GEH

ORIGINAL

Decision No. 49132

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF OAKLAND, a municipal corporation, CITY OF ALBANY, a municipal corporation, CITY OF PIEDMONT, a municipal corporation, CITY OF ALAMEDA, a municipal corporation, CITY OF SAN LEANDRO, a municipal corporation, COUNTY OF ALAMEDA, a body politic, COUNTY OF CONTRA COSTA, a body politic, CITY OF HAYWARD, a municipal corporation, CITY OF SAN PABLO, a municipal corporation, CITY OF EMERYVILLE, a municipal corporation, Complainants, vs. KEY SYSTEM TRANSIT LINES, a corporation, Defendant.	Case No. 5492
CITY OF BERKELEY, a municipal corporation, Complainant, vs. KEY SYSTEM TRANSIT LINES, a corporation, Defendant.	Case No. 5493

JOHN W. COLLIER and ROBERT E. NISBET for City of Oakland; J. P. CLARK for City of Alameda; FRED C. HUTCHINSON and ROBERT T. ANDERSON for City of Berkeley; CLAIR MacLEOD for City of Piedmont; J. FRANK COAKLEY and BERNARD KING for County of Alameda, County of Contra Costa, City of Albany, City of Alameda, City of San Leandro, City of Hayward, City of San Pablo and City of Emeryville.

Donahue, Richards, Rowell & Gallagher by FRANK S. RICHARDS and GEORGE E. THOMAS for Key System Transit Lines; Tobriner & Lazarus by DAVID GOLD for Amalgamated Association of Street Railway and Electric Motor Coach Employees of America; DION HOLM and PAUL L. BECK for the City and County of San Francisco.

O P I N I O N

Defendant operates a passenger transportation service in Alameda

and Contra Costa counties, and an interurban passenger transportation service between East Bay communities and San Francisco. Defendant's employees have been on strike since July 24, 1953. All service has been suspended since that date.

The complaints allege that defendant has failed to perform its legal obligations to render service by an unreasonable refusal to operate its trains and busses. The answers allege that the strike of defendant's employees is the sole reason for service suspension, that it is physically impossible to operate safely without trained personnel, that union personnel cannot be obtained, and that it would not be in the public interest to use non-union personnel, if in fact such persons could be obtained.

The matters were consolidated and public hearing was held at San Francisco on September 21, 1953 before Commissioner Potter and Examiner Cassidy.

On September 11, 1953 the Superior Court in and for the County of Alameda issued a peremptory writ of mandate directing defendant to resume operation not later than seven days after that date. (Dubovsky v. Key System Transit Lines, No. 251 697.) Key System's petition for a writ of supersedeas and a temporary stay of that order was denied by the District Court of Appeal on September 18, 1953. (1 Civil 15972.) On September 22, 1953 Key System's petition to the Supreme Court for writs of prohibition and mandate was denied on procedural grounds. (Key System Transit Lines v. Superior Court, S.F. No. 18924.)

At the opening of the hearing before this Commission on September 21, 1953 counsel for the striking union moved that the present proceedings be continued until the Superior Court had rendered its opinion on issues asserted to be the same as the issues before the Commission. The motion was denied. The union did not request leave

to intervene and is not a party to these proceedings.(1) Complainants' motion for a continuance of the hearing was also denied.

Counsel were requested to state their theory of the case and to discuss the following matters in an opening statement:

> 1. If the Commission should order Key System to resume operations, how could such order be complied with without securing operating personnel other than the present operating personnel now on strike?
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> 2. Do complainants take the position that Key System should undertake or be ordered to hire personnel other than the operating personnel now on strike?
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> 3. Is it complainants' position that this Commission has authority to require Key System to submit the labor controversy to arbitration, or to meet the demands made upon it by its employees?
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> 4. Is it the position of complainants that this Commission has jurisdiction over labor-management relations, and, if so, what is the source and extent of such jurisdiction?

The contentions of the parties will be summarized before discussing the record and the issues.

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(1) Rule 45 of the Commission's procedural rules provides as follows:

"Intervention. In a complaint proceeding petitions to intervent and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. Such a petition shall be served and filed by petitioner at least five days before the proceeding is called for hearing, except for good cause shown. If petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition shall be served and filed by petitioner at least ten days, and the parties may serve and file replies at least five days, before the matter is called for hearing.

"Leave will not be granted except on averments which are reasonably pertinent to the issues already presented, but do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention, or by the presiding officer at the hearing."

