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Decision No. 69660

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of The Atchison, Topeka and Santa Fe Railway Company, a corporation, for authority to reduce its passenger train service between Los Angeles, and San Diego and certain intermediate points.	Application No. 46609
Investigation on the Commission's own motion into the operations, service, rates, rules, regulations, facilities, equipment, contracts, and practices of THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, within the State of California.	Case No. 7905

ORDER DENYING REHEARING

A petition for rehearing of Decision No. 69511 having been filed by the petitioner, Orange County Commuters Association, and the Commission having considered said petition and each and every allegation therein, and being of the opinion no good cause for granting rehearing has been made to appear,

IT IS ORDERED that said petition for rehearing be, and the same is, hereby denied.

Public Utilities Code section 1733 provides that when an application for rehearing is made 10 days or more before the effective date of the decision as to which rehearing is sought, such application "shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied."

Decision No. 69511, issued August 3, 1965, to become effective August 23, 1965, was suspended by the filing of the above petition for rehearing on August 13, 1965, the tenth day before the other-

wise effective date. The suspended decision authorized discontinuance of specified trains, subject to a number of conditions, one condition being that applicant, "within twenty days after the effective date hereof", shall "file in this proceeding a proposed schedule" covering operation of the trains to be continued.

Applicant railroad filed a timetable schedule on August 23, 1965, to become effective September 13, 1965. Such filing was premature and unauthorized, because the order authorizing any such filing had already been suspended. Suspension of an order under section 1733 necessarily means that the effective date of the order is suspended until rehearing is granted or denied. If rehearing is denied later than the suspended effective date, then the effective date of the order is the date rehearing is denied.

Because of the suspension, on August 23, 1965 applicant railroad had no authority to file any revised timetable schedule. It may not discontinue trains on September 13, 1965, and may do so only in accordance with the provisions of Decision No. 69511, which decision becomes effective on the date of this order.

Dated at San Francisco, California, this 8th day of SEPTEMBER, 1965.

Frederick B. Holoboff
President

George G. Grover

Swigart

Commissioners

A. 46609
C. 7905

DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

Once upon a time there was a progressive and a great Governor named Hiram Johnson. And because of the abuse of the public trust by a certain railroad corporation within the State of California it became necessary to impose rigid controls upon railroads. The theory of regulation was as old as Munn vs. Illinois and in California the people by constitutional amendment created a Railroad Commission and subsequently there was enacted a Public Utilities Act. The law was made quite specific and rigid in the control of railroad corporations. This was so because of the great effect such railroads had upon the economy of California, its citizens, its affairs. Obviously railroad corporations having received valuable rights from the public to serve in and about the State also took on corresponding obligations. And to make these obligations more than empty promises the people enacted controls to be administered by a regulatory commission.

Today's decision turns down the request of a substantial number of the citizenry of California which insists that passenger service be retained. It is a far cry from the era of Hiram Johnson and the philosophy of the Public Utilities Commission of the State of California at least as expressed in the past. Indeed it is a far cry from the decision of the Public Utilities Commission of the State of California rendered in this very proceeding on May 5, 1964 wherein the majority denied the request to discontinue Train No. 71. That same decision, by the way, authorized the discontinuance of San Diegan Trains Nos. 70 and 81.

The opinion of May 5, 1964 referred to pointed out the policy of this Commission concerning rail passenger service

as it was and as it ought to be before being abandoned by today's action. At page 2 of the previous opinion is found this:

"It is the policy of this Commission to insist upon the preservation and maintenance of reasonably adequate railroad passenger service and the modernization and improvement of such service, the Transportation Act of 1958 (enacted by the Congress of the United States) to the contrary notwithstanding. Instead of such service being degraded, it should be improved so that the railroads may more effectively compete for the passenger business of the Nation. We believe the Transportation Act of 1958 to be contrary to the public interest, insofar as it not only permits but actually invites railroads summarily to abandon interstate passenger trains and also to seek Federal intervention to abandon purely intrastate passenger trains.

