SW/LM */HJH *

ORIGINAL

Decision No. 73280

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Unauthorized Discontinuance of Service by SOUTHERN PACIFIC COMPANY.

Case No. 7906

E. D. Yeoman, John McDonald Smith, Herbert A. Waterman and Randolph Karr, for Southern Pacific Company, respondent.
James E. Howe and George W. Ballard, for Brotherhood of Railroad Trainmen, AFL-CIO, interested party.
James L. Evans (by George W. Ballard), for Brotherhood of Locomotive Firemen and Enginemen, AFL-CIO, interested party.
G. R. Mitchell, for Brotherhood of Locomotive Engineers, interested party.
Howard W. Taggart, for Brotherhood of Railway Clerks, interested party.
Leonard M. Wickliffe, for the Railroad Brotherhoods Legislative Association, interested party.
James F. Crawford, for Brotherhood of Railroad Trainmen, Arizona State Legislative Board Sec., interested party.
Donovan P. Anderson, for California State Legislative Committee, Order of Railway Conductors and Brakemen, interested party.
R. W. Russell (by K. D. Walpert), for the Department of Public Utilities and Transportation, City of Los Angeles, interested party.
Robert Daru, for himself and for Arizona Information in New York and Association of American Railroad Passengers, interested parties.
Donald Day, V. V. MacKenzie, Counsel, John C. Gilman, Counsel, and Charles J. Astrue, of the Commission's staff.

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## O P I N I O N

This proceeding is brought pursuant to an order of the Commission directing respondent, the Southern Pacific Company, to show cause why said company should not be required to resume certain passenger train service which was discontinued, assertedly without requisite authority.

Said Order to Show Cause was prompted by the following circumstances:

Prior to April 19, 1964, respondent operated passenger train service between Los Angeles and Yuma, Arizona, and points east via two trains, the "Sunset" and the "Golden State". Passenger service within California was provided on both trains between Los Angeles and Niland and certain intermediate points.

As of April 19, 1964, respondent reduced its interstate service by combining the aforesaid trains and operating them as one train between Los Angeles and El Paso, Texas. No reduction was made at the time, however, in respondent's service within California. Respondent continued to provide service between Los Angeles, Niland and intermediate points as part of its Los Angeles/El Paso service. Also, it established a passenger service between Los Angeles, Niland and intermediate points which it operated on the same schedules as those which it had otherwise discontinued with the consolidation of the "Sunset" and the "Golden State." The latter service was maintained until May 31, 1964, when it was terminated.

The reduction of service between Los Angeles and El Paso which resulted from consolidation of the "Sunset" and the "Golden State" was accomplished by respondent without notice to, or authorization from, the Interstate Commerce Commission. This action was taken under Section 13 a (1) of the Interstate Commerce Act which provides that a railway company may, but is not required, to give notice to the Interstate Commerce Commission precedent to a discontinuance of passenger service between states. When notice is given, the Interstate Commerce Commission may inquire into the proposed discontinuance and order that the service be continued if it finds that the service is required by public convenience and necessity and will not unduly burden interstate or foreign commerce. Unless otherwise ordered by the Interstate Commerce Commission, the carrier may discontinue the service in question thirty days after the filing of the aforesaid notice, the laws or constitution of any State or order of any court or State authority to the contrary, notwithstanding. If, however, prior notice of the proposed discontinuance is not filed with the Interstate Commerce Commission, the proposed discontinuance is subject to such laws of any State or orders of any administrative or regulatory body of any State as may be applicable.[1]

Respondent's reduction in service between Los Angeles and El Paso through consolidation of the "Sunset" and "Golden State" was also accomplished without notice to, or any authorization

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[1] 49 U.S.C.A., Sec. 13 a (1).

from, the California Public Utilities Commission.[2] With respect to the service between Los Angeles and Niland which respondent operated solely as an intrastate service from April 19, 1964, to May 31, 1964, advance notice of respondent's intent to discontinue said service on May 31, 1964, was forwarded to the Commission on May 8, 1964. By such notice respondent undertook to effect said discontinuance of service in accordance with informal procedures specified in the Commission's General Order No. 27-B. The Commission, however, rejected the notice and informed respondent that it should make formal application for authority for the discontinuance.[3]

On May 19, 1964, the Commission issued its Order to Show Cause whereby in recognition of the discontinuance of service which respondent Southern Pacific Company had effected with the consolidation of the "Sunset" and the "Golden State", and being of the opinion that the company's remaining service "may be inadequate or insufficient to meet the convenience and necessity of the people of the State of California," respondent was directed

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[2] On April 14, 1964, respondent notified the Commission of intent to make changes in the time schedules of the "Sunset" and "Golden State" on April 19, 1964, which would eliminate differences of several hours between the respective arrival and departure times of the two trains at Los Angeles and would place the trains on virtually the same schedules. The Commission informed respondent that changes of such magnitude should not be made without prior public hearing thereon. Respondent did not put the indicated changes into effect. Instead, it consolidated the "Sunset" and "Golden State" as stated above.