Position of Complainants. Many aspects of the above questions are premature. The Commission has power to order immediate resumption of service, its function being to determine whether the suspension of service and failure to resume service is reasonable or unreasonable under all of the circumstances. The mechanics of how the service would be resumed would come up if defendant refused to comply with a Commission order directing resumption of service. In that event the Commission could seek appropriate action by the Superior Court to compel resumption of service, and, if defendant did not do so, the Superior Court could exercise its power to appoint a receiver to conduct the operations. It would be the duty of the receiver to endeavor to reach a negotiated agreement with defendant's employees, and, if unable to do so, to submit the dispute to arbitration. Complainants also suggested that with present negotiations deadlocked and service not having been rendered for 60 days, the Commission could specify a certain period of time for arrival at a negotiated agreement, and then order defendant to arbitrate the matter, defendant to appoint one arbitrator, the employees another, and the third arbitrator to be selected by the Commission. Complainants contend that these proceedings do not involve the question of whether or not the Commission has jurisdiction over labor-management relations. If defendant were required to pay higher wages, it could come to the Commission immediately upon resumption of service and request interim fare increases because of the increased cost of operation.

Position of Defendant. The Commission has no jurisdiction over labor-management matters. The labor dispute is within the exclusive jurisdiction of the National Labor Relations Board. The prescribed administrative remedies before the board have not been exhausted. No court or commission has the authority to order defendant to pay

labor a certain amount of money. Defendant moved that the Commission set aside the order of the Superior Court upon the ground that the latter had no jurisdiction over the matter, the Commission having previously and continuously exercised exclusive jurisdiction over defendant's operations.

The complaint, answer, and writ in the Superior Court matter were received in evidence for the limited purpose of showing the nature and status of that court proceeding, but not for the purpose of establishing facts in the present proceeding.

It was stipulated that as a result of the strike great injury has been and is being suffered by a vast number of individuals, businesses, defendant, and the general public. Complainant also called witnesses who testified in substance that the average weekday gross passenger revenues of the Municipal Railway of San Francisco during the 21 weekdays during August were approximately $3,000 a day less than during the 18 weekdays preceding July 24, 1953; that approximately 7500 public school pupils in Oakland normally use public transportation; that a check made by a banker with various Oakland merchants indicated a "falling off" of business activities since July 24, 1953, with an increase of business in outlying areas; that there has been a decrease in the hiring of retail clerks in various industries in Alameda County; that the case load of various hospitals in Alameda County has decreased, and that hospital employees have had difficulty in obtaining transportation; and that patrol officers of the Oakland Police Department have been assigned to traffic duty because of increased congestion of automobile traffic.

On May 29, 1953 defendant and the local union, in view of proceedings then pending before the National Labor Relations Board involving a jurisdictional dispute, agreed to continue the then current

collective bargaining agreement, subject to the right of the union to give notice of a desire to commence negotiations looking toward a modified or new agreement. Upon receipt of official notice from the National Labor Relations Board of the dismissal of a case filed by a machinist's union, the local carmen's union, on June 15, 1953, gave defendant notice of a desire to commence negotiations. There were further interim extensions of the bargaining agreement and on July 20, 1953 the union gave defendant notice of its intention to terminate the contract as of July 24, 1953.

There have been approximately 35 days of negotiations between defendant and the local union. Federal conciliators have participated in these negotiations. Defendant and the union were negotiating through an intermediary on September 11, 1953. The meeting "broke up" upon receiving notice that on that day the Superior Court had issued a peremptory writ directing defendant to resume service. A citizens' committee appointed by the Mayor of the City of Oakland was unsuccessful in its efforts to effect a settlement of the strike. Neither the local union nor its parent organization has filed with the National Labor Relations Board any complaint against defendant charging unfair labor practices or refusal to bargain.

Defendant's lines serve transcontinental railroad and interstate bus terminals, an airport and several military installations, including Oak Knoll Hospital, Oakland Army Base, Naval Supply Depot, Naval Air Station and Treasure Island. It carries employees from and to several plants the products of which enter interstate commerce, purchases goods and materials in interstate commerce, has an arrangement for use of certain of its tracks by a railroad freight carrier, and derives revenue from the advertising of nationally advertised products in its trains and busses. Based on these facts, defendant contends that its labor controversies are subject to the

jurisdiction of the National Labor Relations Board.

We need not pause long on the subject of the injury which the public, necessarily, has been and is now suffering from this strike, as is always the case where a strike involves the public transportation service in any large metropolitan center of population. It would be difficult to overstate such injury.