"We are not unaware of the difficult situation in which the railroads of this country find themselves because of the competition of the private automobile and other forms of transportation. However, we offer the opinion that the defeatist attitude of many of the railroads as regards passenger service has largely contributed to this regrettable situation. It is our opinion that the public welfare requires that reasonable rail passenger service be preserved and maintained, even though public subvention becomes necessary. Many objectives to which public funds are now being put, in our opinion, are not as important as is the maintenance of reasonable rail passenger service.

"The problem presented by a railroad's request to abandon or reduce passenger train service, so far as the State of California is concerned, is one of paramount importance because of the tremendous population and economic growth of this State. This is not the problem

of the railroads alone; it is also, and more significantly, the problem of the people of the State of California. The problem presented is one most difficult of solution and one which requires the most careful consideration. There is no problem, in our judgment, which more completely involves the public interest than this one. To say that the problem is insoluble is the road of defeatism. There must be a solution of the problem.

"Disagreeing as we do with the fundamental concept underlying that part of the Transportation Act of 1958 which appears to encourage the abandonment or reduction of passenger train service throughout the Nation, nevertheless, we must face the fact that the Transportation Act of 1958 is the latest expression of Congressional policy on the subject. In our judgment, that policy adds to the difficulty of the problem rather than contributing to its solution.

"We must keep in mind that this Commission is charged with the fundamental duty of supervising and regulating every public utility in this State and that the Commission is empowered to do all things, whether specifically designated in the statutes or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. Thus, there is placed upon this Commission the lawful duty of attempting a solution of the problem presented, calculated to comport with the public interest.

"It is our purpose and it will be our policy to require the railroads of California to maintain a reasonably sufficient passenger service operated with modern equipment until either the people of this State, by constitutional prescription, or the Legislature, by statutory enactment, shall direct otherwise. Anything less than this would, in our judgment, amount to a complete disregard of the dynamic growth in the population

and economy of California and its future.

"The Scriptures tell us that where there is no vision the people perish. Public officers must have and exhibit vision in the discharge of their public duties, and they must furnish appropriate leadership for the people.

"It must not be forgotten that a railroad corporation, being a public utility, performs a function of the State, and that it is charged with a public duty in the nature of a trusteeship. Also, a public utility exercises an extraordinary privilege and occupies a privileged position because of the franchise granted to it by governmental authority. In the circumstances, public service of the highest order is the solemn obligation, and must be required, of such a public utility.

"A railroad should be as zealous to maintain reasonable and adequate service as governmental authority is to see to it that such service is maintained. It is the lawful duty of a railroad notonly to perform its public duty but to perform it willingly and not to wait until it is compelled to discharge that duty by lawful authority.

"Whenever a railroad seeks to abandon or reduce passenger service, the burden strongly rests upon the railroad to prove by clear and convincing evidence that the public convenience and necessity no longer require such service. The law raises a presumption that any service furnished by a railroad is required by the public convenience and necessity; and therefore, when the railroad seeks to abandon or reduce such service it must meet this heavy burden of showing that the public convenience and necessity no longer require the continuation of the service sought to be abandoned or reduced.

"Unlike a proceeding involving a general rate adjustment of a railroad, a proceeding involving the abandonment or reduction of service addresses itself to public convenience and necessity rather than to a matter

of confiscation. It is a general rule of regulatory law that a public utility may not demand that such segment of its service be profitable or that it realize its out-of-pocket costs in connection with each segment of its service. Public convenience and necessity may require the operation of a particular service at a loss; and if so, the public utility may not complain.

* * * * *

"In this connection, attention is called to the decision of the Supreme Court of the United States in the case of Alabama Public Service Commission v. Southern Railway, 341 U.S. 341, 346-348, 352-355, 95 L. ed. 1002, 1007-1008, 1010-1011. The Supreme Court, in that case, pointed out the rules of law applicable in cases of the kind here presented, observing that a service, lawfully, may be required to be performed even at a loss where public convenience and necessity justify such a conclusion. See, also, United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 309, 73 L. ed. 390, 396, and B & O Railroad v. U.S. 345 U.S. 146, 150, 97 L. ed. 912, 916.