[3] General Order No. 27-B provides that upon 20 days' notice to the Commission and to the public a rail carrier may effect reductions in its passenger train service unless the Commission requires the carrier to file an application for formal approval of the Commission of the proposed reductions.

to appear and show cause why it "should not be ordered to resume service within California as a part of, and in the same manner as, the interstate service" theretofore rendered prior to said discontinuance. Hearing on the Order to Show Cause was set for June 10, 1964.

On May 27, 1964, respondent initiated an action in United States District Court, Ninth District (Southern Pacific Company v. Public Utilities Commission 64-712-S), whereby it sought an order restraining the Commission from doing anything which would cause or result in the continuance of the intrastate service between Los Angeles and Niland which respondent had scheduled for ending as of May 31, 1964. As a basis for this request respondent alleged that the service was resulting in a loss of $1,200 per day and was thereby causing irreparable damage to respondent's operations otherwise. Accepting respondent's allegation of loss, the Court issued the sought restraining order on May 28, 1964. On June 5, 1964, after further hearing on the matter, the Court continued the restraining order in effect. However, it also provided that the order should not operate "to restrain the Commission from conducting a hearing or hearings and proceeding with a final determination of the issues of public necessity and all issues incident thereto with respect to any of the trains referred to in this complaint."[4]

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[4] The restraining order was vacated on May 11, 1965, in response to the Commission's appeal of the matter to the United States Circuit Court of Appeals (Public Utilities Commission of the State of California, et al. v. Southern Pacific Company, 19,704). In its order upon appeal the Court stated: "We fail to find the necessary prerequisite irreparable injury..."

The hearing which had been originally scheduled for June 10, 1964, on the Order to Show Cause was postponed due to illness of respondent's counsel. Thereafter it was held before Examiner Jarvis at Los Angeles on July 1, 1964, and the matter was taken under submission subject to the filing of briefs. On October 13, 1965, the submission was set aside by order of the Commission, and further hearings were held before Examiner Abernathy at Los Angeles on September 12, 1966, and at San Francisco on September 14, 1966. The record was closed with the filing of briefs on March 20, 1967. This decision is upon the record as it has been thus adduced.[5]

Evidence which was submitted at the hearing on July 1, 1964, consisted only of that which was presented by a representative of the Commission's staff who testified concerning the events which led up to the issuance of the Order to Show Cause in this matter. The participation of respondent was confined largely to argument in support of a motion which respondent made for dismissal of the proceeding on the grounds that on most of the issues the Commission is without jurisdiction, and that the Commission's orders have not been violated in those respects where the Commission has jurisdiction. The motion was denied by the Examiner.

A similar motion was made by respondent at the hearings on September 12 and 14, 1966, and was denied by the Examiner.

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[5] Prior to the close of the hearing on September 14, 1966, respondent submitted a petition for the issuance of a proposed report by the Examiner. This petition is denied.

Thereupon, in response to a directive from the Examiner, respondent submitted and explained data which it had prepared pursuant to the request of George G. Grover, the Commissioner to whom the matter was then assigned. By said data respondent set forth estimates of financial operating results of its passenger services for 1966 between Los Angeles and El Paso (a) assuming that the "Sunset" and the "Golden State" are still being operated as separate trains, and (b) on the basis of present combined operations. Respondent's figures in these respects are summarized in the following table:

Estimated Operating Results from Operation of "Sunset" and "Golden State" Trains between Los Angeles and El Paso, Year 1966

| | (1) | (2) |
|---|---|---|
| Revenues | $ 7,084,100 | $5,625,700 |
| Expenses | 10,052,400 | 7,820,800 |
| Net profit or (loss) | ($2,968,300) | ($2,195,100) |

(1) Revenues, expenses and net operating results, assuming separate operation of the "Sunset" and the "Golden State".

(2) Revenues, expenses and net operating results, based on combined operation of the "Sunset" and the "Golden State".

As may be noted, the foregoing figures show losses from respondent's passenger services between Los Angeles and El Paso, irrespective of whether provided by the two trains separately or in a consolidated operation. However, with the consolidation of the "Sunset" and the "Golden State" respondent's figures show a reduction of its losses by about three quarters of a million dollars annually.

Respondent also submitted data relative to the intrastate service which it had provided from April 19, 1964, to May 30, 1964, in addition to its service with the consolidation of the "Sunset" and "Golden State". It reported that a passenger count taken over a two-week period had disclosed that on the average fewer than eight passengers had used the service per one-way trip. On the basis of the usage which was thus developed respondent estimated that over a year's time the separate intrastate service would produce revenues of $18,200. Expenses applicable to the service were estimated by respondent to be $350,200, thus producing an estimated loss of $332,000.

Discussion, Findings and Conclusions

As indicated early in this opinion, respondent's consolidation of the "Sunset" and the "Golden State" to reduce or discontinue service was accomplished by procedures which leave respondent subject to such state laws or requirements of state regulatory agencies as may apply. Respondent contends, however, that for the most part its actions were not subject to the laws of this State nor the regulations of this Commission. A principal issue which is thus raised is the extent that this Commission may exercise jurisdiction over the service changes which respondent accomplished as a result of, or in connection with the consolidation of the aforesaid trains.

