

ORIGINAL

Decision No. 78560

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of WILLIAM E. LEE, dba FRANCISCAN)
LINES, for a Certificate of Public)
Convenience and Necessity to)
operate as a passenger stage)
corporation.)

Application No. 50537
(Filed September 10, 1968;
Amended April 9, 1969)

Martin J. Rosen and John P. Fischer, Attorneys
at Law, of Silver & Rosen, for applicant.
Craig McAtee, and William W. Schwarzer, Attorneys
at Law, Doyle, Brown & Enersen, for The Gray
Line, Inc.; Peter Derenale, for Chauffeurs
Union Local 265; protestants.
Robert A. Burrowes, for Charter Bus Owners of
California; C. R. Jernberg, Jr., for Charter
Sedan Service; Marshall G. Berol, Attorney
at Law, for himself; John E. Penn, for
Membership (employed by Franciscan Lines) of
Local Division 1225 Amalgamated Transit Union;
interested parties.
Hilton H. Nichols, Victor Weiss and R. W. Hannam,
for the Commission staff.

O P I N I O N

This application was filed on September 10, 1968 by
William E. Lee, an individual, doing business as Franciscan Lines,
for the issuance of a certificate to establish and operate sight-
seeing service in the San Francisco Bay Area, over the following
routes:

- Tour 1: Land and Water Tour of San Francisco,
Muir Woods and Sausalito.
- Tour 2: San Francisco, Golden Gate and Sausalito.
- Tour 3: 49 Mile Scenic Drive (San Francisco).
- Tour 4: Muir Woods and Mt. Tamalpais.

James A. Drucker became a partner of Lee after the application was filed. Applicant was later incorporated under the name of Franciscan Lines, Inc., and the application was amended on April 9, 1969 to make the corporation the applicant herein.

Public hearings were held before Examiner Fraser in San Francisco on March 10, 11, 12; April 14, 15, 16; July 28, 29, 30, 31; September 29, 30; October 1, 2, 3, 20, 21, 22 and 23; all in 1969. The matter was submitted on January 6, 1970, after the filing of concurrent opening and closing briefs. The record includes 2,145 pages of transcript in 19 volumes and 61 exhibits. The Commission authorized a Proposed Report which was filed on July 15, 1970. The Proposed Report recommended findings that Gray Line is performing an adequate per capita sightseeing tour service in San Francisco and vicinity; that the service proposed by the applicant is a duplication of the tours presently provided by the protestant; that tourism is increasing in San Francisco and vicinity; that Gray Line has the facilities and equipment available to handle substantial increases in numbers of passengers and that public convenience and necessity require the type of sightseeing service now being provided by Gray Line in San Francisco and vicinity. The Proposed Report concluded that public convenience and necessity do not require the certification of a second competing sightseeing passenger stage corporation and that the application should be denied because the territory is adequately served by Gray Line. The applicant filed Exceptions to the Proposed Report and a Petition To Set Aside Submission and Reopen Hearing on September 18, 1970. A reply to the exceptions and petition to set aside the submission was filed by The Gray Line, Inc., on November 17, 1970. Applicant's pleading developed certain exceptions which should be discussed herein.

1. Applicant alleges that the Proposed Report does not correctly reflect the public witness testimony.

The testimony referred to was provided by a group of tour operators from San Francisco and other parts of the United States. These people testified that San Francisco is one of the most popular tour areas in the United States and is the only prominent area served by a single tour operator. They further testified that each tour area should have at least two operators to provide healthy competition and a greater variety of service. This group also testified briefly regarding the tours proposed by the applicant and what type of tour is favored by Germans, Italians, Japanese, and others. The testimony of these witnesses was considered in the Proposed Report A fair, succinct summarization of testimony provided by a group of witnesses is to be commended. There is nothing to indicate that the testimony of applicant's public witnesses was not adequately covered in the Proposed Report herein and we so find.

2. Testimony regarding alleged intimidation of competitors by Gray Line.

The issue is raised by the applicant on two occasions. A tour operator testified that she was authorized to place advertising matter in a Gray Line bus in Union Square in San Francisco; forty-five minutes later a Gray Line executive ordered the brochures removed on the basis she was a competitor. Two other witnesses testified their advertising matter had been removed from the lobbies of two prominent downtown San Francisco hotels. Gray Line later presented evidence that each of the hotels referred to provides every commercial tenant with a lease which guarantees that no one else will be authorized to engage in the same business as the tenant on the hotel premises. Anyone selling tours other than Gray

Line, in these hotels, would be violating the lease agreement. In the incident first above mentioned a local employee of Gray Line was overruled by management. It is evident, and we so find, that there has been no intimidation of competitors by the Gray Line.

3. Gray Line witnesses have a monetary interest in Gray Line.

Applicant alleges that 17 of the witnesses who testified for protestant sell its tour tickets exclusively and therefore must testify for protestant or lose significant income. No one sells tickets for a bus ride unless he is to be reimbursed. These witnesses have more knowledge of the public reaction to protestant's service than the management of Gray Line. It is of no consequence that they cannot identify the specific equipment used or have never taken a Gray Line tour. It is evident that these witnesses would not continue to sell the Gray Line tickets unless there was a profit and a benefit to their guests.

