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ORIGINAL

Decision No. 83292

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the application of ALLTRANS EXPRESS CALIFORNIA, INC. for authority to sell (1) its operating authority as a highway common carrier; and (2) certain property used in its public utility operations; and of DELTA LINES, INC. for authority to purchase the operating authority as a highway common carrier of ALLTRANS EXPRESS CALIFORNIA, INC.	Application No. 54997 (Filed June 26, 1974)

Dunne, Phelps & Mills, by Marshall G. Berol and James O. Abrams, Attorneys at Law, for Delta Lines, Inc. and Alltrans Express California, Inc., applicants.

Silver, Rosen, Fischer & Stecher, by Martin J. Rosen, Michael J. Stecher and Granville Harper, Attorneys at Law, for Neilsen Freight Lines, Peters Truck Lines, Applegate Drayage Co., and Golden West Freight Lines, Inc.; and, Robert L. Lavine, Attorney at Law, for Willig Freight Lines, protestants.

OPINION

The Application

Delta Lines, Inc. (Delta) and Alltrans Express California, Inc. (Alltrans) both hold certificates of public convenience and necessity as highway common carriers under the Public Utilities Code. They request authority pursuant to Section 851 of the Public Utilities Code:

(1) For the sale of Alltrans' certificate to Delta.

(2) For the sale of much of Alltrans' property including vehicles, shop and garage equipment, tires, and other miscellaneous property to Delta or to a related corporation.

It is alleged that Alltrans is a long-established carrier hauling general commodities throughout much of California and is generally recognized as a LTL carrier. It is presently a wholly-owned subsidiary of Alltrans, Inc.[1/] The present management gained control of the carrier in 1969 (at which time it was known under its prior name as Walkup's Merchants Express).

At the time of acquisition, the carrier's operation was conducted at a loss. The present management has been unable to improve the situation; it is alleged that in four of the five intervening years, the loss has ranged from $466,000 to $1,300,000 per year. The parent corporation has decided that such losses are intolerable and accordingly has decided to dispose of the intrastate carrier operation. It plans to continue Alltrans' local warehouse and drayage operation as well as its interstate operations, which together represent only a fraction of Alltrans' overall business.

If the proposed transaction is approved, Delta itself will receive the certificate and Delta California Industries (DCI - Delta's parent) will receive some of the physical assets for use by Delta. Alltrans will also sublease to Delta Terminals (a subsidiary of DCI) certain terminals which it presently leases for use in certificated intrastate carriage; alternatively, arrangements will be made to substitute Delta Terminals as lessee. The net effect is that Delta will be able to use all of Alltrans' present terminals.

1/ Alltrans, Inc. is in turn a subsidiary of Thomas Nationwide Transport, Ltd., an Australian corporation.

It is proposed that the Delta and Alltrans certificates be merged and the duplications eliminated. In net effect, Delta would acquire new authority for service north on Highway 101 to Crescent City, on 99 to the Oregon border, on 120 between a point near Jacksonville and Yosemite Park, and on 140 between Planada and Mariposa.

It is alleged that the transaction will be in the public interest because it will enable the continuation of Alltrans' service to the California shipping public. It is alleged that Alltrans is performing a needed and useful service. It is alleged that if the transfer is not approved, the management of the corporation has no alternative but to discontinue intrastate carriage to the great detriment of the shipping public, the people of California, and the employees of Alltrans. It is alleged that the purchase price for the Alltrans' certificate ($10,000) was arrived at after arm's-length negotiations and will be payable in cash. It is further alleged that the consideration to be received by Alltrans for the operating properties is a fair and reasonable consideration based on arm's-length negotiation. It is alleged that Delta has an experienced and well-qualified management and it is anticipated that Delta will be able to bring to the Alltrans operation the necessary management, financial strength, and systems and procedures to reduce and eventually eliminate the loss situation which now exists.

It was requested that the Commission process this application expeditiously. It was further requested that the decision be made effective on the date of issuance and that the necessary tariff filings be permitted on five days' notice. Service was made on California Trucking Association and on the attorneys for protestants. Hearings were held in San Francisco on July 18, 19, and 22.

Position of Parties

Protestant Willig contends that Delta's operations are illegal in that Delta maintains duplicate operating authorities and that these duplicate authorities are a vehicle by which Delta exacts different rates and practices for identical shipments. It claims that authorizing the proposed acquisition would permit a further extension and compounding of this existing illegality. Willig further contends that the application is inconsistent in that it proposes that the authority of Alltrans which duplicates Delta's be merged with that of Delta, while at the same time it shows that Delta plans to use the name Alltrans, to acquire all the revenue equipment of the selling carrier, and to continue the Alltrans operation.

On July 22, protestant Willig and the applicants reached a stipulation under which Willig would withdraw its protest on the condition that applicants agree to an order by which the Delta corporate family would combine all its highway common carrier certificates into one, and do the same with its express authorities, and establish the same rates and rules for all transportation provided by any of its divisions.

