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ORIGINAL

Decision No. 79154

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HARBOR CARRIERS, INC., Complainant, vs. CALIFORNIA INLAND PILOTS ASSOCIATION, Defendant.	Case No. 9119 (Filed September 17, 1970)
HARBOR CARRIERS, INC., Complainant, vs. HAL C. BANKS, dba MARINE CHARTER, Defendant.	Case No. 9120 (Filed September 17, 1970)
HARBOR CARRIERS, INC., Complainant, vs. KENNETH A. HULME, Defendant.	Case No. 9121 (Filed September 17, 1970)

Vaughn, Paul & Lyons, by John G. Lyons, Attorney at Law, for complainant.
Thacher, Jones, Casey & Ball, by James E. Ratcliff, Jr., Attorney at Law, for California Inland Pilots Association; Jennings, Gartland & Tilly, by John F. Henning, Jr., Attorney at Law, for Hal C. Banks; and Lillick, McHose, Wheat, Adams & Charles, by Anthony Cary, Attorney at Law, for Kenneth A. Hulme, defendants.
Kenny Nakashima, for the Commission staff.

O P I N I O N

Harbor Carriers, Inc., is engaged in business as a common carrier by vessel, as defined in Section 211(b) of the Public Utilities Code of the State of California. It transports persons and property between points on San Francisco, San Pablo, and Suisun Bays under prescriptive operative rights and certificates of public convenience and necessity granted by this Commission. Among other vessels, it operates several vessels in the performance of water taxi service. Harbor Carriers alleges that the defendants, California Inland Pilots Association (the Association) and Hal C. Banks, dba Marine Charter (Banks), operate as common carriers in the transportation of persons by vessel between points on San Francisco Bay without certificates of public convenience and necessity, in violation of Section 1007 of the Public Utilities Code; Harbor Carriers seeks a cease and desist order. Harbor Carriers moved that its complaint against defendant Kenneth A. Hulme be dismissed; the motion is granted. A consolidated

public hearing on the two remaining cases was held before Examiner Robert Barnett in San Francisco on February 10, 1971, at which time the matter was submitted subject to the filing of briefs, which have been received.

Complainant's Evidence

The president of Harbor Carriers testified that his company operates four water taxis under prescriptive rights granted by this Commission, and subject to filed tariffs which provide for rates based upon the use of the entire vessel on a quarter-hour basis. For over 30 years it has been servicing steamship companies, harbor pilots, ship chandlers, and ship crews, with the principal emphasis on transporting harbor pilots from shore to ship in San Francisco Bay. In June 1969 its business was struck and it was not able to operate until March 1970. For the year 1968 its gross revenue was $198,858 for an average of $16,572 a month. After the strike, for the nine months April through December 1970, its gross revenue was $18,608 for an average of $2,067 a month. Harbor Carriers actively solicits the business of steamship companies, but since the strike there has been a change in the pattern of the transportation of persons from pier to vessel. Harbor Carriers asserts that most of the change has been caused by the activities of the Association with the remainder attributable to the activities of Banks.

Banks' Evidence

Hal C. Banks testified that he has been in operation for about two years and is the sole owner and operator of Marine Charter Service which operates a 25-passenger 45-foot motor cruiser of more than a burden of five tons net register. He has no operating authority from this Commission. He stipulated that during the months of April and May 1970, he engaged in 33 movements in the transportation of harbor pilots, and others, to and from ships in San Francisco Bay. The 33 movements are fairly typical of the

frequency with which he transports persons to or from ships in San Francisco Bay. The majority of the persons he transports are harbor pilots, and in the great majority of cases a single passenger is transported. In addition to pilots, shipping company officials and crew members of ships are transported. For the two-month period in question, total revenue for the transportation was $2,347.50.

Banks testified that his service is only available to members of Local 40 of the Masters, Mates and Pilots Union AFL-CIO. He does not offer his services to the public at large; nor does he perform services other than going to and from ships in the bay. If he was requested to take a fishing party on his boat, he would turn down the business. His usual trip is from the waterfront to the arrival position of the ship in the bay, which is usually along Pier 41 to Pier 45; the exact position where the ship would be met in the bay depends upon the inside destination of the ship, which varies from ship to ship. On occasion he goes 15 to 25 miles outside San Francisco Bay.