Much of the effort which was expended by respondent in arguing, both at the hearings and on brief, that this Commission is without jurisdiction over the service changes in issue was directed to the point that the Commission does not have the authority to require the Southern Pacific Company to run trains outside of the borders of California, or to require the operation of interstate trains, or to determine the adequacy of facilities for the accommodation of interstate traffic, or to inquire into the revenues and expenses applicable to the operation of the "Sunset" and "Golden State".

Whatever limitations there may be upon a state's powers to exercise jurisdiction over interstate operations of a carrier do not limit the state's authority to inquire into a carrier's operations to the extent reasonably necessary to the exercise of the authority inherent in the state over intrastate commerce. Since respondent's services extend both to transportation in interstate commerce and to transportation in intrastate commerce, and since the two services are commingled to a large extent, it is inescapable that inquiry into one service should touch upon the other.

It is in this context that this inquiry is focused upon whether the level of respondent's service which was established with the consolidation of the "Sunset" and the "Golden State" was, and is, sufficient to meet the needs of the people of the State of California. Although the inquiry is directed primarily to the intrastate aspects of respondent's operations, it encompasses interstate aspects as well. The Commission has a responsibility to the people of California to make representations to the Interstate Commerce Commission and to seek remedial action when it has determined that changes in a carrier's service may leave the people without the amount of interstate transportation service they need.

In its consolidation of the "Sunset" and "Golden State" respondent obviously was motivated by a desire to curtail operating losses which it deemed it was incurring from the separate operation of the two trains. However, the fact that the trains were being operated at a loss does not necessarily establish that the remedy to be applied is the discontinuance of the services. Of particular pertinence to whether the services should be continued or terminated is the public need for said services. Also to be considered is the extent that the losses would burden respondent's other services. A carrier may be required to continue the operation of a particular service where it appears that there is a substantial public need therefor and where it also appears that the losses resulting from the continued operation of the service would not constitute an undue burden upon the other services.

Whether a carrier's losses from a particular service are so great as to constitute an undue burden on other of the carrier's services is a question which is not readily answerable. One consideration is whether the operating losses which the proposed discontinuance is intended to mitigate or eliminate are actually as great as those which the carrier represents them to be. The determinations which are required in this respect often require resort to complex cost-finding procedures because of multi-purpose usage of the carrier's facilities. For example, respondent's tracks between Los Angeles and Yuma are not only traversed by the "Sunset" and "Golden State" but they are used by respondent's freight trains as well. Both types of trains may be engaged in performing interstate and intrastate operations simultaneously. Assuming that in connection with these movements respondent must replace a broken rail of the track over which the trains run, the costs of the replacement obviously must be allocated to each of the services inasmuch as it would not be equitable to charge all of the replacement costs against only one of the services involved. A number of factors, including judgment and bias, enter into the allocations. Since the results of the application of judgment factors may vary widely, depending upon the soundness of the judgment employed and the extent of the influence of any bias, the propriety of the reported losses should

be tested before being accepted as a basis for the discontinuance of service.[6]

Another consideration which bears upon the question of whether losses from a particular service constitute an undue burden upon a carrier's other services is whether and to what extent the discontinuance of a service as proposed would actually improve the carrier's overall operating results. This question stems from the fact that a substantial portion of the costs of railroad transportation consists of so-called "fixed" costs, i.e., costs which do not vary directly with the volume of the services performed or provided. If a carrier is to earn a profit from a particular service, the revenues which it receives from the service

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6. The need for analysis or testing of the reported losses is well illustrated by figures which respondent presented to the United States District Court in connection with the injunctive order it sought, and obtained, from the Court to restrain the Commission from requiring respondent to continue beyond May 30, 1964, the operation of the intrastate service which had been established between Los Angeles and Niland when the "Sunset" and the "Golden State" were consolidated. As previously mentioned herein, the restraining order was issued upon respondent's representations that the service was resulting in a loss of $1,200 a day. However, respondent's representations to this Commission (Exhibit No. 17) were that the intrastate services were being operated at a rate of loss of $332,000 annually. Converted to a daily basis this rate of loss is $910 a day. Moreover, this loss is after provision for such expenses or claimed expenses as depreciation, interest, joint facilities expense, casualty expense, maintenance of way and structures, traffic expense, and expenses incurred in the hauling of company property. All of such expenses may be properly chargeable against the services on a long-time basis. However, they are not so directly related to the services that they would be definitely eliminated if the services are actually discontinued.

should be sufficient to cover not only the variable costs (the costs which vary with the volume of service) but the applicable fixed costs as well. However, a service may be advantageously continued even though it may be unable to return all of the costs. This situation arises where the service is able to earn the variable costs and, in addition, makes some contribution to the payment of fixed costs which otherwise would fall in total upon other of the carrier's services. Thus, the circumstance that a particular service is being performed at a loss may not be, per se, clear and unequivocal justification for the termination of the service.

