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ORIGINAL

Decision No. 76133

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SOUTHERN PACIFIC COMPANY for authority to discontinue the operation of passenger Trains Nos. 51 and 52 between Oakland, San Francisco and Los Angeles.	Application No. 51122 (Filed May 29, 1969)

Charles W. Burkett and Robert S. Bogason, for applicant.
D. H. Brey, for Brotherhood of Locomotive Engineers; K. R. Burns, for J. E. Howe, State Director, United Transportation Union; J. L. (Jim) Evans, for United Transportation Union, Legislative Board; Earl P. Kinsinger, for United Transportation Union; Thomas M. O'Connor, William C. Taylor, Robert Laughead, for the City and County of San Francisco; C. H. Purkiss, for Brotherhood of Railway & Airline Clerks; protestants.
James M. Cooper, for San Francisco Chamber of Commerce, interested party.
William Figg-Hoblyn, Counsel, George H. Morrison and Clyde T. Neary, for the Commission staff.

O P I N I O N

As amended, this application seeks Commission authority to discontinue the operations of its passenger Trains Nos. 51 and 52, popularly referred to as the San Joaquin Daylight. That operation presently provides service between Los Angeles and the San Francisco Bay area via Bakersfield, Fresno and intermediate points; if discontinuance is granted, Southern Pacific plans by collateral proceedings to seek discontinuance of the connecting operation to Stockton, Lodi and Sacramento.

The connecting service is now provided by Trains Nos. 53 and 54 (The Sacramento Daylight).[1/]

1/ By Application No. 50976 Southern Pacific seeks to substitute bus service for the trains. That application has been heard and is now under submission to the Commission.

A previous application, No. 50211, sought discontinuance of Trains Nos. 51, 52, 53 and 54. That application was filed May 3, 1968 and submitted July 31, 1968. The application was denied by Decision No. 74832, issued October 15, 1968. Southern Pacific petitioned for rehearing on November 8, 1968, which petition was denied on January 7, 1969 (Decision No. 75178).

The staff of this Commission on July 2, 1969 has herein filed a Motion to Dismiss, based on the close proximity in time and similarity of issues to those presented in Application No. 50211. On July 17, 1969 applicant filed a Reply to the Motion; oral argument on the motion was held August 1, 1969, at which time the motion was taken under submission. At argument, each of the protestants supported the staff motion.

Discussion

Staff argues that the Commission should not launch a second series of hearings with attendant expense, consumption of time, and burden upon protestants and staff. It claims that, absent an allegation of materially changed facts, or passage of a sufficient length of time to raise a presumption of material changes, the Commission's last decision should be treated as res judicata.

Staff points to the second Del Monte case, (62 Cal. P.U.C. 649) in which the Commission, without hearing, dismissed a renewed application to discontinue since:

> "The short period of time that has elapsed since the Commission fully explored the 'Del Monte' service is insufficient to have materially changed conditions so as to justify another full scale inquiry. The application is premature, to say the least.

> "The Commission finds that the elapsed time since the rendition of said Decision No. 65530 does not constitute a reasonable and fair trial period to test the operations of said train service from the standpoint of public convenience and necessity." (Emphasis added.)

Applicant contends that the doctrine of res judicata does not apply where a regulatory commission is dealing with a question of public convenience and necessity.

The Commission, in dealing with such an issue, exercises delegated legislative, rather than judicial, power. Rigid application of the judicial doctrines would be inappropriate in such proceedings. However, strong justification is required before the Commission should contemplate reversing its decisions. Professor Davis has discussed this problem in his treatise on administrative law.

> "No practical reason appears for deciding the same question twice until circumstances change." (2 Davis, Administrative Law Treatise Section 18.08 at 605, n. 32 (1958).)

We have followed this practice.

> "It is a long established rule that when the commission, upon a given statement of facts reaches a conclusion regarding a certain rate, it will adhere to that conclusion in subsequent proceedings regarding the same rate, unless (a) some new facts are brought to its attention, (b) conditions have undergone a material change, or (c) it proceeded on a misconception or misapprehension." (Carnation Co., v. Southern Pacific (CRC Nov. 9, 1936) D. 29255, C. 3220.)