Banks testified that he has no written contract with Local 40, but merely an understanding. He charges $35 for a trip, which is usually billed to and paid by the steamship company, but occasionally the pilot, or even the Union president pays. In almost every instance, he takes a pilot out to a ship or brings one back. It is only in conjunction with his pilot business that others are carried on his boat and the fee for carrying others is included in the fee for carrying the pilot. Mr. Banks' trips are always initiated by the pilot calling him; neither the union nor the steamship company makes the initial contact. Marine Charter Service maintains no office, is not listed in either the white or yellow pages in the telephone directory, and conducts business from Mr. Banks' home.

The Association's Evidence

The Association stipulated that in October 1970 it made 379 trips to ships; of those trips, 302 had only a pilot on board; 24 had a pilot and others; and 53 had no pilot at all. However, all nonpilot trips were to vessels also having pilot trips. All trips were between its office at Pier 7, San Francisco, and the vessel. They were charged on a fixed fee basis of $35 a trip without regard to number or type of passenger carried, with minor exceptions.

The president of the Association testified that his organization of 18 harbor pilots services the inland waters of the San Francisco area. The Association first began operating a boat in June 1969 when a strike of launch operators stopped the pilots' usual method of transportation to and from ships. The boat used by the Association has more than a burden of five tons net register. The Association has no operating authority from this Commission. He said that the statistics in evidence for the Association's operation in October 1970 is representative of operations throughout the year. The normal method of operation is that a pilot boards at Pier 7, a run is made out to the central area of San Francisco Bay and the pilot is placed on a ship; another pilot, usually the bar pilot, is relieved and comes back on the Association's boat to Pier 7. The original request for a pilot comes from a steamship company, which is billed for the trip.

He stated that the Association's boat is used solely for the purpose of transporting harbor pilots and, in conjunction with the transportation of pilots, other persons having business on the vessel to which the pilot is being taken. Members of the general public are not transported to vessels unless the steamship operator gives permission. The Association has turned down other kinds of business, such as making regular crew runs. On demand, the Association

will furnish harbor pilots to any steamship company. It would be a very rare occasion that anyone other than an Association member would use the Association's boat. Prior to the strike in June 1969, in most instances, the Association used the services of Harbor Carriers for the transportation of its members to vessels in the harbor.

He testified that bar pilots were different from harbor pilots. The bar pilot brings the ship into San Francisco Bay; then the Association takes a harbor pilot out to the ship to relieve the bar pilot. The bar pilots meet incoming vessels by using their own boat which takes them out to sea. On occasion, the Association transports bar pilots from Pier 7 to outgoing vessels for piloting out of the harbor.

Discussion

The principal Public Utilities Code sections applicable to this proceeding are: Section 1007: "No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this State, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation..."; Section 211: "'Common carrier' includes: (b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. 'Inland waters', as used in this section includes all navigable waters within this State other than the high seas." (The exceptions in Section 212 are not applicable to this case.); and Section 216(a): "'Public utility' includes every common carrier...where the service is performed for or the commodity delivered to the public or any portion thereof."

Harbor Carriers contends that the defendants are common carriers and should be required to cease and desist from operations until this Commission issues certificates of public convenience and necessity to them. Defendants contend that they are not common carriers but are merely charter party carriers. Further, they contend that they have not dedicated their property to a public use and that they serve only a highly selective group of customers.

Defendants argue that this Commission has consistently held that the statutory provisions quoted above do not cover operations commonly known as charter boat operations in which the whole vessel is hired out to the customer for a particular trip on a flat rate regardless of how many passengers the hirer chooses to have aboard the vessel for the trip. Defendants cite: California Inland Water Carriers' Conference v. Peterson Water Taxi (1937) 40 CRC 353; Cal. Civil Code Section 1959 which defines "charter party" as: "The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself..."; Gilmore and Black, The Law of Admiralty (1957) for the proposition that a charter is entered into "when one person (the 'charterer') takes over the use of the whole of a ship belonging to another (the 'owner')."; and Robinson on Admiralty (1939), at page 593, for the proposition that "Charter carriage is distinguished from common carriage by the fact that the charterer engages the whole of the ship's capacity."

The term "charter party" in admiralty law has certain well-defined characteristics. California courts have quoted with approval Gilmore and Black, The Law of Admiralty, as follows:

"Charter parties are highly standardized. There are three main types:

"A. The Voyage Charter. In this form, the ship is engaged to carry a full cargo on a single voyage. The vessel is manned and navigated by the owner.