Notwithstanding any question of whether the continued operation of the "Sunset" and "Golden State" as separate trains was actually required by public convenience and necessity, and notwithstanding any inquiry which might reasonably have been made as to whether the separate operation of said trains was resulting in losses of such magnitude as to justify the consolidation of the trains, respondent's actions were such as to make itself the sole arbiter on these matters at the time. In this same vein respondent's position concerning intervention of this Commission in matters pertaining to, or growing out of, the consolidation of the "Sunset" and "Golden State" was made crystal clear, namely that:

> 1. The establishment of the intrastate service between Los Angeles and Niland which was initiated April 19, 1964, as a substitute for intrastate services formerly provided on certain schedules of the "Sunset" and "Golden State" completely removed from the Commission's jurisdiction the services of the "Sunset" and "Golden State" which were discontinued with the consolidation of said trains.

2. The Commission was without authority to enjoin the discontinuance of the intrastate service operated between Los Angeles and Niland from April 19 to May 30, 1964.

3. The Commission is without authority to require the reestablishment of the intrastate service between Los Angeles and Niland except after public hearing and a finding that the service is required by public convenience and necessity.

4. Reestablishment of the intrastate service is not required by public convenience and necessity.

We do not agree with respondent that the establishment of the substitute intrastate service between Los Angeles and Niland wholly eliminated any basis for inquiry or action by the Commission relative to the services which had been discontinued when the "Sunset" and "Golden State" were consolidated. By its being fragmented from other services which were formerly provided by the discontinued schedules of the "Sunset" and "Golden State" the substitute intrastate service was so obviously foredoomed from the outset that it must be regarded as no more than a diversionary device whereby respondent sought to free itself from any regulatory steps which the Commission might take in relation to the service changes stemming from the consolidation.

That the Commission can properly inquire into the operations of the "Sunset" and "Golden State" as said operations were being conducted prior to their consolidation and the establishment of the substitute is pointed up by a quotation in respondent's own brief (page 25) from Corpus Juris Secundum, to wit:

> "While a state commission cannot enforce the continued operation of an interstate train, it is proper to require . . . that

> reasonable notice be given it of a contemplated discontinuance of intrastate service rendered by interstate trains, to the end that the commission may make appropriate orders for the rendition of reasonable and proper intrastate service after discontinuance of the existing service." [7]

Obviously, if a state commission is to make "appropriate orders for the rendition of reasonable and proper intrastate service after discontinuance of the existing service," it should do so in the light of all pertinent factors, including those applicable to the interstate and intrastate services, performed as a joint operation. Thus, the commission's inquiry should extend not only to the need for the intrastate services but also to the financial results of said services, including the extent, if any, that the services are burdening other services. Obviously, also, since the intrastate and interstate services are being jointly performed, the inquiry into the former services must extend into the latter.

As a further comment concerning the Commission's jurisdiction over the "Sunset" and "Golden State", it should be pointed out that the ultimate decision as to whether the intrastate service to be provided after discontinuance of the interstate service is reasonable and proper is fundamentally a decision which rests with the Commission. The Commission's jurisdiction over the matters involved is not diminished where the carrier elects to establish a substitute service without notice to the Commission and without affording the Commission opportunity to determine what is required for the rendition of reasonable and appropriate intrastate service.

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[7] 15 C.J.S. Commerce, Section 78, Page 405.

The Commission's determination of what is required for the rendition of reasonable and appropriate intrastate service may be overturned by order of the Interstate Commerce Commission (or of the Courts) upon a finding that the intrastate service casts an undue burden upon interstate commerce. Ordinarily, under the provisions of the Interstate Commerce Act, the decision as to whether the intrastate service was unduly burdening interstate commerce would lie within the province of the Interstate Commerce Commission. In this instance, however, the decision rests initially with this Commission -- the California Public Utilities Commission -- inasmuch as the procedures which respondent has chosen to follow have avoided bringing the service changes, and the issues arising therefrom, within the scope of the Interstate Commerce Commission's interpretation of its jurisdiction.

Inasmuch as respondent elected to effect the consolidation of the "Sunset" and "Golden State" under procedures which subject it to the laws of this State and the regulations of this Commission, it is appropriate that the bearing of some of said laws and regulations upon respondent's intrastate operations be reviewed.

The Public Utilities Code provides that:

> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."
>
> (Section 451, 2d paragraph)

"Whenever any schedule stating an individual or joint rate, classification contract, practice, or rule, not increasing or resulting in an increase in any rate, is filed with the commission, it may, either upon complaint or upon its own initiative, at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, enter upon a hearing concerning the propriety of such rate, classification, contract, practice, or rule. Pending the hearing and the decision thereon such rate, classification, contract, practice or rule shall not go into effect. The period of suspension of such rate, classification, contract, practice, or rule shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, classifications, contracts, practices, or rules proposed, in whole or in part, or others in lieu thereof, which it finds to be just and reasonable.

"All such rates, classifications, contracts, practices, or rules not so suspended shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify them."