We hold that the existing deplorable condition resulting from the suspension of service by said utility, resulting from said strike, is sufficient to require the exercise by us, to the fullest extent, of all lawful powers of this Commission in an attempt to bring to an end the suspension of service by defendant.

The proposition which presents itself is the determination of such powers. We hold that this Commission has exclusive jurisdiction over the service of the defendant, Key System Transit Lines, subject only to review by the Supreme Court of this State to the limited extent provided by law. In all matters of public utility regulation, so far as State law is concerned, this Commission stands next in authority to the Supreme Court of this State. In our opinion, the Constitution and statutes of California, as interpreted by that Court, leave no doubt on this point. (Miller v. Railroad Commission, 9 Cal. (2d) 190, 195, 198; People v. Northwestern Pacific R. Co., 20 Cal. App. (2d) 120, hearing by the Supreme Court denied; Loustalot v. Superior Court, 30 Cal. (2d) 905, 912; Sexton v. A.T. & S.F. R.R. Co., 173 Cal. 760, 763-764; People v. Brophy, 49 Cal. App. (2d) 15, hearing by Supreme Court denied; Northwestern Pacific Railroad Co. v. Superior Court, 34 Cal. (2d) 454; Live Oak W. U. Assn. v. Railroad Commission, 192 Cal. 132, 143; Clemmons v. Railroad Commission, 173 Cal. 254, 256-258; Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 650, 655-656, 658, 689.)

It is strenuously urged upon us that we order the defendant

utility, forthwith, to resume service upon pain of being held in contempt of the Commission should it not comply and further subjecting itself to the heavy penalties provided for by the Public Utilities Code flowing from such failure to resume service. Also, we are urged to order the defendant to submit the labor dispute with its employees to arbitration or in some other manner resolve such dispute so that the striking employees will return to work.

All these propositions we have considered and had considered long prior to the filing of the complaints in the above-entitled cases. We shall proceed to discuss these proposals and suggestions.

In approaching the subject of power and authority exercised by government, we must ever keep in mind that we live under a government of laws and not of men and that due process of law must be observed. Also, it must be kept in mind that, even where jurisdiction and power lawfully exist, such jurisdiction and power must not be exercised arbitrarily or otherwise unlawfully. Likewise, we must remind ourselves that there are areas of human conduct which government has not seen fit to enter or to regulate, believing that it is better to leave such conduct to self-regulation than for government to enter such fields. In such areas of human conduct, government has established a policy of non-regulation. Furthermore, we desire to point out that regulation is not inherent but must be based upon some constitutional, statutory or established common law provision or principle. This Commission is a creature of the law and must stay within the law of its creation whenever action is taken by it. Officers of the law should be the first to set an example of obedience to the law. A public official who is, himself, a lawbreaker violates the high trust with which he has been clothed. A desirable end can never be justified if it must be reached by unlawful means. Therefore, we are not permitted by law to achieve a lawful object by un-

lawful means. The desire, however justified, to solve a human problem never can substitute for lawful authority to accomplish such solution.

The people of this State and the Legislature have not seen fit to outlaw strikes and lockouts and to provide governmental machinery for securing those legitimate objectives of labor and management which strikes and lockouts are supposed to achieve. Therefore, strikes and lockouts are lawful provided they are pursued within lawful limits. These are stubborn facts which we must recognize. As of the present date, collective bargaining to resolve labor-management disputes is favored by public policy over the use of compulsory process. (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586, 96 L. ed. 1153, 1167.) It follows that collective bargaining procedures should be given a fair trial. Opinions may differ as to how much time should be consumed in such procedures.

We are of the opinion that this Commission, lawfully, may order the defendant utility to resume service but, unless such order be qualified and conditioned upon the taking of all reasonable and lawful means by said defendant to resume service, such order would be unrealistic and meaningless because of the existing strike on the part of the employees of said defendant. The law neither performs nor requires the performance of idle acts. Neither does the law require impossibilities. It is a perfectly lawful defense to any order of a public tribunal if it appears that it is not possible to comply with such order.

We know that the only way service may be resumed by this utility is through the settlement of the present strike. No one suggests that the defendant attempt to resume service by employing operating personnel outside the group of operating employees of defendant now on strike. No party to this proceeding has suggested

the employment of so-called strikebreakers. We will not order said defendant to perform an act which could be said to involve or invite the use of strikebreakers and thus add to the present woes of the public.