A reversal of policy is apparently not sought by applicant, since broad attack on previous Commission policy was not made in either the pleadings or oral argument. Further, a radical change in State policy concerning rail passenger service would not be appropriate while national policy in this area is in a state of

flux. We would hesitate to permit the abolition of passenger service on a major route when it may soon become national policy to retain such service even if some form of public funding is required.

Even if changes in policy were sought, it still would be unnecessary to have the kind of full-scale evidentiary hearing sought by respondent. Even where the ultimate conclusion of a Commission proceeding is "legislative", the resolution of disputed issues of fact in such a proceeding has been described as a "strictly judicial" process (PT&T v. Eshelman, 166 Cal. 640, at 650).

Section 1708 of the Public Utilities Code would seem to indicate that the Commission has discretion to permit it to repeat this "judicial process". However, sound procedural policy requires that such discretion be applied very restrictively. If the Commission were automatically to permit a disappointed litigant to obtain a complete hearing de novo by the simple expedient of filing a new application without any significant period of repose, the result would be near chaos. The Commission's docket would be so overloaded with old disputes that new issues of great urgency would have to be delayed. Factual disputes would ultimately be resolved not by a trial of the merits but by the relative staying power of the contesting parties.

Thus, whether sought by petition for reconsideration or by a new application, a hearing de novo should ordinarily be granted only on a showing of serious procedural or substantive defects in the prior proceeding - at least as serious as those needed to support a petition for rehearing. No such showing has been made herein.

A hearing on this application would apparently not present us with any questions of new methodology. The issue which most needs a fresh analysis is that dealing with the projections of savings accompanying a discontinuance.

The ICC has recently had occasion to criticize the methods traditionally employed by SP in this area (SP Co. discontinuance Los Angeles, New Orleans, 333 ICC 783).

The ICC's report to Congress, Investigation of Costs of Intercity Rail Passenger Service, issued July 16, 1969, also indicates the need for new analysis in this area.

Our own Decision No. 74832 in Application No. 50211 also indicated serious doubts about the reliability of SP's savings methodology. The decision referred to the 21 pairs of California trains and 16 pairs of non-California trains discontinued since 1957. The total projected annual savings from these discontinuances were over $16.5 million. The decision pointedly commented "[Southern Pacific's] ... witness was unable to indicate to what extent those savings had been realized." (Mimeo p.24.)

However, nothing in the allegacions or argument indicates that applicant intends to rely on new methodology to obtain a different result.

The question remains whether applicant's allegations of material changes in circumstances occurring since the close of the last record are such as to require an evidentiary hearing limited to updating the last record.

The last record included a projection by applicant of operating results for the period July 1, 1968 to June 30, 1969 (Appendix B, Decision No. 74832). The projection estimated a

decline in revenues and increases in certain costs, including labor costs and material prices. Since no findings were specifically directed to these projections, it is to be inferred that the Commission considered such decreases and increases not significant enough to require a different result.

Applicant in its reply claims that decreases in traffic and revenues and increses in material and labor costs since the closing of the last record are material. It had ample opportunity since the filing of the staff motion to plead that these changes exceeded those projected. At argument, it was offered further opportunity to particularize these alleged changes; the opportunity was waived by applicant's counsel. Consequently, we can only assume that the changes which have occurred are not significantly different from the projected changes considered in Application No. 50211.

Two significant changes have occurred; on March 23, 1969 certain schedule changes in applicant's intrastate operations were instituted. Applicant contends that the following are the material aspects of these changes:

"1. The later departure of Train No. 51 from Los Angeles on the northbound trip is a more convenient hour for the public, one which should have encouraged patronage on the train. However, applicant will demonstrate that patronage has continued to decline notwithstanding the change.

"2. Trains Nos. 51 and 52 are no longer the only direct through connection between Southern Pacific Company's Trains Nos. 11 and 12 (The Cascade). Because of the schedule changes on Trains Nos. 98 and 99 (The Coast Daylight) applicant now offers through service on those trains to and from Southern California on the one

hand, and points north of Davis, California, including the Northwest, which was not true when Application No. 50211 was decided.

"3. In addition, the schedule change has resulted in a connection between Train No. 51 and Train No. 1, (The Sunset), which did not exist prior to March 23, 1969."

The most important aspect is conceded to be No. 2 above. However, even though there is now another direct connection with the Cascade, this fact, standing alone, or considered in conjunction with the other alleged changes, would not necessarily justify a discontinuance order.

