

Decision No. 41176

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission's investigation into the operations, schedules, and service of SAN BERNARDINO VALLEY TRANSIT COMPANY.

Case No. 4908

Application of SAN BERNARDINO VALLEY TRANSIT COMPANY to purchase stock of Air Service Transit, Inc., for approval of merger agreement, for transfer and consolidation of certificates, for authority to borrow money and issue promissory note.

Application No. 27512
(Reopened)

Guthrie, Lonergan and Jordan, by John B. Lonergan,
for San Bernardino Valley Transit Company; Charles C. Towle,
Towle, in propria persona.

OPINION ON REHEARING

The City of San Bernardino and its outlying districts are served by two certificated bus operators, Charles C. Towle, operating as Highland-Patton Bus Lines, and San Bernardino Valley Transit Company. In May of 1946 the Commission authorized the merging of San Bernardino Valley Transit Company and Air Service Transit, Inc., and the consolidation and integration of the operative rights of those two corporations. (1) The surviving corporation will be referred to herein as Transit Company.

Before July 9, 1947 Transit Company operated a cross-town service along Base Line Street in San Bernardino and between the out-

(1) The 1946 "merger" order provided that Transit Company should acquire the rights of Air Service Transit, "which operative rights it may consolidate and integrate with those now owned and operated by it." (Dec. No. 39011, App. No. 27512.)

lying sections of Del Rosa (northeast of the City) and Muscoy (northwest of the City). This east-west service along Base Line Street crossed the north-south service of Transit Company's Shandin Hills line at the intersection of Base Line and E Streets. Del Rosa and Muscoy passengers traveling to or from downtown San Bernardino generally transferred at that intersection.

On July 9, 1947 Transit Company split the cross-town service into two lines, both of which operated to downtown San Bernardino along E Street, thus eliminating the transfer point, and affording direct service.

Towle, the other local carrier, operates two bus lines between an area south and east of the community of Del Rosa and downtown San Bernardino. His Ninth and Victoria Streets line serves between an area east and south of the intersection of Del Rosa Avenue and Base Line Street and downtown San Bernardino. This line parallels that part of Transit Company's Del Rosa route which operates along Base Line Street between Del Rosa Avenue and E Street⁽²⁾, and along E Street to downtown San Bernardino. The Del Rosa Postoffice is near the northerly end of Del Rosa Avenue.

Towle's Highland-Patton line serves between an area east of Del Rosa Avenue and north of Base Line Street, and downtown San Bernardino. This line crosses Del Rosa Avenue a few blocks north of Base Line Street and traverses a revenue-producing area north of and paralleling Base Line Street (via Pacific and Gilbert Streets), proceeds southerly on Waterman Avenue to Base Line Street, westerly thereon to Mountain View Avenue, and southerly thereon to downtown San Bernardino.

(2) Except for a short deviation, where Towle's line proceeds southerly from Base Line Street along La Junta Street to Olive Street, westerly thereon to Waterman Avenue, and northerly thereon to Base Line Street.

On July 8, 1947, the day preceding Transit Company's elimination of the transfer point at E Street and the furnishing of direct downtown service from Del Rosa, Towle filed a petition in the 1946 "merger" proceeding. (App. No. 27512.) He requested that such proceeding be reopened, and that Decision No. 39011 therein be set aside in so far as it may have authorized Transit Company to consolidate the cross-town service with any then existing service to downtown San Bernardino. This action was sought upon the grounds that Towle's predecessor had had no notice or knowledge of the ex parte merger order, and that Transit Company's competitive direct service would cause Towle to lose substantial revenue.

After hearing on the petition, the merger proceeding was reopened to determine whether the decision therein should be rescinded or amended. A Commission investigation was instituted into the operations and service of Transit Company. (Case No. 4908.) Following hearing in the consolidated proceedings, Transit Company was ordered to resume cross-town service as originally authorized, to cease furnishing direct service between downtown San Bernardino and Del Rosa Postoffice on its Del Rosa line, and in rendering service on its Muscoy line to refrain from using Base Line Street between "I" and "E" Streets. (Decision No. 40688.)

Rehearing was granted. The order was suspended during the pendency thereof. The first issue on rehearing is whether Transit Company had the right to furnish direct service from Del Rosa without further authorization. A Commission witness introduced a map depicting the present operative rights of both carriers, and in his testimony referred to the various decisions affecting those rights. A witness for Transit Company introduced three maps depicting operative rights at various periods.

It is unnecessary to discuss all of the decisions affecting

Transit Company's rights, or to consider in detail the history of that operator and its predecessors. In 1943 Transit Company was authorized to render a north-south service between the Shandin Hills residential section and the main business section of San Bernardino. (Dec. No. 36365, 10th Supp. App. No. 24432.) That operation, as re-routed pursuant to a 1945 decision, was along E Street and crossed Base Line Street. (Dec. No. 38261, 18th Supp. App. No. 24432.)