The law imposes upon said defendant the affirmative duty to furnish reasonable and adequate service to the public at all times, all the facts and surrounding circumstances being taken into consideration. In the present circumstances, defendant is required by law to take every reasonable and lawful means available to it in an attempt to resume service to the public. Also, there is a duty incumbent upon the employees of this utility to exert every reasonable effort to bring this strike to an end and thus facilitate the resumption of service to the public by defendant. The utility and its employees are equally obligated to act in the public interest. To unreasonably prolong this strike is to act contrary to the public interest.

The suggestion that we order the defendant to submit to arbitration or meet the demands made upon it by its employees, in our opinion, would be unlawful. The law, as it now stands, confers no such authority upon this Commission. Very recently, the Supreme Court of this State passed upon the implied powers of this Commission and, in our opinion, the holding of that Court on such subject rejects any thought that we possess powers sufficient to order this utility to submit to arbitration or to meet the demands made upon it by its employees. (Pacific Telephone & Telegraph Co. v. Public Utilities Commission, 34 Cal. (2d) 822, 828-829.) In only comparatively recent years has the Supreme Court of the United States recognized that government could enact laws calculated to effect compulsory adjustment of labor disputes.

The evidence indicates that this utility has not exhausted all

reasonable and lawful means to resume service to the public, a duty which is enjoined upon it by law. We will direct defendant to take and exhaust all such means and to make reports to the Commission as to the action taken.

It is not inappropriate to here point out that the same situation as is presented by this strike has been presented to the Commission several times in the recent past. There is nothing new or novel about it. But we believe it is timely that governmental authority did something to prevent the recurrence in the future of such situations by the enactment of appropriate regulatory laws.

Counsel for the complainants advanced the proposition that the level of wages to be paid the employees of a utility is no different than the cost of a facility which the Commission orders a utility to install. Such contention, to say the very least, is unrealistic and constitutes a great oversimplification. It need only be observed that a utility may choose among many suppliers of facilities and no supplier may strike and bring the operations of such utility to a standstill just because the utility refuses to pay the price such supplier demands.

A further proposition put forward by counsel for complainants was, in effect, that the expense which would be incurred from the payment by the utility of increased wages is guaranteed or in some way insured by this Commission. The exact contrary is true. We desire to make it clear to this utility and its employees that it would be unlawful for this Commission to undertake to assure either or both in advance that any rate increase will be granted to said utility or that the Commission will underwrite any wage increase which may be granted by the defendant utility to its employees. Reduced to its lowest terms, the proposition is that the employees of a public utility demand a wage increase; the utility resists; the

employees strike and this Commission is obligated to put up the money, so to speak, in the form of a rate increase, which must be borne by the public, in order that the demands of the employees be met by the utility and the strike terminated. This Commission will not become a party to such a squeeze-play procedure. It is enough to say that such a proposition is unlawful. Regulation does not guarantee, insure or assure a utility that it will earn net revenues. (Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 590, 86 L. ed. 1037, 1052; Smyth v. Ames, 169 U.S. 466, 544-545, 42 L. ed. 819, 848.) It would be contrary to law for a regulatory body to attempt such a guarantee at the expense of the public. A utility is constitutionally entitled to an opportunity to earn a reasonable return upon its investment reasonably employed in the service of the public but nothing more. If, after using all reasonable means available to it, such utility cannot earn a reasonable return and thus suffers confiscation, it has a constitutional right to go out of business. (Railroad Commission v. Eastern Texas R. Co., 264 U.S. 79, 85-86, 68 L. ed. 569, 572; Ft. Smith Light & Traction Co. v. Bourland, 267 U.S. 330, 332-333, 69 L. ed. 631, 633.) These are rules of law which we desire to impress upon all the parties to these proceedings.

During the hearing of these matters a suggestion was made that the Superior Court of Alameda County could be asked to appoint a receiver for the utility. Baldly stated, this would amount to seizure by government. Seizure is a last resort in a matter of this nature and must be authorized by some constitutional or statutory provision. (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. ed. 1153.) If there is any law of this State which would authorize such drastic action, it would have to be the Public Utilities Act for the reason that, as yet, no emergency laws have