(Section 455)

"Unless the commission otherwise orders, no change shall be made by any public utility in any rate or classification, or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the changes to be made in the schedule or schedules then in force, and the time when the changes will go into effect. The commission, for good cause shown, may allow changes without requiring the 30 days' notice, by an order specifying the changes so to be made, the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any

rate or classification, or in any form of contract or agreement or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item."

(Section 491)

"Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission.

"Every public utility receiving from the commission any blanks with directions to fill them shall answer fully and correctly each question propounded therein, and if it is unable to answer any question, it shall give a good and sufficient reason for such failure."

(Section 581)

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

(Section 701)

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

(Section 702)

> "The commission may investigate all existing or proposed interstate rates, fares, tolls, charges, and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto takes place within this State and when they are, in the opinion of the commission, excessive or discriminatory or in violation of the Interstate Commerce Act, or any other act of Congress, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply for relief by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction."
>
> (Section 703)

> "Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."
>
> (Section 763)

In addition to the foregoing the State Constitution provides (amongst other things) that "the commission shall have the . . . power to examine books, records and papers of all railroad and other transportation companies."

(Article XII, Section 22)

Reference has been made heretofore to General Order No. 27-B of the Commission which provides that a rail carrier may effect reductions in its passenger train service upon 20 days' notice to the Commission and to the public unless the Commission requires the carrier to file an application for formal approval of the Commission of the proposed reductions. Said general order also provides that "It may be understood that in cases where the plans for the proposed reduction in service have advanced to a point where it would be unreasonable and/or hazardous to cancel the same, the said changes may be put into effect and the carrier will be allowed reasonable time within which either to restore the service or file such formal application."

In its brief, respondent asserts that the California statutes do not specifically empower the Commission to pass upon passenger train discontinuances, and that, as a consequence the regulations which the Commission has promulgated in General Order No. 27-B requiring formal approval of the Commission as a prerequisite to said discontinuances are invalid.

Respondent's assertions in this respect stem either from a misinterpretation or a disregard of the effect of the above-quoted sections of the Public Utilities Code. As may be noted from Section 455, for example, the Commission is empowered to suspend for a period as long as 10 months (120 days plus six months) schedules which a carrier has filed to effect changes in its rates, classifications, contracts, practices or rules. Respondent apparently interprets the suspension authority which is conferred upon the Commission by Section 455 as being limited

to rates. However, such interpretation does not give adequate effect to the references in the section to the terms "practices" or "rules". A more reasonable construction of said terms is that they embrace the service aspects of a carrier's operations as well as the rate aspects. Such construction is consistent with usage of those terms in other sections of the Public Utilities Code. Sections 486 and 487, not mentioned hereinbefore, require common carriers to file with the Commission schedules setting forth the carriers' "rates, fares, charges and classifications . . . the places between which property and persons will be carried . . . all privileges or facilities granted or allowed, and all rules which may in any wise change, affect, or determine any part, or the aggregate, of such rates, fares, charges, and classifications, or the value of the service rendered to the passenger, shipper or consignee." (Emphasis supplied.) Clearly, the references to "privileges", "facilities", and rule changes which affect "the value of the service rendered to the passenger, shipper or consignee" are not limited solely to the rates and charges of a carrier. We hold that the suspension authority which is conferred upon the Commission by Section 455 may be applied to proposed changes in a carrier's rates, or to changes in a carrier's services, or to both.

Our conclusions concerning the Commission's powers to suspend proposed changes in a carrier's services apply both to the California intrastate services which respondent formerly provided by the schedules of the "Sunset" and "Golden State" that were discontinued with the consolidation of those trains and to the

intrastate service which respondent separately operated between Los Angeles and Niland from April 19 to May 30, 1964. In view of said conclusions it is not necessary to discuss respondent's contentions that the Commission was without authority to enjoin the discontinuance of the Los Angeles/Niland service.

Mention should be made, however, of a further argument by which respondent undertook to defend its unauthorized discontinuance of said service. Respondent asserts that the establishment of a carrier's service schedules lies with the carrier in the first instance as a matter of managerial discretion, and that only if the resulting level of service is found by the Commission to be insufficient may the Commission order an increase in service. Various court decisions to this effect were cited by respondent as support for its position.[8]

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[8] See Public Service Commission v. St. Louis-San Francisco Railway Co., 256 S.W. 226 (1923) which states in part that: "It is not necessary to hold, and we do not hold, that the Commission is without power to make general rules or regulations other than those specified in the statute. It is entirely conceivable that the promulgation of others are 'necessary or proper to enable it to carry out fully and effectually all the purposes' of the act. But a general rule requiring its permission before a passenger train can be withdrawn from service cannot be so characterized. A consideration of the Public Service Commission Law as a whole, so far as applicable to common carriers, convinces us that it was the intention of the Legislature to leave with the carriers the initiative as to both service and rates. There are certain restraints imposed by other statutory provisions in regard to rates, fares, and charges, but, so far as service is concerned, the carriers may in the first instance determine for themselves its character and extent, and may likewise make such changes therein from time to time as they deem proper. It is only when the service so inaugurated or furnished is, or becomes, 'unreasonable, unsafe, improper, or inadequate' that the Commission may interfere."

