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Decision No. 70574

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations of TANNER MOTOR TOURS, LTD., a corporation, in connection with the rates charged passengers in Southern California since November 16, 1962, for services performed under Local Passenger Tariffs, California Public Utilities Commission Numbers 19 and 20.	)	Case No. 7923

William A. Knight, for Tanner Motor Tours, Ltd. respondent.
K. D. Walpert, for R. W. Russell, Chief Engineer and General Manager, Department of Public Utilities and Transportation, City of Los Angeles, interested party.
Robert C. Marks and Kenji Tomita, for the Commission staff.

OPINION

On November 21, 1962 respondent herein filed Application No. 44957, requesting authorization to charge increased fares. Prior to the repeal of the ten percent Federal transportation tax on November 16, 1962, respondent's total charges had consisted of two elements: (1) the fare authorized by this Commission, as set forth in respondent's filed tariffs, and (2) the ten percent Federal tax. With the repeal of the tax, the total amount to be charged would have been less than when the tax was in effect. In Application No. 44957 respondent sought a ten percent fare increase so that the total amount to be charged would remain the same as before the repeal of the tax.

Respondent charged the fare without authorization from this Commission during the pendency of the application. Decision No. 67371 (issued on June 12, 1964) granted the requested increase in fares, and

further found that the ten percent surcharge, collected by the respondent on all fares charged between November 15, 1962 and the effective date of the decision, was imposed without authorization from the Commission and contrary to law, and ordered that the sum so collected should be retained by the respondent in a special trustee account until further order of the Commission.

On June 12, 1964 the Commission instituted this investigation into the operations of respondent.

A public hearing was held on December 9, 1964 in Los Angeles, before Examiner Fraser. The matter was submitted on said date subject to the filing of a late-filed exhibit, which was received on February 10, 1965.

A staff accountant testified that in October 1964 he made an investigation of respondent's operations to determine the total sum collected without authority. The investigation covered all revenue collected by respondent during the period from November 16, 1962 through July 7, 1964 for all bus operations except sight-seeing tours, and from November 16, 1962 through August 11, 1964 on sight-seeing tours. (Rate increases authorized by Decision No. 67371 had been put into effect immediately subsequent to these dates.) Exhibit No. 1, introduced by the Commission staff, shows an adjusted revenue base, exclusive of the ten percent surcharge, of $2,514,350 for the period from November 16, 1962 through August 11, 1964. This total includes some of the revenues derived from the Caliente Race Track tours. Exclusive of the Caliente operation, the total amount collected in excess of the authorized fares has been computed by the staff to be $214,171.

The Caliente operation consists of Saturday and Sunday (racing days) round-trip tours from Los Angeles to San Ysidro at a fare of $6 per passenger. Service is provided on other days of the

week when races are scheduled. The buses start leaving early in the morning (5:30 to 6:00 a.m.) as soon as they are loaded. Buses are assigned until all ticket holders have a seat. From ten to twelve buses are used on an average day, although there have been as many as twenty-five assigned on special racing days. The buses remain parked in San Ysidro after arrival, awaiting the passengers' return from the track in the afternoon. Each bus then leaves as soon as it is loaded. The buses remain on the California side of the border. The passengers walk into Mexico and are provided free round-trip transportation to and from the race track after showing the stubs of their bus tickets. Respondent has no contract or agreement with either the Mexican Cab Company or the Caliente Race Track. The free cabs are provided by the race track and apparently serve all buses which discharge passengers at the border.

Respondent argued that the Caliente tours (Los Angeles to San Ysidro) are under the jurisdiction of the Interstate Commerce Commission and that the $6 fare charged is provided for in its tariff filed with the Interstate Commerce Commission. (Supplement No. 8 to MP-I.C.C. No. 2). Official notice was taken of Decision No. 61751, issued by this Commission on March 28, 1961, in Application No. 42447, wherein the respondent applied for and was granted a certificate to serve from Los Angeles, on the one hand, to San Ysidro, on the other hand.

Respondent filed Application No. 47247 on January 7, 1965 wherein it requested that the $5 rate provided in the California P.U.C. Tariff (pursuant to Decision No. 67371) be raised to $6, since the other two certificated carriers, providing an equivalent service from the same general area, charge a fare of $5.50 and $6.66 per round trip. The application also alleges that, although applicant (respondent here) has been operating under the belief that the Caliente operation was interstate

commerce, it now appears that jurisdiction over the operation may rest with the California Public Utilities Commission. The application prompted a further staff investigation since it was apparent that respondent had not been charging the rate authorized in its P.U.C. tariffs. Respondent concurs with the staff audit of the Caliente operations, which shows a gross revenue of $410,995 for the period from November 16, 1962 to July 7, 1964 and the sum of $101,486 collected in excess of the authorized P.U.C. rate. As noted, the tariff filed with the Interstate Commerce Commission during this period provided for a fare of $6, the amount respondent actually charged.

The unlawful collections amount to a substantial sum, but there are many mitigating factors. Respondent applied to the Commission to authorize the rate, since held unlawful, about seven days after the rate was put into effect. The sums collected were used to pay current expenses so that respondent could continue in operation, respondent having been in serious financial difficulty for some time. The rate of $6 charged by respondent on its Caliente operation has been published in an interstate tariff filed with the Interstate Commerce Commission.

The principal question presented in this case relates to the particular action which the Commission should take against respondent by reason of the excessive fares charged in the period between the repeal of the Federal transportation tax and the effective date of the increases authorized by Decision No. 67371 in 1964.