been placed in operation which would apply to this controversy. Seizure is the most onerous of all legal procedures. (22 Cal. Jur. 432.) There is no such a proceeding as an action to appoint a receiver. (22 Cal. Jur. 433.) Appointment of a receiver is ancillary to and in aid and support of some primary cause of action. Justification for appointing a receiver must be found in the statute. (22 Cal. Jur. 440.) In order that a receiver be appointed for a strike-bound public utility, it would be necessary either to enact specific legislation to that end by amending said Act or to assume that the broad provisions of Sections 701 and 702 of the Public Utilities Code grant such authority. We have never so construed said section of said Code and the decisions of the Supreme Court of this State do not indicate that any such authority resides in those sections or elsewhere. If this Commission may not exercise such authority we know of no other State tribunal which may. Should the Superior Court purport to appoint a receiver in the present circumstances, this Commission would not recognizesuch purported appointment until the order appointing such receiver should be affirmed by the Supreme Court of this State. An attempt was made to enact legislation at the 1953 session of the Legislature authorizing the appointment of a receiver for a public utility when it failed or refused to furnish reasonable and adequate service but such proposed legislation never reached the floor of either House. The provisions of State law empowering the Superior Court to appoint a receiver have no application to the instant controversy. No contention is made that the defendant utility is insolvent or that its financial integrity is seriously impaired. On the contrary, the contention by those who urge the appointment of a receiver is that the defendant is financially able to meet the wage increase demands being made upon it by its employees and that it unreasonably fails

to meet such demands or submit the dispute to arbitration. No lawful grounds for the appointment of a receiver have been shown.

Defendant requests that we set aside the order and mandate of the Superior Court of Alameda County which purported to order and direct the utility to resume service. That this Commission has authority to set aside a final judgment of a Superior Court, even though such judgment may have been valid when rendered, if such judgment interferes in any way with the exercise by this Commission of its jurisdiction, we entertain no doubt. (Miller v. Railroad Commission, supra.) Being of the opinion, however, that such action is neither necessary nor appropriate at this time, said request is denied. Nevertheless, we wish to make it perfectly clear that, in our opinion, this Commission has exclusive jurisdiction over the subject matter concerning which said Superior Court sought to exert its jurisdiction by rendering said order and mandate. The Constitution and laws of this State, as interpreted by the Supreme Court, leave no doubt on this point. (Miller v. Railroad Commission, and other cases, supra.) The order and mandate of said Superior Court show on their face that the defendant is a public utility and that this Commission has assumed and exercises jurisdiction thereover. In such circumstances, said order and mandate are void and the law ex proprio vigore sets them aside. If the Superior Court, lawfully, may issue orders to a public utility concerning service rendered to the public by such utility, it may, also, issue orders concerning rates, safety matters or any other subject of regulation and thus completely supplant this Commission in the regulation of public utilities. The whole scheme of regulation of public utilities established in 1912 would be demolished.

We do not pass upon the point raised by the defendant as to Federal authority applying to certain issues raised herein, being of

the opinion that the same is unnecessary to the decision rendered herein.

We desire to remind defendant and its employees that the defendant utility is performing a function of the State (Smyth v. Ames, 169 U.S. 466, 544-548, 42 L. ed. 819, 848-849), and that it exercises an extraordinary privilege and occupies a privileged position. (United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 309, 73 L. ed. 390, 396.) In such circumstances, a higher duty is owed to the public than by an ordinary business not so affected with the public interest.

Our conclusions as to the impropriety or lack of authority on our part to issue compulsory directions to this utility, as indicated in this opinion, are subject to review by the Supreme Court of this State. A petition for review to that Court respecting the decision herein may be filed and, under the law, that Court is required to give to such petition expedited action. This question could be disposed of with dispatch and conclusively, so far as the law of the State of California is concerned.

Finally, we wish to observe that obedience to the law as it exists is, in our opinion, the first duty of the citizen. It is more important that we observe the law in hard cases, such as the instant case, than in easy cases. Our constitutional guaranties were constructed with a particular view to hard cases, where only such bulwarks could avail against the surge and sweep of an enraged and unwise public opinion. Let us not forget the recent Steel Mills Seizure cases where the President of the United States was told by the Supreme Court that his seizure of these mills was unlawful, although it may be said that such seizure was not entirely without historical and legal precedent. (Youngstown Sheet & Tube Co. v.

Sawyer, 343 U.S. 579, 96 L. ed. 1153.)

O R D E R

Based upon the findings and evidence in these consolidated cases,

IT IS HEREBY ORDERED that defendant Key System Transit Lines, its officers, servants and agents take and exhaust every reasonable and lawful means to resume service to the public and said defendant is hereby ordered to report daily to this Commission, in writing, the status of the dispute which exists between defendant and its employees and the measures taken to settle such dispute and to resume service to the public.

We will hold this proceeding open for the purpose of entering such supplementary orders as may appear appropriate.

This decision shall become effective two days after the date hereof.

Dated at San Francisco, California, this 28th day of September, 1953.

President

Commissioners

Commissioner HAROLD P. HULS, being necessarily absent, did not participate in the disposition of this proceeding.