Compare, also, Pennsylvania Railroad Co. v. Public Utilities Commission, 146 A. 2d 352 (1958). Nashville, C. & St. L. Ry. v. Hannah, 160 Tenn. 586, 27 S.W. 2d 1089, 70 A.L.R. 837; In re New York Central Train No. 421, 161 Ohio St. 332, 119 N.E. 2d 77; Darby v. Southern Ry. Co., 194 S.C. 421, 10 S.E. 2d 465; State ex rel. Public Service Commission v. Northern Pacific Ry. Co., N.D., 75 N.W. 2d 129; Thompson v. Boston & M. R. R., 86 N.H. 204, 166 A. 249.

However, analysis of the cited decisions shows a material dissimilarity between the circumstances upon which said decisions were reached and those which are under consideration herein. In the cited cases, orders of state regulatory agencies to restrain carriers from discontinuing passenger train services were annulled by the Courts on the grounds that the agencies lacked the statutory authority to issue such orders. In the instant matter the corresponding circumstances do not prevail. As we have previously pointed out, the Commission has been empowered by Section 455 of the Public Utilities Code to suspend proposed service discontinuances. Also it is empowered to hold hearings on the propriety of the proposals, and to issue orders on the levels of service which it finds to be reasonable. Consequently, this is not an instance where statutory authority for the Commission's action is lacking.

With respect to respondent's assertions that the Commission may not suspend a proposed discontinuance of service inasmuch as the establishment of a carrier's service schedules is a matter of managerial discretion, we point out that in this State it has been recognized that the exercise of regulatory powers involves an invasion of the functions of management to some extent; that it does not necessarily follow that such invasions are necessarily unlawful; and that the functions of management are subject to the exercise of the police power in the regulation of the carrier.[9]

One other matter that impels comment is the sense of urgency to avoid or reduce operating losses that obviously was

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[9] Southern Pacific Co. v. Public Utilities Commission, 41 Cal. 2d 354, 367 (1953).

the backdrop for the changes which respondent effected in its schedules for the "Sunset" and "Golden State". As stated earlier herein, respondent estimated that during the year 1966 it would incur an out-of-pocket loss of $2,968,300 from separate operation of the "Sunset" and "Golden State" whereas under the consolidated operations its loss would be $2,195,100. Thus respondent's figures indicate that the consolidation of the two trains would result in a reduction of more than three quarters of a million dollars in out-of-pocket losses during 1966.

Although respondent's objectives to achieve a reduction in its losses are commendable, we are not persuaded that the showing of losses which respondent presented reasonably portrays the applicable circumstances. Part of the claimed losses are after allowance for interest expense on locomotives and passenger cars. The estimates for this expense for the year 1966 are as follows:

| | (1) | (2) |
|---|---|---|
| Locomotives | $ 22,000 | $ 14,400 |
| Passenger cars | 280,600 | 229,100 |
| Total interest expense | $302,600 | $243,500 |

(1) Assuming separate operations of the "Sunset" and "Golden State".

(2) Based on the consolidated operations of the "Sunset" and "Golden State".

We do not deem interest expense to be properly chargeable as an out-of-pocket operating expense. It should be excluded from respondent's listing of said expenses, and the alleged losses should be reduced accordingly.

We are also not persuaded that the realizable relief from the separate operation of the "Sunset" and "Golden State" was as great as might be inferred from respondent's showing. Respondent's expense estimates (Exhibit 20) show amounts of $441,300 and $1,246,800 as being the out-of-pocket charges that would have been made against said trains for the year 1966 for joint facilities expense and for the expenses listed in the margin below.[10]

It might be concluded that the reduction in its passenger train service would have enabled respondent to effect proportionate reductions in the above expenses. However, such is not the case. A substantial portion of the expenses are allocations of expenses which are incurred in respondent's operations as a whole, and which either do not vary directly with the number of trains operated or do not vary immediately with the number of trains operated.[11] Hence, it follows that as a reduction in trains

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10 Maintenance of way and structures
Station supplies and expense
All other transportation
All other maintenance of equipment
Traffic
General
Haul of company material
Non-operating employees' wage increase
Health, welfare and payroll expenses
applicable in connection with above expenses.

11 A principal item of expense of the latter type is maintenance of way and structures expense. Assertedly, such expense varies with the volume of traffic. However, the record shows that a reduction in traffic is not immediately followed by a corresponding reduction in maintenance of way and structures expense. The reduction in expense is accomplished over the ensuing years to the extent that the deterioration of ways and structures is lessened by the lesser traffic and therefore requires a lesser amount of upkeep to maintain the ways and structures.

occurs, some of the expenses must be reallocated to fewer trains. If the costs of respondent's other services are augmented by expenses formerly assigned to the "Sunset" and "Golden State" the apparent benefits from consolidation of the trains are diminished and should be evaluated accordingly.