"B. The Time Charter. In this form, as in the voyage charter, the owner's people continue to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period...

"C. The Demise or Bareboat Charter. In this form, the charterer takes over the ship lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer is analogous." (At pages 170 - 171.) (See Apodoca v. Schiffahrtsgesellschaft De Vries & Co. (1962) 199 CA 2d 605, 608.)

Although the above definitions refer to the carriage of cargo, they are equally applicable to the carriage of passengers. The Supreme Court of the United States has held that a demise charter is "tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all." (Guzman v. Pichirilo (1962) 369 US 698, 700, 8 L ed 2d 205, 208.) Clearly, defendants' operations cannot be considered to be either a demise or time charter. If they are charters at all, they must be voyage charters.[1/] Since every trip is a voyage, defendants'

1/ Defendant Banks asserts that he operates pursuant to an agreement in the nature of a time charter. Under the definition of time charter as used in this opinion defendant's assertion is wrong. There is no fixed period of time for his charter; the trip takes whatever time is necessary to get a pilot from the shore to the ship, and the rate is $35 regardless of the time needed to complete the trip.

argument boils down to one proposition: Any person who rents the use of a whole boat is a voyage charterer and therefore cannot be a common carrier. We do not agree with this argument as it creates an exemption that the statute does not provide. It also would permit the operator of a vessel to set "charter" rates for the whole vessel based upon the number of persons transported, and thereby avoid regulation.

We have set forth the foregoing general principles of admiralty law because they were raised by the parties. However, in our opinion, they are not controlling and only tangentially applicable to this proceeding. The Commission has in the past been called upon to define charter service and to determine whether a certificate was needed for such service. In Re Island Boat Service (Decision No. 64776, dated January 8, 1963, in Application No. 44124) the Commission stated: "It appears that as applied to vessel operations the term "charter" has several meanings. One meaning, usually common to all, is that the exclusive use of the vessel is granted to the "charterer." In other respects the term may comprehend instances in which the responsibility for the operation of the vessel remains with the vessel's owner, or it may comprehend instances in which the responsibility for the operation of the vessel is transferred to the "charterer." The transportation which is involved in the first instance may be that of a common carrier, subject to the certificating and related provisions of the Public Utilities Act. The chartering agreement in the second instance may require the Commission's approval under Section 851 of the Public Utilities Act before it becomes operative. It is clear from the record herein, including applicant's definition of the "charter" services which it seeks to have authorized, that said services in substance are no more than nonscheduled services for a specific person or group of persons

for which charges are to be assessed on an hourly basis. In order to avoid the diversity of meanings of "charter" service, the "charter" service which is involved herein will be referred to as nonscheduled service at hourly rates." In the Island Boat Service case the Commission determined that a certificate was necessary to provide nonscheduled service charged for on an hourly basis between points on Santa Catalina Island as well as between Long Beach and Santa Catalina Island.

Further, in Re MGRS, Inc. (1962) 60 CPUC 148, the Commission stated: "One further comment which is necessary in this matter relates to the nonscheduled service which the record shows that applicant provides between Wilmington and Avalon during the period from Labor Day to the end of April. It appears that in providing this service applicant operates as a common carrier by vessel, as that term is defined in Section 211(b) of the Public Utilities Code, and that the charges which applicant assesses for the service are based on the duration of the trip or according to the group transported. Such charges are not published in applicant's tariff.

"... If it intends to provide nonscheduled service either during the period from Labor Day through April 30 or to supplement the scheduled service authorized by Decision No. 59710, it should obtain appropriate authority to do so. Also, it should comply with the requirements of Section 486 of the Public Utilities Code with respect to fares, rates, charges and classifications for its nonscheduled service." (At pp. 159-60.)

Defendants' reliance on the Peterson case is misplaced. At best, Peterson's application to the transportation of pilots is ambiguous. The pertinent portion of Peterson is as follows:

"The admitted operations of the defendants are:

(1) Deep sea fishing parties outside the Golden Gate.

(2) Fishing parties on the inland waters under charter.

(3) Transporting pilots to ships at quarantine in Golden Gate. (Emphasis added.)

(4) Transporting seamen and ship employees and visitors to and from ships anchored in the bay.

(5) Sightseeing trips to both Golden Gate Bridge and San Francisco Bay Bridge.