The unlawful charges are subject to suits for reparation by those from whom they were collected, but no one seriously suggests that reparation litigation will provide a solution. As was pointed out in Decision No. 67371, it is not to be expected that any significant portion of the excess

charges will be returned in that manner. (At the same time, we are not to be understood as discouraging such suits or as suggesting that the company has no reparation liability.)

The Commission has decided to file a complaint for penalties in the Superior Court (Pub. Util. Code §§ 2104, 2107-2109), rather than institute proceedings in contempt or for a possible forfeiture of the excess charges collected. Such a penalty suit has been filed.

We have determined that the total amount of the penalties to be sought should be $214,000, which is substantially equivalent to the total excess amounts which respondent collected, exclusive of the Caliente operation. No penalty has been sought in connection with the Caliente operation. During the period covered by the record made in this case, respondent charged (and apparently is still charging) the $6 fare provided in its tariff on file with the Interstate Commerce Commission, rather than the $5 authorized by this Commission. For many years, this operation was conducted solely under ICC authority and it was not until after this Commission's Mannino decision in 1959 (Decision No. 58412, dated May 12, 1959, in Application No. 40853) that respondent requested and was granted a State certificate. (Decision No. 61751, dated March 28, 1961, in Application No. 42447.) Neither Decision No. 58412 nor Decision No. 61751 involved any real consideration as to which Commission has jurisdiction, and in neither proceeding did any party argue that the Interstate Commerce Commission is the appropriate agency. It appears that respondent requested the State certificate for the Caliente operation in order to protect its right to conduct the service in the face of a question concerning jurisdiction; it thereafter operated, in practical effect, under "both" ICC and State authority so that, whichever Commission should prove to have jurisdiction,

the service would be lawful. As late as July 12, 1964 (and in spite of having issued a State certificate in 1961), this Commission noted, in Decision No. 67371, that our staff's revenue calculations had separated the Caliente operation "because it is under the jurisdiction of the Interstate Commerce Commission." (63 Cal. PUC 1, 3.) We believe that respondent, in charging the fare provided in its ICC tariff, acted in good faith. Any overcharges that may have resulted have been due to the jurisdictional problems rather than to any deliberate intention to violate the law. Under these circumstances it would not have been equitable to include the Caliente operation in the penalty suit.

Upon consideration of the evidence the Commission finds that:

1. In the period from November 16, 1962 to August 11, 1964, in respondent's operations certificated by this Commission, exclusive of its Caliente operation, respondent collected as part of its fares a total of $214,121 in excess of the amounts authorized for such fares by tariffs on file with this Commission. Prior to Decision No. 67371 (issued June 12, 1964 and effective July 2, 1964), this Commission had not authorized the increased fares thus charged and had not made any finding that such increases were reasonable or justified.

2. Respondent failed to establish a trustee account and to deposit therein the unlawful excess collected on rates as required by ordering paragraph 4 of Decision No. 67371.

Conclusions of Law

We conclude that:

1. The respondent failed to comply with the provisions of ordering paragraph 4 of Decision No. 67371, dated June 12, 1964, in Application No. 44957.

2. By reason of its unlawful collection of the charges specified in Finding No. 1 herein, respondent has violated Sections 454 and 532 of the Public Utilities Code.

ORDER

Since appropriate action has been taken by the filing of a penalty suit, it is ordered that the above investigation is hereby discontinued.

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

Dated at San Francisco, California, this 18TH day of APRIL, 1966.

Frederick B. Holoboff
President

George G. Grover

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.

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DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

I dissent and object to the manner in which Case 7923 pertaining to Tanner Motor Tours, Ltd. was signed out by the members of this Commission. It was done on a day on which I was present at my Commission office and without notice and without the convening of the usual Commission conference. Even though the regular Commission conference was scheduled for one day later for some reason the Tanner Motor Tours, Ltd. opinion was signed out in this unusual manner.

Thus it is that only three signatures were on the Tanner order and the parties were deprived of the decision-making processes of the full Commission as a Commission. Commissioner Mitchell is not a party of that decision and I presume for the same reasons that prevented my participation.

It is to be noted that the long long delay in finally getting out the Tanner decision is a critical commentary upon the Commission as presently administered. This matter was submitted in December 1964 and more than that has been before the Commission on its summary since November of 1965. It is apparent then that inordinate delay is of no concern to the majority of this Commission which thus makes more inexplicable the sudden signing of the Tanner Motor Tours, Ltd. and not at the regular conference.

The Commission has seriously weakened its right to bring a penalty action by virtue of the fact that it has had this matter before it and the assigned Commissioner has failed to bring it to the attention of this Commission so that whatever interest ratepayers had in the over-collections might be protected. As it is, it is difficult to determine in reality where the fault lies -- with Tanner for charging in excess of a lawful rate and illegally or with this Commission and the peculiar manner in which this case was handled doing nothing about the

overcharges until April of 1966. Regulation is simply not working in the Commission as presently constituted and the whole theory that an administrative agency was set up because it could discharge its responsibilities with more expedition than a judiciary is no longer true so far as we are concerned.

The language of the instant decision is replete with excuses for respondent for having made over-collections. After reading the instant Tanner decision one is prompted to wonder why a penalty action is being brought in the first instant. One is also prompted to a sharp criticism of the fact that a penalty action could and, therefore, should have been instituted as long ago as June 12, 1964 when the Commission instituted this investigation. Unless, however, such matters are brought to the attention of the full Commission and unless and until cases cease to be delayed and delayed then this Commission and at least one member thereof is in a very difficult position in reference to discharging his constitutional responsibilities.

WILLIAM M. BENNETT
Commissioner

San Francisco, California
April 19, 1966