Operation along Base Line Street was first authorized on February 5, 1946, when Air Service Transit, Inc., which merged with Transit Company a few months later, was permitted to establish an east-west cross-town service along Base Line Street and between Del Rosa Postoffice and Mt. Vernon Avenue. (Dec. No. 38665, Apps. Nos. 26974 and 27018.) That cross-town right intersected Transit Company's Shandin Hills route at Base Line and E Streets, and was acquired by Transit Company pursuant to the "merger" order of May 28, 1946. (Dec. No. 39011, App. No. 27512.)⁽³⁾

In the ex parte merger proceeding, Transit Company was authorized to acquire the outstanding stock of Air Service Transit, Inc. Both corporations were authorized to merge their properties, with Transit Company as the surviving corporation. Transit Company was also authorized to issue a note to pay certain indebtedness and part of the cost of acquiring the stock of the other corporation. The third ordering paragraph of the order in that decision read as

(3) Prior to the 1946 merger order, and on August 16, 1944, Transit Company and Air Service Transit, Inc., had been authorized to enter into an operating agreement. (Dec. No. 37279, App. No. 26157.) The 1944 decision, although it did not fully explain the operating agreement, referred to the agreement as being a plan of consolidated operation of the two carriers, providing an improved service through such coordinated operation. Whether or not the through service questioned here could have been rendered without further certification between February 5, 1946 (when Air Service was authorized to operate along Base Line Street) and May 28, 1946 (the date of the merger authorization) is of no significance on this rehearing. The 1944 operating agreement necessarily ceased upon merger of the two corporate parties thereto.

follows:

"3. If such agreement of merger is executed, San Bernardino Valley Transit Company as the surviving corporation shall assume the obligations and indebtedness of Air Service Transit, Inc., and shall acquire the properties and operative rights of Air Service Transit, Inc., which operative rights it may consolidate and integrate with those now owned and operated by it." (Emphasis added.)

The above unqualified authorization to consolidate and integrate the particular separate rights here involved, meant that thereafter Transit Company could route vehicles operated on particular lines over other streets without further certification, provided that such rerouting was over streets named in the certificates or service regulations affecting the rights so consolidated. Adequate service must be provided, however, and any such rerouting of lines by Transit Company was subject to change, for cause, by the Commission.

So far as certification is concerned, on July 9, 1947 Transit Company had the right to eliminate the transfer point and give direct service between Del Rosa and downtown San Bernardino. Towle takes the position that if Transit Company had that right, then the 1946 merger authorization in effect issued a new certificate, granted ex parte through mistake and inadvertence, and without any notice or opportunity to be heard in protest. Towle asks that the merger order be set aside in so far as it may have authorized direct competitive service through consolidation of Transit Company's cross-town line with any of the latter's then existing service to downtown San Bernardino.

The ex parte merger decision was concerned primarily with the financial aspects of the merger of two corporations. ⁽⁴⁾ Except

(4) Transit Company was authorized to acquire the stock of Air Service Transit, Inc. The two corporations were authorized to merge

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for incidental mention of the fact that operative rights were involved in the merger the only mention thereof is the single phrase which closed one paragraph of the order, and which authorized the surviving corporation to "consolidate and integrate" the rights of the two corporations. The merger decision neither discussed nor considered the potential effect of such a consolidation. Nor did Transit Company consider that the intended merger would result in any change in operative rights. Transit Company's president testified in the present proceeding that at the time of the merger some provision had to be made to carry on service to the public undisturbed by the demise of Air Service Transit, and that this was accomplished by consolidation of the rights of the two corporations. He testified that there was no change in operations or operative rights or operating practices, and that for this reason Towle's predecessor was given no notice in the proceeding in which the merger decision was issued. ⁽⁵⁾ That proceeding having been reopened under section 64 of the Public Utilities Act, any injustice shown by the record to have resulted from the consolidation provision may now be corrected.

Towle disclaims any interest in Transit Company's route changes in furnishing service between the Muscoy area and downtown San Bernardino. He agrees that resumption of cross-town service by Transit Company between the Muscoy and Del Rosa areas will not serve any public interest, urging that lack of patronage of that former line demonstrates the absence of public need therefor. However, as

Footnote (4) cont'd.- their properties in accordance with a merger agreement, upon execution of which the surviving corporation should assume obligations and indebtedness of the other corporation and acquire the latter's properties and operative rights, which rights it "may consolidate and integrate" with its own. Transit Company was authorized to issue a \$30,000 note. It was also directed to file a copy of journal entries used to record the merger, and to amortize certain charges on its books.

(5) The merger decision was issued on May 28, 1946. Transit Company rerouted the Del Rosa operation approximately thirteen months later, on July 9, 1947.

to the Del Rosa operation, Towle argues that he should be protected against unreasonable competition resulting from the institution of direct service to downtown San Bernardino.

As already indicated, Towle operates two routes between downtown San Bernardino and areas east of the City. Both such lines operate in part along the easterly portion of Base Line Street. Before 1946, neither Transit Company nor its predecessors operated in the general areas served by Towle. Each carrier is partially in the other's territory, and both carriers operate in part over the same streets, as a result of the Commission's order of February 5, 1946. (Dec. No. 38665, Apps. Nos. 26974 and 27018.) That decision authorized Transit Company's predecessor (Air Service Transit) to operate between Del Rosa and San Bernardino. This line traversed part of the Towle territory, and placed two bus lines along Base Line Street between Mountain View and Del Rosa Avenues. A restriction, however, prohibited the carriage of passengers having both origin and destination along Base Line Street between the two avenues mentioned.