"We are aware that many of the railroads throughout the nation complain of the alleged burden which the rendition of passenger service casts upon the entire operations of the railroads. It is our view that the position of the railroads vastly exaggerates the problem. Be that as it may, the fact remains that the railroads must furnish reasonable passenger service as a part of their public duty; and it is the responsibility of this Commission, as it is of all other regulatory bodies, state and federal, to see to it that that duty is performed by the railroads.

"In our view, the service performed by the railroads of this Nation, both passenger and freight, takes second place to no other public service being performed. We

intend that such service, as far as California may be concerned and to the extent that this Commission is permitted so to do, shall be protected and maintained to the end that the public shall be served. We cannot preserve the railroads by taking action which leads only to their destruction."

"Said policy was reaffirmed by this Commission by its Decision No. 61221 rendered on the 20th day of December, 1960, (58 Cal. P.U.C. 340, 343). We adhere to that policy."

The majority is proceeding upon the premise that simply because a loss is demonstrated that discontinuance should be granted. Such a rational discloses a misunderstanding of the nature of regulation and of the obligations of a railroad corporation as here. It has long been the rule, and for good reason, that public service corporations take unto themselves the obligation to serve the whole even though portions thereof may be less than satisfactory in terms of earnings or return upon investment. Nothing has been presented to this Commission in my view which justified the abrupt change in policy and the abrupt concession to the private interest as opposed to the public interest. It is to be noted that the opinion on rehearing dated August 3, 1965 permits the removal of Train No. 71 as well as other trains but said opinion is lacking in rationale, discussion and cogent reasons which should prevail over the original opinion herein and particularly the previous Commission policy to which I have referred.

The compulsions of private demands even upon businesses totally unregulated if for good will if nothing else, demands that all must be served even at times without adequate compensation.

To excuse service here is to ignore the total system affluence of the Atchison, Topeka and Santa Fe Railway system.

It is as contrary to the public convenience and necessity of Californians as it is totally suitable to the private convenience and necessity of the carrier. But the private convenience and necessity of the carrier is not the overriding concern of a regulatory Commission. That consideration comes second to that which the public needs and demands.

The carrier here assumed the obligation to carry not only freight but more importantly at least in my opinion people as well. And simply because there is a financial burden associated with the obligation to transport people is no reason to forgive the carrier its historic promise. What is the revenue from freight for example over this same line using these same rails? Undoubtedly substantial.

The opinion of the majority goes against the precedents of this and other regulatory bodies holding a carrier as here to its obligation to serve people. This Commission historically has always been more reluctant to permit train abandonment than has the Interstate Commerce Commission - at least until recently. And all today's decision does is to relieve the carrier of the obligation of going to a federal agency where perchance the public might still prevail as they have upon occasion in the past.

I repeat again that which I had stated earlier in these proceedings that today's decision takes no note of the future growth and requirements of California.

The Commission has been besieged by a flood of telegrams and letters from persons having some grasp of the public interest all unanimous in requesting that the Commission retain Train No. 71. It is no light matter to hold this as does the majority that the public has no need of nor desire for the specific train here involved when its retention has been requested by both United States Senators from the State of California, the ~~majority~~ Mayor of the City ~~and County~~ of Los Angeles, a substantial portion of the California Congressional delegation, the Orange

County Commuter's Association, the City of San Diego, many representatives and voices of the Brotherhood of Locomotive Engineers and affiliated unions, members of the Federal Judiciary, and other persons whose views are entitled to great weight simply because they are Californians who need a train. I know of no better way to measure that which the public declares it needs than by so loud and unanimous a plea directed to this Commission.

I repeat again that which I stated earlier in these proceedings that today's decision takes a narrow look at rail passenger service in Southern California. It ignores the problem of traffic confusion, freeways, the fastest growth of any State in the Union. This is not a train that runs to no place. It runs to one of the largest metropolitan areas in the world and such an area will be strangled by the motor car unless relief is found in some form and manner in the future. One of the ways however slight or great that the public interest can be served by this Commission is to retain a means of transportation which enables the public to get into Los Angeles and out without occupying a certain area of cubic feet on those concrete ribbons for some reasons styled "free-ways."