4. Applicant alleges that Gray Line equipment, facilities and operations are not adequate.

There is no basis in the record for this allegation. It is based, in part, on the fact that over 50 percent of the Gray Line buses are 1954 or older models. Protestant presented evidence to show that its 1954 models are especially suited to sightseeing and that all models have been kept in excellent operating condition by Greyhound's maintenance plant in San Francisco, which is equipped to paint, repair, and rebuild buses.

Applicant refers to protestant's shuttle bus system, where passengers for tours are picked up at various points in San Francisco by special shuttle buses and transported to a downtown terminal. The passengers then purchase their tour tickets and get on the tour buses at the terminal, where all tours start; at the end of the tour.

passengers have a choice of several locations where they can leave the bus, or they can ride it back to the terminal.

The record indicates, and we so find, that the shuttle bus system is best for a large operator in a metropolitan area. Applicant favors a system where each tour bus picks up its passengers and proceeds on tour without depositing its passengers at a terminal. Applicant's suggestion would require each of its buses to stop in the downtown area to pick up passengers. The latter would have to wait at a central location, or the bus would visit individual motels and hotels. If many buses were involved, it would be a serious burden on downtown traffic and possibly inconvenient to the motels, where parking space for the bus would have to be provided.

5. Effect of the Orange Coast decision.

The Proposed Report recommended that this application be denied. The applicant filed its exceptions based on the recent decision in Orange Coast Sightseeing Co. (Decision No. 76527, dated December 9, 1969, in Application No. 49730.) A Petition For Writ of Review was filed with the California Supreme Court on February 19, 1970, S. F. No. 22731 and denied on October 22, 1970). The Orange Coast decision eliminates Section 1032 of the Public Utilities Code as protestants defense to the granting of this application.

The Orange Coast decision concerned a party who had been previously certificated to serve a precise route within the City of Los Angeles. It did not follow the precise route in its certificate and the Commission held it was not entitled to the protection of Section 1032 of the Public Utilities Code. This finding was sustained on appeal in spite of the argument that the party had three routes through Los Angeles and that two of its tours are the same as the one authorized by the certificate, even though operated under other authority. The petitioner argued that it was certificated to serve an area not a specific route. This contention was rejected and the Commission held that each tour was separate and required a separate finding of public convenience and necessity. It was also held that if a route is abandoned, or has not been served by a carrier, it is not entitled to the protection of Section 1032.

Protestant has no Land and Water Tour as proposed by the applicant as Tour No. 1. Protestant has no tour from San Francisco over the Golden Gate to Sausalito as proposed by applicant's Tour No. 2 and has discontinued a 49-mile Scenic Drive Tour (of San Francisco) the equivalent of applicant's No. 3 and a Muir Woods and Mt. Tamalpais Tour, applicant's No. 4, without Commission authority. The Orange Coast decision concludes that where a sightseeing carrier is either authorized and not operating a tour, or not authorized and operating a tour, its operation is unlawful and it is not a certificate holder within the meaning of Section 1032 of the Public Utilities Code.

Petition to Set Aside Submission

The petition to set aside the submission should be denied. It is based upon an allegation that applicant was prejudiced at the hearing by not being permitted to present evidence regarding the Gray Line monopoly and use of intimidation. It is alleged that these factors are relevant in determining public convenience and necessity. Applicant's offers of proof, made when testimony was not permitted, do not indicate that the excluded testimony would add to the record.

Applicant claims that a certain movie was not accepted in evidence or marked for identification. On December 23, 1969 the Commission issued Decision No. 76591 in this application, which reopened the proceeding to mark the movie film as Exhibit No. 60 and place it in the record. It was not received in evidence. Applicant argues that the film should have been received in evidence since it would show the confusion resulting from the Gray Line shuttle bus system. The film was described by the man who operated the movie camera. It shows lines of people waiting at the Gray Line terminal. Conditions at the terminal were described by numerous witnesses and the conditions at Union Square, where Gray Line has a passenger pickup point, are mentioned in testimony and illustrated by a collection of photographs. What the movie illustrates was briefly described by the photographer without comment. There is nothing in the movie to justify reopening this proceeding. Upon a careful review of the evidence the Commission is of the opinion and finds that the recommended findings, conclusion and order of the Proposed Report should not be adopted in view of the California Supreme Court acceptance of the Orange Coast decision and that the following findings, conclusion and order should be substituted therefor:

Findings

1. The Proposed Report adequately summarizes the evidence filed and testimony of witnesses.
2. Tourism is increasing in San Francisco and vicinity.
3. The removal of brochures from hotel lobbies and occasional indiscreet statements by an executive are an insufficient basis for a charge of "intimidation of competitors."
4. The shuttle bus system seems best for a large operator in a metropolitan area.
5. Gray Line equipment, facilities and operations are adequate.
6. Gray Line has operated unlawfully by discontinuing certificated routes without authority; by altering existing routes without authority and by failing to follow the sightseeing routes exactly as presented in its certificate.
7. The four tours applicant seeks to be certificated to serve are different than the tours presently provided by the protestant.
8. Section 1032 is not applicable to the present proceedings, since applicant is seeking to provide a service different from that provided by the protestant.
9. The application should be granted.
10. Applicant has the ability and resources to establish and operate a sightseeing tour as described and proposed in its application No. 50537.
11. Public convenience and necessity require the granting of the operative authority which applicant seeks by said Application No. 50537.
12. The Petition to Set Aside Submission and reopen the proceeding should be denied.