(6) Transporting employees of the Golden Gate Bridge district between the Federal Dock at Presidio Point and Lime Point in Marin County, under contract with Golden Gate Bridge district.

"Among the questions to be determined are whether the "Sea Giant" has performed all or any of such services and whether in so doing, it has created for its operators the status of a common carrier between points on the inland waters of the State. Undoubtedly the transportation of persons to the high seas, may be disregarded; also the transport of parties when the boat is under charter.

"The Petersons maintain a wharf at the north foot of Buchanan Street, San Francisco, near the Transport Dock at Fort Mason, and the "Sea Giant" uses the wharf as a base. The record shows that passengers are transported on individual fare bases in the manner indicated by items 4 to 6, inclusive, as set forth above. The only operation seriously disputed by complainant is the contract hauling of employees to the Golden Gate Bridge....This service is based on an agreement with the bridge district (Exhibit No. 1) providing an individual rate of 15¢ one way, 25¢ round trip. The passengers paid this rate. Another contract (Schedule No. 2) provided for similar transportation of W.P.A. workmen from San Francisco to Lime Point, Marin County, at the same rates and the fares of the individuals were paid by the W.P.A. All other movements

of the "Sea Giant" were on individual fare bases, according to the testimony of Harry S. Peterson, with no movement for less than $5.00. Peterson's testimony is assuring that the "Sea Giant" was held ready at the wharf at Buchanan Street for the transportation of persons or property between that dock and points on the Inland waters for compensation and that this service was available to the public, individually or by groups, at individual fares."

The reported decision does not disclose whether item (3), transporting pilots to ships at quarantine in Golden Gate, was considered by the Commission to be a charter or individual fare operation. What is clear is that Peterson's boat would not move for less than a $5.00 charge. The Commission found that Peterson was a common carrier. In our opinion this finding means that item (4), transporting seamen and ship employees and visitors to and from ships anchored in the bay, was common carriage. And this is so even if only one person, or a few persons, wished to make the trip, when the minimum charge would be $5.00 for the whole boat. Such payment did not convert what is usually a common carrier run into a charter party run. In any event, cases subsequent to Peterson, e.g., Island Boat Service and M.G.R.S., hold that charter service is subject to regulation.

Defendants' service does not approach in scope the charter services offered by certificated vessels under Commission jurisdiction. Defendants only operate from one pier in the harbor to vessels within the harbor. This cannot compare in scope with the service offered by Island Boat Service, e.g., "Nonscheduled service at hourly rates: A. Between Long Beach and Wilmington, on the one hand, and all points on the coast of Santa Catalina Island, on the other hand. B. Between all points on the coast of Santa Catalina Island." (Decision No. 64776 in Application No. 44124, Apendix B, Original Page 5.) In our opinion defendants

operate no more than a water taxi shuttle service which this Commission considers to be common carriage and which this Commission has certificated. (See Re H-10 Water Taxi Company, Ltd., Decision No. 76436, dated November 18, 1969, in Application No. 51342.)

But even if we were to find that defendants operate valid voyage charter parties, it does not necessarily follow that they are exempt from the Code. If, in fact, at common law a voyage charter party carrier was not considered a common carrier, such a rule has no bearing on common carriage under the Public Utilities Code. The legislature defines common carriage in California, subject only to the requirement of dedication. (Richfield Oil Corp. v. Public Utilities Commission (1960) 54 C 2d 419, 429.) The legislature may enlarge by statute the definition of a public utility. (Cal. Const. Article XII, Section 23[2]; Western Canal Co. v. Railroad Comm. (1932) 216 Cal 639, 652.) So long as defendants operate between points on the inland waters of California for compensation, the Code subjects them to the requirements of obtaining a certificate. There is no exemption for charter boats in the Code and this Commission cannot create exemptions.