WILLIAM M. BENNETT
Commissioner

San Francisco, California
September 8, 1965.

Decision No. 69660
A 46609, C 7905

COMMISSIONER PETER E. MITCHELL DISSENTING:

"In face of the big city's mounting needs for fast and efficient urban transit service, commuters daily trip over the monstrous illogic of dwindling railroad service." 1/

Perhaps we should add to that quotation:

"and the logic of the California Public Utilities Commission."

I would definitely grant a rehearing to pursue the exigency for railroad passenger transportation between Los Angeles and San Diego.

I am amazed at the majority of the Commission in its refusal to heed the pleas of United States Senators Kuchel and Murphy; California members of Congress; the Boards of Supervisors of Los Angeles and Orange Counties; the Mayor of the City of Los Angeles, and other officials and interested parties. They all requested this Commission to reconsider its action and grant a rehearing.

The telegram of Mayor Yorty to this Commission is representative of the views of these distinguished public officials. He stated: "As Mayor of Los Angeles, I am familiar with the need for passenger service on the Atchison, Topeka and Santa Fe Railway to serve commuter needs for people who must travel to Los Angeles daily. Los Angeles has a vital interest in seeing that Train #71 is retained

1/ Introduction, Quest for Crisis, by James N. Sites (1963)

and we ask that the PUC order eliminating this service be set aside and that a rehearing be granted in order that we may present new documentary evidence to you."

Gentlemen, welcome to the minority!

The California Public Utilities Commission has been esoterically intimidated and subordinated by the Transportation Act of 1958 and by the Act's nominee for power, the Interstate Commerce Commission. The California Commission does not now receive a complaint, does not now hold a hearing, does not now issue a decision, affecting rail passenger transportation without the sword of Damocles of the Interstate Commerce Commission waiting to fall on its defenseless head.

It is obvious that a majority of the California Public Utilities Commission has acquiesced quietly and gracefully to the legal blandishments of national control of the railroads. But I, for one, will not succumb either quietly or gracefully. The railroads may appeal every minute of the hour to the Interstate Commerce Commission if they desire. That is their right and <u>their</u> decision to make. It is my duty and <u>my</u> obligation to act on behalf of the residents of the State of California whose interests are my interests. Their interests and my interests may not necessarily coincide with <u>other</u> interests 3000 miles away.

This decision is another step in the abandonment of regulation by the California Public Utilities Commission over railroad passenger transportation. Indeed, in the past few years, the railroads have pursued a policy of filing an application bearing on passenger service with this Commission. Then, after a decision - or sometimes before a decision - by this Commission, an identical appli-

cation was filed with the Interstate Commerce Commission. Thus, herein Application No. 46609 was filed by the Atchison, Topeka and Santa Fe with the California Public Utilities Commission. Decision No. 68271 was rendered by this Commission, and Atchison, Topeka and Santa Fe promptly filed a similar application with the Interstate Commerce Commission. The California Commission granted a rehearing on Application No. 46609 and with the Interstate Commerce Commission waiting in the wings granted Atchison, Topeka and Santa Fe its presageful relief.

Apparently, we may be entering a new era of governmental approach by the railroads. Recognizing the self-induced regulatory poverty of this Commission, the Southern Pacific Railroad recently submitted to the Interstate Commerce Commission an original application for a rate increase on its peninsula trains, not even deigning to make a token filing to placate the California Public Utilities Commission. We will participate in the hearings before the Interstate Commerce Commission on Southern Pacific's rate application, just as a home owner cheers for the fireman protecting his house from destruction. The only difference is - it is our house that has been and is under siege and the walls are incalescent.

