

ORIGINAL

Decision No. 42587

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PETER J. VAN LOBEN SELS, an individual)
doing business as VALLEY TRANSIT LINES,)

Complainant,

vs.

Case No. 5165

B. J. SMITH, H. B. WAGNER, BENJAMIN
CLAYTON, PAUL BURKHOLDER, JOHN DOE
WAGNER, B. J. SMITH and H. J. WAGNER,
copartners doing business under the
firm name and style of CAL TRANSIT
LINE, DOE ONE CORPORATION,

Defendants.

Glanz and Russell, by R. Y. Schureman, for complainant.
Edward L. H. Bissenger, for Pacific Electric Railway Company,
intervenor.

E. W. Turcotte and Jack Oliver Goldsmith, for defendant,
B. J. Smith; Herbert Cameron and W. Cooley, Jr., for
defendant Benjamin Clayton; Burke Mathes, for defendant
Paul Burkholder; H. B. Wagner, defendant, in propria persona.

O P I N I O N

The complaint in this case alleges that defendants are operating passenger stages over regular routes and between fixed termini and specifically between the Baldwin Avenue shopping center, Arcadia, and four termini located in the unincorporated territory of Los Angeles County; that passengers are transported free of charge; that certain business and commercial establishments located in the vicinity of said routes, and defendants Clayton and Burkholder are contributing funds to defendants B. J. Smith and H. B. Wagner to compensate the latter for conducting said passenger stage operations; that none of the defendants have a certificate of public

convenience and necessity or other authority to maintain such operations.

Based upon further allegations concerning the certificated rights of complainant to operate as a passenger stage corporation in the same localities covered by defendants' operations, and the loss of business suffered by the complainant as the result thereof, this Commission on December 8, 1949, by Interim Order issued its Decision No. 43595 ordering defendants and each of them, pending further order, immediately to cease and desist from operating or conducting the transportation service described in the complaint. Such order further provided for a hearing on December 15, 1949, and directed defendants to answer on or before December 14, 1949. Separate answers were filed on the latter date by defendants Clayton and Smith. No answer was filed by defendant H. B. Wagner, but he appeared and testified at the hearing.

Defendant B. J. Smith in his answer admits that he does not possess a certificate of public convenience and necessity authorizing him to transport passengers for compensation over any of the public highways in the State and that two buses have been operated over the routes and on the schedules specified in the complaint, and alleges he "chartered" to defendant Clayton two buses with drivers for the period December 1, 1949, to January 31, 1950, for a weekly rental of \$266.67 plus \$500 at the end of December and \$500 at the end of December and \$500 at the end of January if the buses were operated every day as scheduled. He further alleges he agreed to make such buses available without charge or compensation to all persons desiring to travel along such routes to or from the Baldwin Avenue shopping center in Arcadia.

Defendant Benjamin Clayton in his answer denied all the allegations of the complaint, and alleged he had invested \$900,000 in the Baldwin Avenue shopping center, Arcadia, and had leased his buildings to tenants who transact 60% of all business conducted in that area; that there is no transportation service between that area and several new outlying residential districts, and for the benefit of those residents, and all the merchants on Baldwin Avenue he decided to establish a "courtesy" transportation service during December, 1949, and January, 1950, and to effect that end he entered into a contract with B. J. Smith on November 30, 1949, which provides that Smith agrees to operate from December 1, 1949, to February 1, 1950, two buses over the four routes designated (being the same routes as shown by Exhibits A, B, C and D attached to the complaint, and Exhibits 1, 2, 3 and 4 in evidence) without charge to passengers, and Clayton agrees to pay Smith therefor \$266.67 per week, and in addition, if Smith performs faithfully, to credit \$500 on December 31, 1949, and \$500 on January 31, 1950, on a certain note made July 1, 1949, by California Transit to Clayton. Personal service of the complaint and interim order was made on all defendants except H. J. Wagner, John Doe Wagner and Doe One Corporation.

A public hearing was held before Examiner R. K. Hunter in Los Angeles, and the matter is now ready for decision.

The evidence shows that the transportation system complained of, hereinafter referred to as "bus lines", was created by defendant Clayton and operated by defendant Smith. Clayton has a very substantial investment on Baldwin Avenue, Arcadia, and all his leases to his tenants are on a percentage of gross receipts basis. His purpose was to advertise and promote the Baldwin Avenue

Shopping Center for the financial gain he would secure from increased rentals. His contract with Smith of November 30, 1949, recites that "Clayton considers it in his interest that such bus lines should be operated."

Clayton, and Clayton's agent, Blake Touchstone, established the basic plan of the bus lines. Clayton told Touchstone to set up routes to residential areas built within the last 15 months, within 70 minutes round trip time from the shopping center, where the houses were grouped and the families had but one car. Touchstone worked out the routes on that basis with Smith and established four areas to be served, prescribed the use of two buses and the starting and ending times of each of the three trips on each route. From that information Smith worked out the intermediate stops and time schedules. Clayton's name is included as one of the insured in the public liability policies issued on the two buses used in the operation.

Smith started performance under his contract on December 1, 1949, and operated two buses with two drivers three times daily over each of the four routes until served with the Interim Order herein at 6 p.m. Saturday, December 10, 1949. During that period an average of 25 round trip passengers were carried each day. Smith admits that each of said routes commenced in the City of Arcadia and went outside the limits of said City into the unincorporated territory in the County of Los Angeles. No fares were charged or received from the passengers, and no shopping tag, receipt, ticket or any indication of purchases made from Baldwin Avenue merchants was required. With the exception of three persons who were discharged en route, passengers inbound to the shopping center were discharged only at that point, and outbound passengers were

picked up only at the terminals in the shopping center. The buses were plainly marked in large letters on each "Free Bus Service to Baldwin Avenue Shopping Center", and all persons waiting at the scheduled bus stops were picked up. Clayton made two payments of \$266.67 each to Smith for operating the bus lines during the period it was in service.