Defendants' final contention is that they do not hold themselves out to the general public to provide service by vessel and they have not dedicated their facilities to a public use. The Association states that they hire their vessel only to local steamship companies; Banks states that he hires his vessel solely to member pilots of Local 40, Masters, Mates and Pilots, AFL-CIO. Defendants make much of the fact that they do not provide sightseeing for the general public or fishing trips; nor do they provide

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2/ "...[E] very class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation."

transportation for crew trips for dredge operators on the bay. None of these factors is conclusive as to holding out to the public or dedicating their property to public use. Banks asserts the additional argument that he has some transportation on the high seas and, therefore, does not operate exclusively within the inland waters. As to this latter argument, we find it without merit. First, we are dealing with transportation of harbor pilots whose function begins when ships are within the bay; there is no need to transport those persons on the high seas. And second, a person may operate part of its business as a public utility and part in a purely private capacity. (Lamb v. California Water & Tel. Co. 21 C 2d 33, 40; Richfield Oil Corp. v. Public Utilities Commission (1960) 54 C 2d 419, 431.) Nor does defendants' self-imposed restriction limiting their service to transporting harbor pilots automatically exclude them from being common carriers. A utility that has dedicated its property to public use is a public utility even though it may serve only one or a few customers. (Richfield Oil Corp. v. Public Utilities Commission (1960) 54 C 2d 419, 431.)

The remaining question is whether defendants have dedicated their property to public use. We find that they have. When a steamship company calls the Association and requests that it transport a pilot to a ship in the harbor, the Association performs. When a member of Local 40 requests Banks to transport him to a ship in the harbor, Banks performs. Although the service is on call, it is by no means sporadic. The evidence in this case, which covers just one- or two-months' operation and is representative of every month's operation of defendants, shows almost-daily service, and multiple trips on many days, on the part of both defendants. There is no singling out of certain persons, with transportation based upon carefully drawn contract; rather, we have a situation where no more

than a telephone call initiates the service and all those involved know that the rate is $35. In our opinion the Association stands ready to serve all steamship companies that call upon it to supply pilots; Banks stands ready to serve all members of Local 40 who call upon him for service. We find that defendants have dedicated their service to the public use.

The result reached here is not only compelled by the plain words of the statute, but is required in order to protect the certificated carrier. Some of the purposes of certificates in utility regulation are to protect the public from speculation and duplication of facilities and to protect utilities from competition. (Greyhound Lines, Inc. v. Public Utilities Commission (1968) 68 C 2d 406, 412.) Because of the actions of defendants, the gross monthly revenue of the common carrier Harbor Carriers has been reduced from $16,500 to approximately $2,000. To a large extent this reduction in gross revenue is reflected in the revenues of the two defendants herein. Such weakening of the financial condition of the common carrier could easily be reflected in its ability to provide adequate service. And it is the function of the Commission to assure that the public receives adequate service at reasonable rates. The proposition that two carriers can take over 80 percent of the business away from a common carrier, yet remain private carriers to serve or not serve as they deem appropriate and to charge any rates they feel the traffic will bear, is not supported by the showing on this record.

Findings of Fact

1. We find to be true all that is set out under the headings Complainant's Evidence, Banks' Evidence, and The Association's Evidence, on pages 3, 4, 5, and 6 of this opinion.

2. The service provided by the California Inland Pilots Association and Hal C. Banks, dba Marine Charter, is a nonscheduled water taxi service charged for on the basis of $35 a trip.

3. Defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, operate vessels engaged in the transportation of persons for compensation between points upon the inland waters of this State. The points are piers in the San Francisco Harbor and ships located in San Francisco Bay.

4. Defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, hold themselves out to serve the public or a portion thereof. They have dedicated their property to a public use.

5. Because of the actions of the defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, the gross monthly revenue of the common carrier Harbor Carriers has been reduced from approximately $16,500 to approximately $2,000. To a large extent this reduction in gross revenue is reflected in the revenues of California Inland Pilots Association and Hal C. Banks, dba Marine Charter.

6. The defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, are operating vessels for the transportation of persons for compensation between points in this State without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation.

Conclusion

The Commission concludes that the defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, are in violation of the Public Utilities Code and shall forthwith cease and desist from operating vessels for the transportation of persons for compensation between points in this State without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation.

O R D E R

IT IS ORDERED that the defendants California Inland Pilots Association and Hal C. Banks, dba Marine Charter, shall forthwith cease and desist from operating any vessel for the transportation of persons for compensation between points in this State without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation. The complaint in Case No. 9121 is dismissed.

This order shall be effective as to California Inland Pilots Association when it is personally served on the Association; this order shall be effective as to Hal C. Banks, dba Marine Charter, when it is personally served on Hal C. Banks; this order is effective as to Kenneth A. Hulme on the date hereof.

Dated at San Francisco, California, this 21st day of SEPTEMBER, 1971.

Chairman

Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.