Our conclusions concerning the effect of the reallocation of expenses appear to be borneout by respondent's own figures relating to the costs of operating the "Sunset" and "Golden State" on a consolidated basis. Whereas, for example, respondent's figures show joint facilities expense as being about $220,000 per train for the separate operation of the two trains during 1966, the figures (Exhibit 19) show $370,500 as being the joint facilities expense applicable to the consolidated operations. Similarly, respondent's figures for the expenses named in footnote 10, above, show expenses of about $623,000 per train for the separate operation of the trains during 1966. However, for the consolidated operations the corresponding estimate is $1,019,000.

The total of the joint facilities expense and the other expenses named in footnote 10 which respondent's figures show would have been charged to separate operations of the "Sunset" and the "Golden State" during 1966 is $1,688,100. The total of said expenses which was charged to the consolidated operations is $1,389,600. Respondent's showing does not explain whether the difference of almost $300,000 represents actual reductions in expenses which were effected with the consolidation of the two trains or whether the expenses continue to apply, or to apply in part, and have been charged against other aspects of respondent's

operations. The amount which is involved is sufficiently large to be significant and deserves explanation.

One further matter which should be considered in regard to the reduction in losses which respondent was seeking to achieve through its consolidation of the "Sunset" and "Golden State" is the effect of income taxes. No reference was made by respondent to income taxes. However, the effect thereof is substantial, since in the computation of the taxes applicable to respondent's total operations, losses from respondent's passenger operations may be offset against profits from respondent's other operations. The practical effect, in general, is that under prevailing tax rates respondent's income tax liability is reduced to the extent of about one-half of the losses. Revision of the reported losses to eliminate the effect of interest, as previously discussed, and to reflect the reduction in tax liability results in the following estimates of respondent's out-of-pocket losses for 1966 from the "Sunset" and "Golden State":

| | |
|---|---|
| Estimated losses from separate operations . . . . . | $1,332,850 |
| Estimated losses from consolidated operations . . . . . | 975,800 |
| Difference | $ 357,050 |

Thus it appears that instead of a saving of more than three quarters million dollars, the realizable saving from consolidation of the trains was less than half that amount. This saving is subject to a further reduction, for it does not take into account any portion of those expenses aggregating almost $300,000, which applied to the separate operations of the "Sunset"

and "Golden State", and which may have been charged, in whole or in part, to respondent's other operations in the reallocation of expenses following the consolidation of the trains.

Even though respondent's losses from the separate operation of the "Sunset" and "Golden State" were as great as reported and the anticipated savings from the consolidation of the trains as great as indicated, those facts, of themselves, are not sufficient justification for the utilization of methods which do not accord due recognition to the obligations inherent in respondent's operations to function fully and fairly in the public interest. Since, moreover, it appears that the realizable gains from consolidation of the train services would not reduce the losses from the separate services nearly to the extent that respondent's figures imply, said gains provide even less excuse for the precipitous reductions in service without compliance with lawful procedures.[12]

The extent that public convenience and necessity required the level of service which was being provided by the "Sunset" and "Golden State" just prior to the consolidation of those trains cannot be reasonably approximated at this time. However, it

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[12] Had respondent's financial situation been so critical that it could not defer action until authorization for the service changes could be procured in accordance with customary procedures, it could have requested authority to effect the service changes pending hearing thereon pursuant to provisions of General Order No. 27-B which permit such action when "it would be unreasonable . . . to cancel the same (plans for a proposed reduction of service)." However, respondent did not seek to follow this course.

appears that following the schedule changes, the demand for respondent's services, as indicated by the following comparison of the number of trains, including second sections, operated prior to and after said schedule changes, deteriorated quite rapidly:

| | |
|---|---|
| Scheduled annual number of trains operated between Los Angeles and El Paso prior to April 1964 . . . . | 730 |
| Number of trains operated between Los Angeles and El Paso during 1965 . . | 555 |
| Estimated number of trains operated between Los Angeles and El Paso during 1966 . . . . . | 464 |

The foregoing figures are not wholly indicative of the availability of service after the schedule reductions, for with said reductions respondent increased the size of the trains used in the consolidated operations. Nevertheless, the number of trains which were operated in 1965 was only about 75 percent of the scheduled operations during the year prior to April 19, 1964, and the estimated number for 1966 was only about 84 percent of the number for 1965. Inasmuch as the service reductions which respondent initiated in April, 1964, are continuing at a substantial pace, it seems evident that a substantial segment of the public which respondent transported when the "Sunset" and "Golden State" were separately operated has been turned away from respondent's services by respondent's own actions.[13]

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13 Respondent's exhibits (Nos. 19 and 20) show that had the "Sunset" and the "Golden State" been operated separately in 1966 the combined annual passenger revenue would have been $4,725,000 while the corresponding estimate for the consolidated train is $3,700,000. Thus, respondent's own figures reflect a traffic loss of 21 percent due to the consolidation.

Whether the present public need for respondent's services is being adequately satisfied by the services which respondent is now providing is a matter which cannot be determined on this record. Although a stated purpose of this proceeding was to determine whether respondent should be required to reestablish the level of service within California which it operated prior to the consolidation of the "Sunset" and "Golden State", no evidence relative to the present and future needs for said service was presented. In the circumstances we conclude that cause for an order directing respondent to reestablish the level of service which it operated prior to April 19, 1964, has not been shown on this record. This proceeding will be terminated.