The same 1946 decision authorized Towle's predecessor to re-route and to extend service westerly from the intersection of Mountain View Avenue and Base Line Street to E Street, a distance of three blocks, and thence southerly on E Street to downtown San Bernardino. As Transit Company already operated the Shandin Hills line along E Street, the decision placed two bus lines along E Street south of Base Line Street. Operation of this new line by Towle's predecessor was also subject to a restriction to the effect that passengers could not be carried locally along E Street and the three blocks of Base Line Street west of the intersection at Mountain View Avenue.

Transit Company's through service between Del Rosa and downtown

San Bernardino operates one trip per hour between 6:50 a.m. and 6:50 p.m. No service is furnished on Sundays and holidays. Towle operates approximately four times as many trips daily, between 5:55 a.m. and 11:55 p.m., and also operates numerous schedules on Sundays and holidays. The record at the first hearing herein indicated that Transit Company operated its buses immediately ahead of Towle's buses. However, at the rehearing both parties stated that this particular factor of competition had been eliminated, at least for the time being, by rearrangement of schedules.

The record shows that immediately following Transit Company's inauguration of through service to Del Rosa Towle's revenue per mile fell below his operating expense per mile. Towle contends that Transit Company's through service does not result in more frequent service to the public, is not in the public interest, and was designed to harass and ultimately destroy his business.

Transit Company's president testified that from the inception of the cross-town service authorized by the 1946 decision last discussed (Dec. No. 38665), his company received about half of the traffic it had anticipated from the line. In his opinion the line was unprofitable because of the competitive situation set up by that decision. He testified that residents of the Muscoy area later requested an extension of service in that area (Dec. No. 40398, App. No. 28261), and that maintenance of hourly service on the extended cross-town line would result in unduly high operating costs. According to Transit Company's president, certain reroutings by Towle (Dec. No. 40399, App. No. 28331) added to the competitive situation, and Transit Company divided the cross-town line into two lines, each furnishing direct service to downtown San Bernardino. He expected that the direct routing would improve Transit Company's competitive position. However, the record shows that the Del Rosa direct line

does not meet operating costs.

The two carriers have made a number of conflicting suggestions concerning a possible solution of the competitive problem. Each carrier urges that the lines of the other should be rerouted in various ways. However, the rerouting of the lines of both carriers is not within the issues of the investigation and reopened application proceeding.

It is clear that, although the 1946 merger decision authorized consolidation and integration of the rights of Transit Company and Air Service Transit, Inc., the intent of applicants therein and of the Commission was to sanction continued operation of existing service by the surviving corporation. Neither applicants nor the Commission gave consideration in that proceeding to the significance of the incidental consolidation provision. Towle's predecessor had no notice or opportunity to be heard upon the question of consolidation of operative rights. And Transit Company did not inaugurate through service on the Del Rosa line until approximately thirteen months after issuance of the merger decision. Institution of that through service by Transit Company created additional competition which has substantially affected Towle's revenue, although Towle had no opportunity to be heard in connection with the establishment thereof. Transit Company's through service has not met operating costs. The incidental consolidation provision of the 1946 merger order having resulted in an inadvertent inequity, that order will be amended in so far as the consolidation provision thereof may have sanctioned Transit Company's subsequent action in establishing direct through service between Del Rosa and downtown San Bernardino.

ORDER ON REHEARING

Rehearing having been had in the above proceedings before Ex-

aminer Cassidy, said rehearing having been submitted upon the filing of briefs, and based upon the entire record herein and upon the findings contained in the foregoing opinion on rehearing, IT IS HEREBY ORDERED as follows:

I. That ordering paragraph number 3 of Decision No. 39011 in Application No. 27512 is amended to read as follows:

"3. If such agreement of merger is executed, San Bernardino Valley Transit Company as the surviving corporation shall assume the obligations and indebtedness of Air Service Transit, Inc., and shall acquire the properties and operative rights of Air Service Transit, Inc., which rights it may consolidate and integrate with those now owned and operated by it, provided, however, that in conducting operations over Del Rosa Avenue and Base Line Street no through service may be rendered between Del Rosa Postoffice and the intersection of E Street and Base Line Street and intermediate points along Base Line Street and Del Rosa Avenue, on the one hand, and points south of Base Line Street, on the other hand."

II. That the order portion of Decision No. 40688 in Case No. 4908 and reopened Application No. 27512 is hereby vacated and set aside.

III. That the Secretary cause a certified copy of this decision on rehearing to be served upon San Bernardino Valley Transit Company and that this order on rehearing shall become effective on the twentieth day after the date of such service.

Dated, San Francisco, California, this 28th day of

January, 1948.

R. B. Anderson

Joseph H. Raylee
Harold T. Hulse
Samuel L. Potter
 Commissioners