It is time someone spoke out and asked our fellow Californians to take notice. I am directing that copies of my statement, therefore, be forwarded to our United States Senators and Congressmen from California and to members of the Interstate Commerce Commission. I have no inclination to stand silently by while my house crumbles beneath the weight of State incubation. I believe these parties are entitled to know what is happening to the regulation of

railroad passenger traffic in California, and the disability of this Commission to properly protect the best interests of its citizens in the field of transportation.

Our immediate concern is the action of the majority of this Commission in reversing the Commission and discontinuing certain passenger trains between Los Angeles and San Diego. Decision No. 68271, dated November 24, 1964, first denied the application of Atchison, Topeka and Santa Fe.

The majority opinion in Decision No. 68271 was written by Commissioner Everett C. McKeage, and while I do not agree completely with his sentiments, he enunciated what should be the credo of every officeholder:

> "Public officers must have and exhibit vision in the discharge of their public duties, and they must furnish appropriate leadership for the people."

This spirit was exemplified just recently by the United States Senators Kuchel and Murphy; members of Congress; the Boards of Supervisors; Mayor Yorty, and other officials who sent telegrams and resolutions to this Commission asking for further hearings in Application No. 46609. Their requests have not been honored by the majority of this Commission.

In my concurring opinion to the majority opinion of Commissioner McKeage in Decision No. 68271, I stated:

> "Civil officials and citizens expressed a belief to the Commission that a partial solution is the expansion of passenger traffic by the Santa Fe in

its Los Angeles-San Diego operation at peak hours."

I then asked the question: "Can the Santa Fe Railroad help alleviate the stagnation in passenger transportation? There is insufficient evidence in the record to reach a conclusion." The telegrams and resolutions from interested public officials are indicative that the record is still incomplete.

Supplementing Commissioner McKeage's opinion, there was an additional concurring opinion and a joint dissenting opinion which I believe foreshadow the subsequent approval of the majority (Decision No. 69511) in allowing the Atchison, Topeka and Santa Fe to discontinue certain train service between Los Angeles and San Diego.

The first paragraph of the other concurring opinion to Decision No. 68271 reads as follows:

> "I concur with the decision herein but wish to point out that in reality the control of passenger train service in California is for all practical purposes vested in the Interstate Commerce Commission under the Transportation Act of 1958. At best, decisions such as this are a mere holding action. Our attempt to fulfill our obligation to the train riding public of California is but a transient thing until such time as the Interstate Commerce Commission, at least as it has in the past, overrules our authority."

These are the sentiments of one Commissioner.

The joint dissenting opinion to Decision No. 68271 consisted of three paragraphs with the concluding paragraph recognizing:

> "Neither can this Commission change federal law by shouting at it. Our experience in the recent Southern Pacific Peninsula commute case indicates that the railroads will accept a passenger burden within reasonable limits; but if we impose upon them an unreasonable loss, they will inevitably appeal to the Interstate Commerce Commission pursuant to the federal statute. The majority's attack upon Congress can only discredit the position of this Commission and lead to stricter review at the federal level."

This pragmatic doctrine was advanced by two Commissioners.

Thereafter, on August 3, 1965, after a rehearing limited to oral argument, the California Public Utilities Commission issued Decision No. 69511, Application No. 46609, granting permission to Atchison, Topeka and Santa Fe to discontinue certain trains and specifically a so-called "commuter" train No. 71 from San Diego to Los Angeles.

In the entire Decision No. 69511, no mention is made of federal law or the Interstate Commerce Commission and the filing before it. Nor in the current action denying rehearing of Decision No. 69511 is reference made to the deluge of requests from public officials in Southern California asking the Commission to reopen Application No. 46609. The majority subscribes to the maxim: "many things are better left unsaid."

The California Public Utilities Commission should exercise its own independent authority over railroad passenger transportation in this State or direct all such applications immediately to the Interstate Commerce Commission. To go through the motions of a hearing without a belief in your own authority is senseless. I repeat again Commissioner McKeage's exhortation: "Public officers must have and exhibit vision in the discharge of their public duties, and they must furnish appropriate leadership for the people."

Did this Commission do so in Application No. 46609?

Peter E. Mitchell, Commissioner

San Francisco, California

September 21, 1965