Summarizing our findings and conclusions hereinbefore stated, we find that:

1. Prior to April 19, 1964, respondent was engaged in the transportation of passengers, baggage, mail and express by the trains "Sunset" and "Golden State" between Los Angeles, El Paso and intermediate points.

2. As of April 19, 1964, respondent consolidated the "Sunset" and "Golden State" and thereby reduced its service from two trains daily in each direction to one train daily in each direction between Los Angeles, El Paso and intermediate points.

3. The reduction in service was accomplished without prior notice to, or authorization from, the Interstate Commerce Commission.

4. Section 13a(1) of the Interstate Commerce Act provides that if a carrier wishes to change service without complying with a state regulation, it must file notice of the proposed change or discontinuance with the Interstate Commerce Commission.

5. In its operation of the "Sunset" and "Golden State" prior to April 19, 1964, respondent was also engaged in the transportation of passengers on the trains between points within California.

6. The Public Utilities Code sets forth laws governing the operation of common carrier service by railroad corporations within California.

7. Said laws include requirements that common carriers file schedules covering their services with this Commission and prohibit changes in the schedules except upon due notice to, or authorization from, this Commission.

8. In effecting the reductions in its California intrastate service through consolidation of the "Sunset" and Golden State" respondent did not serve prior notice of the reductions upon this Commission nor did it obtain authorization from this Commission for said reductions.

9. Concurrently with the reduction in service occasioned by the consolidation of the "Sunset" and "Golden State", respondent

initiated passenger train service between Los Angeles and Niland and intermediate points, which service was operated on time schedules the same as those which had been previously operated by the "Sunset" and "Golden State". Said service was operated through May 30, 1964, and was thereafter terminated without Commission authorization.

10. The separate intrastate service to which reference is made in paragraph 9 above was performed under substantially different cost conditions than the corresponding service formerly provided by the "Sunset" and the "Golden State", inasmuch as all of the costs of the operation of the trains in said intrastate service were charged against said service, whereas the corresponding intrastate service formerly provided by the "Sunset" and "Golden State" was performed as a joint service in conjunction with the interstate operations of the "Sunset" and "Golden State", with divisions being made of the costs of the total services involved.

11. In view of the differences between the costs of the separate intrastate service and the costs of the California intrastate passenger service formerly provided by the schedules of the "Sunset" and "Golden State" which were discontinued with the consolidation of said trains, the separate intrastate service was not a reasonable and proper substitute for the California intrastate service of the "Sunset" and "Golden State".

12. What service, if any, would be a reasonable and proper substitute for the California intrastate service formerly provided by the "Sunset" and "Golden State" was a matter which required

determination in light of cost and traffic factors and related considerations applicable to the operation of the "Sunset" and "Golden State" (a) at the time those trains were consolidated and (b) for a reasonable period in the future.

13. The determination of costs and related considerations applicable to a reasonable and proper California intrastate passenger train service to be operated following the discontinuance of an intrastate service performed jointly with an interstate service necessarily requires analysis by this Commission of the costs and related considerations applicable to the joint services.

Upon the basis of the foregoing findings, we conclude that:

1. Under the procedure which respondent followed to reduce its passenger train service between Los Angeles, El Paso and intermediate points through consolidation of the "Sunset" and "Golden State", respondent was subject to the provisions of the California State Constitution, the Public Utilities Code, and the regulations of this Commission to the extent that said provisions and regulations applied to its operations.

2. The action taken by respondent in discontinuing certain California intrastate passenger train services (which it had been providing by the "Sunset" and "Golden State") without first obtaining Commission authorization for its action constituted violation of provisions of the Public Utilities Code, particularly those set forth in Sections 486, 487, 455 and 491.

3. Respondent violated provisions of the Commission's General Order No. 27-B by its action taken as of May 31, 1964, in discontinuing the separate California Intrastate passenger train service which it had established following the reduction in California intrastate service made as a result of its consolidation of the "Sunset and "Golden State".

4. By reason of the foregoing violations of the Public Utilities Code respondent is subject to such penalties for said violations as the Public Utilities Code provides.

Although we conclude that by reason of its unauthorized discontinuance of California intrastate passenger train service respondent subjected itself to penalties which the Public Utilities Code specifies for violation of provisions of the Code and regulations of the Commission, we also conclude that penalties should not be invoked in this instance. We emphasize, nevertheless, that in any further matters involving service reductions which are subject to the Public Utilities Code and regulations of this Commission, we shall expect full compliance with the applicable statutory requirements and the Commission's regulations. Any witholding of penalties in this matter should not be construed as a limitation upon any action which the Commission may take in any similar matter in the future.

In view of the foregoing conclusions and those relative to the absence of a showing of public need for restoration of the services which have been discontinued, we conclude that this proceeding should be terminated.

## O R D E R

IT IS ORDERED that the investigation in this proceeding is discontinued and Case No. 7906 is dismissed.

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

Dated at San Francisco, California, this 7th day of NOVEMBER, 1967.

President

Commissioners