The fare increase authorized in Decision No. 75940 in Application No. 50670 is another change of which we can take official notice. The Commission concluded in that decision that "This record does not provide a reliable basis on which to determine what the effect will be of such increase on the revenues of the train affected; however, we believe that some increase will be produced. Actual experience will have to determine the specific answer there."

The increase was put into effect August 1, 1969. With only a short period of actual experience it is not likely that a hearing herein would provide a significantly higher degree of precision or reliability than that reflected in the above quotation.

We have also considered the impact of Federal law in reaching our conclusion. Under Section 13a(2) of the Interstate Commerce Act (49 USCA §13a (2)), a railroad which cannot persuade a State Commission to permit discontinuance of an intrastate train may take the matter to the ICC and seek a hearing de novo. Because of this provision, this Commission has no power to preclude all hearing on this matter; at most it can reduce the number of potential hearings from two to one.

Of course, the existence of overriding Federal jurisdiction cannot relieve us of our own responsibilities. If the pleadings had indicated that a full hearing in this proceeding would have justified a discontinuance, we would be remiss in our duty if we attempted to transfer the responsibility for a difficult decision to a Federal agency.

Applicant seeks to have a full-scale hearing based on allegations of changes in certain facts; it appears to contend that the only proper way to test the materiality of such changes is to have a full-scale hearing. Our procedures are not so unsophisticated as to require a full hearing to determine whether a full hearing should have been held. We will simply adopt the procedure utilized by the courts in similar situations by presuming the allegations of the pleadings to be true solely for the purpose of passing on the motion.

Findings and Presumptions

1. We take official notice, and find, that schedule changes have occurred since this last proceeding, providing:

(a) A later and more convenient departure time for Train 51 from Los Angeles;

(b) Connections by both the Coast and San Joaquin Daylights to the Cascade;

(c) Establishment of a new connection between Train 1, the Sunset, and Train 51.

2. For the purpose of passing on the motion only, we presume the following:

(a) There has been a decline in passenger traffic and revenue on Trains Nos. 51, 52, 53 and 54 since the closing of the record in Application No. 50211.

(b) There has been an increase in the expenses of operating said trains since the closing of the record in Application No. 50211.

(c) Said increases and decreases are not significantly greater than those projected in Application No. 50211.

3. We take official notice and find that the fare increase authorized in Decision No. 75940 in Application No. 50670 was put into effect on August 1, 1969.

Conclusions

1. Southern Pacific has elected to stand on the allegations of the pleadings filed by it in this proceeding.

2. The findings and presumptions do not support a reversal of the below-stated conclusions of Decision No. 74832 in Application No. 50211.

> "The declining patronage of the San Joaquin and Sacramento Daylights is attributable partially, if not largely, to the lack of promotional advertising, the diminished adequacy and attractiveness of the service and the failure to make the effort necessary to compete effectively with other modes of transportation."
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> * * *
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> "Despite Southern Pacific's failure to provide modern and attractive service and its negative and indifferent attitude on passenger service generally, there is still substantial patronage of the Sacramento and San Joaquin Daylights.
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> "It is the public utility obligation of Southern Pacific Company to continue passenger service provided by the Sacramento and San Joaquin Daylights, notwithstanding operating losses, since there is a substantial public need for the service in question and although Southern Pacific apparently incorrectly assumes that it may divest itself of all unprofitable operations."

3. Conclusion 2 of Decision No. 74832 in Application No. 50211 should be modified as stated below and as modified is adopted as a conclusion herein:

The continuation of the operation of the San Joaquin and Sacramento Daylights is essential to provide the public with a necessary and convenient rail passenger service for numerous California communities and areas, to retain the last passenger trains between Los Angeles and Sacramento and the San Francisco Bay area via the San Joaquin and Antelope Valleys; continuation is also essential to provide a link between the communities of San Joaquin and Antelope Valleys with the remaining national rail passenger network.

4. The fare increase mentioned in Finding 5 will not materially reduce the savings achievable if the trains in question were discontinued.

5. No useful purpose would be served by further hearing on this matter.

6. The Motion to Dismiss should be granted.

O R D E R

IT IS ORDERED that Application No. 51122 is hereby dismissed.

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

Dated at San Francisco, California, this 3rd day of SEPTEMBER, 1969.

William Symon, Jr.
President

Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.