Cal Transit Line, in which defendants Smith and H. B. Wagner appear to be partners, now operates intra-city service within Monrovia, as the Monrovia City Lines, and within Monterey Park. In the bus service involved in this complaint the operation admittedly extends from within the City of Arcadia to termini outside thereof within unincorporated territory of Los Angeles county.

Complainant Van Loben Sels testified that he noticed a falling off in passengers carried by his certificated service when the "free" bus lines started operations and a pickup in traffic after the service was stopped on December 10, 1949. He admitted on cross examination that his check did not reveal at exactly which portion of his routes the diminution in patronage occurred.

It appears that the service complained of constituted, either actually or potentially, a competition for passengers with the certificated operation of complainant Van Loben Sels in either diverting said passengers to Arcadia from other shopping districts or in transporting passengers to the vicinity of the Arcadia Shopping Center which might otherwise be hauled by said complainant. The record also shows that passengers could use the complained of bus lines to ride to points other than the said shopping center

and could use the bus lines to reach points other than the said shopping center by getting off at a transfer point short thereof and connect with other service operated by Cal Transit Line within the City of Monrovia.

The defendants admitted that none of them possesses a certificate of public convenience and necessity authorizing transportation of passengers for compensation over any of the public highways in this State.

Section 2 $\frac{1}{4}$ (b) of the Public Utilities Act described a passenger stage corporation as follows:

"The term "passenger stage corporation," when used in this act, includes every corporation, or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever engaged as a common carrier, for compensation, in the ownership, control, operation or management of any passenger stage over any public highway in this state between fixed termini or over a regular route; provided, however, that this term shall not include those whose operations are exclusively within the limits of a single incorporated city, town or city and county, or whose operations consist solely in the transportation of bona fide pupils attending an institution of learning between their homes and such institution of learning."

The fact that fares are not charged to or collected from any passenger, i.e., the failure to collect "individual fares" does not preclude the defendants from being a passenger stage corporation. Section 2 $\frac{1}{4}$ of the Public Utilities Act by its terms does not require the compensation to be in the form of individual

fares, and the use of the term "individual fare basis" in Section 50½ of the same Act, in establishing a presumption of acting as a passenger stage corporation, makes it clear that the Legislature did not intend "compensation" and "individual fare basis" to be synonymous, and that an individual fare is but one form of compensation embraced within that term as used in Section 2½.

The defendant Smith was paid a specified weekly sum to furnish the service described. That compensation was paid to him for carrying passengers. Whether the cost of the service is borne by the passengers or some third person is immaterial. The fact remains that defendant Smith was being paid to transport passengers and was accordingly carrying passengers for compensation.

Relative to the defendant H. B. Wagner, the record discloses that a partnership has existed between him and the defendant Smith under the partnership name of Cal Transit Line; that the two buses used by Smith in the operation of the bus lines are registered to Cal Transit Line, and that the Clayton-Smith contract of November 30, 1949, provides for a credit of \$1,000 on a note executed by Cal Transit Line. Defendant Wagner therefore falls within the phrase "either . . . in the ownership, control, operation or management . . ." used in Section 2½ in defining a passenger stage corporation.

The defendant Clayton comes within the above definition by virtue of the control he exercised over the operation. The evidence clearly shows that he designated the areas to be served, and dictated the number of routes, the number of trips on each route and the time each trip was to start and end. Clayton's compensation was to be in the form of increased rentals received

under the percentage of gross receipt leases he has with his tenants. The consideration to him was the implied promise of each passenger that he is, or has been, an actual or prospective customer at the Baldwin Avenue Shopping Center, and actual compensation was received by him (under his leases) from each passenger who shopped in one of his leased stores.

After carefully reviewing all the evidence submitted it is our conclusion, and we so find, that defendants Smith, Wagner and Clayton in their operation, ownership or control of the bus lines herein described are performing the service of a passenger stage corporation as defined in Section 2 $\frac{1}{2}$ of the Public Utilities Act for the public generally without having first secured a certificate of public convenience and necessity from this Commission as required by Section 50 $\frac{1}{2}$ of the Public Utilities Act and therefore these defendants should be ordered to cease and desist. The order will so provide.

During the hearing, counsel for complainant moved to dismiss as to the defendant Burkholder. No evidence was introduced connecting this defendant with the operation of the bus lines, and the complaint will be ordered dismissed as to him, and will likewise be ordered dismissed as to H. J. Wagner, John Doe Wagner and Doe One Corporation, the three fictitious defendants who were not served. The other motions to dismiss as to the remaining defendants is denied.

ORDER

A public hearing having been held, and based upon the evidence adduced and the conclusions and findings set forth in the

opinion,

IT IS ORDERED:

(1) That Benjamin Clayton, B. J. Smith and H. B. Wagner, and each of them, individually or as copartners, shall immediately cease and desist from operating or conducting the transportation service described in the foregoing opinion, or any like service, unless and until said defendants, and each of them, shall have obtained from the Public Utilities Commission a certificate of public convenience and necessity authorizing said operation.

(2) That the complaint be and it is hereby dismissed as to Paul Burkholder, H. J. Wagner, John Doe Wagner and Doe One Corporation.

(3) That the Interim Order issued herein shall remain in full force and effect, as to defendants Smith, Clayton and H. B. Wagner, until the effective date hereof.

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

Dated at San Francisco, California, this 10th day of January, 1950.

[Signature]

[Signature]

[Signature]

[Signature]
COMMISSIONERS