right in connection with San Joaquin Valley operations, applicants urge that the Commission lacks statutory authority to do so. They assert that the Commission may do only that which is necessary to safeguard the interests of

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(6) Quoting from the Opening Brief of applicants, counsel advanced the following argument (p.12):

> "In other words, prior to September 13, 1941, the Commission under its construction of the Public Utilities Act had power to prohibit a single operator from conducting through service between points served on two or more certificates possessed by it, whereas after that date, by virtue of a direct legislative grant, any limitations or restrictions theretofore existing were wiped out and the power to impose such limitations or restrictions in the future was taken away."

those persons now entitled to use the service of the vendor, but that in respect to the points that may be served, the vendee's activities may not be curtailed. Counsel contrasted the provisions of Section 50-3/4 under which operative rights are created in the first instance with those under which such rights are transferred. In the former instance, they contend, specific provision is made for the imposition of restrictions coincident with the granting of certificates of public convenience and necessity, whereas, in the latter instance, no such authority has been vested. This being the case, they assert that the express inclusion of authority to impose conditions, on the one hand, and the exclusion of such authority, on the other, clearly limits the Commission, in imposing restrictions, to do so only at the time operative rights are created by it.

Finally, counsel call attention to the fact that although the Interstate Commerce Commission is specifically authorized to impose terms and conditions under which motor vehicle common carrier operative rights may be transferred,(7) the California statute is silent on the subject.

Two major points are presented for determination, viz., First - Does the 1941 amendment to Section 50-3/4 nullify restrictions existing in a highway common carrier operative right at the time the statute became effective, so that they may be disregarded should the holder undertake to consolidate that operative right with another subsequently acquired? and, Second - Has the Commission power to impose a restriction, in a transfer proceeding, limiting, in the public interest, the service that may be performed by the transferee under the operative right acquired?

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(7) Interstate Commerce Act, Part I, sec. 5(b) and (c) - supra.

These questions will be considered in the order mentioned.

At the outset we shall refer to a point raised by both parties, but which need not be determined in this proceeding. Applicants contend, and protestants concede, that the amendment contemplates the unification and consolidation of the operative rights held by a single highway common carrier. We are not required to consider, however, whether the amendment automatically effected the consolidation of distinct operative rights of which the carrier was the owner when the statute became effective. We are concerned now with its application to an operative right subsequently acquired under a transfer proceeding.

We shall now address ourselves to the question whether, under the terms of the amendment, an operative right acquired by transfer may be consolidated with other operative rights then held by the vendee, free from any restrictions which may have been imposed upon the latter. The amendment, on its face, does not clearly prescribe the rule applicable to such a situation. Though it permits a carrier to establish a unified service between all points served under all certificates which it may hold, it is silent as to its effect upon service restrictions contained in a certificate acquired by transfer. Do such restrictions automatically disappear, or must the consolidation be effected subject to such limitations? In view of this uncertainty, it is permissible, under well settled rules of statutory construction, to go beyond the language of the amendment itself, in order to ascertain its meaning.

The amendment, we believe, must be read in the light of other provisions of Section 50-3/4, so that effect may be given to all of them, if possible. Subdivision (c) authorizes the Commission

to issue a certificate subject to such terms and conditions, as in its judgment, the public convenience and necessity may require. Thus the points to be served may be restricted where such a step appears necessary in the public interest. If such a restriction should disappear, immediately upon the approval of the transfer of the operative right, or upon the acquisition by the grantee of another operative right, the Commission would then be powerless, in the public interest, to safeguard the equities of other carriers occupying the field, so as to insure the continuance of adequate service. Such a construction would strip the Commission of much of the authority it now possesses to protect both the public and the carriers against the evils of excessive competition.

The provisions of subdivision (c) relating to the transfer of certificates set forth no legislative standard designed to guide the Commission in acting upon applications for the approval of transfers. It has been held, however, in a proceeding arising under Section 51(a), Public Utilities Act, governing the transfer of operative property, that the Commission must inquire whether the proposed transfer would be injurious to the public interest.(8) And in determining that question, the Commission obviously must consider the effect of the transfer upon the quality of the service to be provided both by the transferee and by the carriers in the field.