The Commission concludes that applicant should be authorized to establish and operate the sightseeing tours described and proposed in Application No. 50537.

Applicant is hereby placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Franciscan Lines, Inc. authorizing it to operate as a passenger stage corporation, as defined in Section 226 of the Public Utilities Code, between the points and over the routes particularly set forth in Appendix A attached hereto and made a part hereof.

2. In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations. Failure so to do may result in a cancellation of the operating authority granted by this decision.

- a. Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. Applicant is placed on notice that, if it accepts the certificate of public convenience and necessity herein granted, it will be required, among other things, to comply with and observe the safety rules of the California

Highway Patrol, the rules and other regulations of the Commission's General Order No. 98-A and insurance requirements of the Commission's General Order No. 101-C.

- b. Within one hundred twenty days after the effective date hereof, applicant shall establish the service herein authorized and file tariffs and timetables, in triplicate, in the Commission's office.
- c. The tariff and timetable filings shall be made effective not earlier than ten days after the effective date of this order on not less than ten days' notice to the Commission and the public, and the effective date of the tariff and timetable filings shall be concurrent with the establishment of the service herein authorized.
- d. The tariff and timetable filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs and timetables set forth in the Commission's General Orders Nos. 79 and 98-A.
- e. Applicant shall maintain its accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

3. The Petition to Set Aside Submission and Reopen The Proceeding is denied.

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

Dated at San Francisco, California, this 20th day of APRIL, 1971.

William Lyman J. Chairman
James L. Sturges
James L. Sturges
James L. Sturges Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Section 1. GENERAL AUTHORIZATIONS, RESTRICTIONS,
LIMITATIONS AND SPECIFICATIONS

Franciscan Lines, Inc., by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to transport passengers for sightseeing purposes from points in the City of San Francisco to points of interest in San Francisco County and Marin County named in tours hereinafter described subject to the following conditions and restrictions:

- a. All service herein authorized shall be limited to the transportation of round trip passengers only, originating and terminating at points within the City of San Francisco.
- b. In all instances where the highway over which operations are authorized to be conducted is not specified, the authorized tours shall be conducted over the most suitable streets and highways subject to local traffic regulations.
- c. Service shall be operated on a scheduled basis but applicant will not be obligated to render service for less than six (6) passengers.

Issued by California Public Utilities Commission.

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Section 2. TOUR DESCRIPTIONS

No. 1 LAND AND WATER TOUR OF SAN FRANCISCO,
MUIR WOODS AND SAUSALITO

Leave downtown San Francisco over city streets touring San Francisco, including such sights as Mission Dolores, Twin Peaks, Golden Gate Park, Japanese Tea Garden, Cliff House and Seal Rocks, the Presidio, Palace of Fine Arts and Fisherman's Wharf. At Fisherman's Wharf board a water carrier for a cruise past Alcatraz and Angel Islands to Tiburon. Reboard the coach at Tiburon touring Belvedere to Muir Woods National Monument for a walking tour. Reboard coaches and return to San Francisco via Sausalito and the Golden Gate Bridge.

Total mileage approximately 60 miles land and water. (June 15 to September 30 only): on-call for balance of year.

No. 2 SAN FRANCISCO, GOLDEN GATE BRIDGE,
SAUSALITO, TIBURON

Leave downtown San Francisco, touring San Francisco, then traveling over the Golden Gate Bridge via U. S. 101 to Sausalito, then to Tiburon, and returning over the Golden Gate Bridge to downtown San Francisco.

Total mileage approximately 41 miles.

Issued by California Public Utilities Commission.

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Section 2. TOUR DESCRIPTIONS--Contd.

No. 3 49-MILE SCENIC DRIVE

Leave downtown San Francisco, viewing such sights as Mission Dolores, Golden Gate Park, Cliff House, Seal Rocks, the Presidio, Palace of Fine Arts, Fisherman's Wharf, Telegraph Hill, China Town, Civic Center, returning to downtown San Francisco.

Total mileage approximately 49 miles.

No. 4 MUIR WOODS AND MOUNT TAMALPAIS

Leave downtown San Francisco, viewing sights in route, traveling over the Golden Gate Bridge via Shoreline and California Highway No. 1 to Muir Woods and then over Panoramic Highway and connecting roads to Mount Tamalpais. Returning over the direct route to Sausalito and over the Golden Gate Bridge to downtown San Francisco.

Total mileage approximately 50 miles.

Issued by California Public Utilities Commission.

Decision No. 78560, Application No. 50537.