The legislature, presumptively, was familiar with the Commission's rule of decision prohibiting, without its consent, the unification of separately held operations. With that rule

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(8) Hanlon v Eshleman, 160 Cal. 200, 202. See also Salo v Railroad Commission, 15 Cal. (2) 612.

before it, the law making body, nevertheless, did not see fit to provide expressly that operative rights would be transferred free from all service restrictions. It is reasonable to suppose that had this been intended, the legislature would have said so explicitly. The abolition of the rule cannot be implied from the terms of the amendment, since it is not sufficiently comprehensive to accomplish that purpose. As we construe the amendment, the conditions originally imposed in a certificate do not disappear upon its transfer. This brings us to the second question presented for consideration, namely, whether the Commission, under the terms of the amendment, may impose a condition insuring the continuation of limitations existing in a certificate held by a carrier which seeks to acquire another certificate. Applicants assert that we possess no such power; the protestants contend, on the contrary, that such authority may be exerted.

The California Supreme Court has held that this Commission, when called upon to approve the transfer of the operative properties of a public utility, may impose adequate conditions.(9) There the Court dealt with Section 51(a), which also failed to prescribe a definite standard. In view of this ruling, we cannot accede to ~~protestants~~ applicants' contention that, under the rule of expressio unius est exclusio alterius our power to impose conditions is confined to the original issuance of the certificate, and does not extend to a transfer proceeding.

Viewing the section as a whole, it is apparent that the Commission, in approving the transfer of an operative right, must

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(9) Henderson v Oroville-Wyandotte Irrigation District, 213 Cal. 514.

determine whether, in the public interest, existing restrictions should be continued in effect. To construe the amendment as a legislative grant, under which these restrictions would automatically disappear, once the transfer has been approved, would strip the Commission of much of its power to safeguard the public interest. We might often be compelled to deny an application in its entirety, where its consummation would seem contrary to the public interest. In many instances, this might work considerable hardship. So unreasonable a construction of the statute, we believe, should be avoided. We conclude, therefore, that in a transfer proceeding the Commission may impose an appropriate condition, designed to safeguard the operations of existing carriers. That a condition such as that proposed by protestants would be justified, must be regarded, under the record in this case, as an established fact.

The application, therefore, will be granted. The transfer will be authorized, however, subject to a condition of the character sought by protestants.

Section 52(b) of the Public Utilities Act provides that:

> "The commission shall have no power to authorize the capitalization of any franchise or permit whatsoever or the right to own, operate or enjoy any such franchise or permit, in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise, permit or right."

As stated, vendee has agreed to pay $2,000 for vendor's operative right. This right was established through two proceedings before the Commission which required the payment of two $50 filing fees. In our opinion, $1,900 of the purchase price cannot be capitalized through the issue of securities and should not be

charged permanently to intangible capital. The $1,900 should be transferred from Account 200, "Intangibles," to Account 109, "Other Deferred Debits," and amortized in equal monthly amounts over a maximum period of two years, commencing with the date of the consummation of the transaction, by charges to Account 315, "Miscellaneous Charges to Income," or in lieu of such amortization in any month of the two-year period, vendee may charge to said Account 315 the unamortized balance of said amount so as to remove from said Account 109 said amount in a two-year period through either amortization or write-off of said amount.

O R D E R

Application having been made as above entitled, a public hearing having been held, and the Commission now being of the opinion and hereby finding, that public interest would be thereby subserved,

IT IS ORDERED as follows:

(1) That Riccardo Tunzi may sell and transfer to Valley and Coast Transit Company the highway common carrier operative right described in the foregoing opinion, and Valley and Coast Transit Company may purchase and acquire said operative right above referred to and conduct a highway common carrier service commensurate therewith, subject, however, to the following limitation:

> Applicant, Valley and Coast Transit Company, shall transport no freight between any point or points upon its lines in the San Joaquin Valley, on the one hand, and any point or points upon its coast lines, north of and including King City, on the other hand.

(2) That the order herein granted is subject to the further condition that Valley and Coast Transit Company shall transfer from Account 200, Intangibles, to Account 109, Other Deferred Debits, said $1,900, and amortize said $1,900 by charging to Account 315, Miscellaneous Charges to Income, in equal monthly amounts over a maximum period of two years, commencing with the date of consummation of the transaction, or write-off to said Account 315 the unamortized balance of said amount so as to remove from its records, through either amortization or write-off, said $1,900; and provided further, that Valley and Coast Transit Company, its successors and assigns, shall never claim before this Commission or any court or other public body, a value for said operative right, or claim as the cost thereof an amount in excess of that paid to the State as the consideration for such right.

(3) That applicants shall comply with the rules of the Commission's General Order No. 80 and Part IV of General Order No. 93-A by filing, in triplicate, and concurrently making effective tariffs and time tables satisfactory to the Commission within sixty (60) days from the effective date hereof, and on not less than five (5) days' notice to the Commission and the public.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 11th day of January, 1944.

Richard Hawkins

E. E. Bunker

Frank C. Havenner

Frank W. Clark

COMMISSIONERS