The remaining protestants are motor carriers operating in intrastate commerce under certificates of public convenience and necessity issued by this Commission. Their protest is based on allegations that: (1) Delta has in recent years engaged in a scheme to monopolize the California intrastate motor carrier industry. (2) In execution of the scheme, Delta California Industries or Delta Lines, Inc. purchased operating authority of several motor carriers, including California Motor Express, Ltd. (CME), Transbay Motor Express, Inc., California Motor Transport Company (CMT), and others, all of which authorities duplicate to some extent the existing authority of Delta. (3) Delta's operations with respect to these acquisitions are illegal either in that the acquired rights are operated as a separate carrier with different rates and tariffs or that the acquired rights are cancelled thus eliminating competition found necessary for public convenience and necessity. It is argued that the operation of separate authorities involves covert discrimination against the shipping public and a violation of the doctrine of "alter ego," as developed by the Commission. They argue that the cancellation of the duplicate rights is in itself monopolization. (4) The attempted acquisition of Alltrans is in furtherance of the foregoing scheme to eliminate competition and control the industry and therefore should be denied.

Preliminary Matters

Neilsen, Peters, Applegate and Golden West[2/] moved for dismissal of the application. This motion was based on the following grounds:

(1) That the application lacks signatures on behalf of Delta California Industries and Delta Terminals who are assertedly parties to the proposed transaction (Rule 35).

(2) That the application does not allege the costs of the property to be conveyed (Rule 35(b)).

(3) That no authority has been sought for assumptions of obligations, guarantees or issuance of securities, all of which are contemplated by the attached contract (Sections 816, et seq. Pub. Util. Code).

(4) The application does not set forth in sufficient detail the operating authorities of purchasing and selling carriers.

This motion was taken under submission by the examiner on the first day of hearing.

The same parties also moved for staff participation in the proceeding under the sua sponte requirements of Northern California Power Agency v PUC (1971) 5 Cal 3d 370. This motion

2/ Hereinafter referred to as protestants' group.

was taken under submission on the first day of hearing and considered by the full Commission; the denial of the motion was announced on the record on that same day.

Motions for continuance of the hearings were denied. The President of the Commission, sitting as the assigned Commissioner, announced his intention that a final decision in this matter would be reached on or before August 16th, the closing date of the contract.

The Evidence

Applicant's first witness was a member of the board of Alltrans' ultimate parent, Thomas Nationwide Transport, Ltd. He testified that the board had been concerned for several years with the drain on Alltrans' resources occasioned by the losses arising from its intrastate carriage operations.

He indicated that at the April 1974 board meeting, the board finally determined that these losses could no longer be tolerated and that the intrastate carriage business must be either terminated or sold before the close of the parent's fiscal year, June 30. However, after subsequent consideration of the company's responsibilities to its employees and the need for regulatory approval, this deadline was reluctantly extended to August 16, 1974. He testified that the local management had tried all feasible methods to halt the drain on Alltrans' resources, but had been unsuccessful.

A Vice President of Alltrans, Inc. described the background and the negotiations for the purchase and sale now under consideration. He sponsored exhibits representing Alltrans' income statements and balance sheet. These indicate that Alltrans had lost substantial sums of money each year since the present parent company purchased it in 1969 and that the cumulative loss is nearly $3.6 million with a negative net worth of over $1.5 million.

He explained that because the parent also owns an interstate carrier it was appropriate to retain Alltrans' interstate operations so that Alltrans could continue to distribute freight brought into this State by that carrier. Alltrans, Inc. also wished to retain the warehouse operations, which are very close to the break-even point.

He indicated that Alltrans, Inc. supported the parent corporation's desire to sell rather than discontinue since the sale would permit continued service for Alltrans' loyal customers, some of whom also patronize warehouse and interstate operations. The company also has a strong sense of obligation to its employees, most of whom will continue to have jobs if the proposed sale is completed.

He testified that Alltrans approached the problem of selling by first drawing up a list of carriers who might be interested in purchasing, giving priority to those who would be most interested and able to come to a quick agreement. Contact with the first carrier on the list was made in the last few days in April. Once that contact was made, it was decided not to approach any other potential purchaser as long as the negotiations were proceeding. Negotiations with that carrier resulted in a tentative agreement in which the consideration was nearly identical to that offered by Delta. However, the parties were unable to agree on financing and negotiations were terminated.

Alltrans then approached Delta and negotiations were again commenced; again there were no contacts with other prospective purchasers during the pendency of the Delta negotiations.

Alltrans at the same time developed a plan for terminating intrastate carriage if a sale could not be completed by August 16. Under the plan, action would be initiated on a Thursday afternoon; within a period of seven to ten days all operations would be terminated. No plans were made to seek regulatory approval of this termination. The plan did, however, allow for discussion with Alltrans' attorneys after the execution of the plan was commenced.

In the event the sale is disapproved by this Commission, Alltrans will not attempt to find another purchaser. It is firmly committed to discontinuing on August 16, even if this proceeding is still pending.

Since announcing the contract with Delta, Alltrans has received no offers or contacts from other prospective purchasers.

One of the essential features of the contract is that Delta will offer employment to approximately 400 to 415 of Alltrans' 450 employees. The union employees will retain their seniority. Delta will give three-year employment rights to those union employees who are laid off as a result of this sale.

The President of Delta testified on behalf of the purchasers. He generally described Delta's certificate as authorizing service from Willits on Highway 101 and from Redding-Project City on Highway 99 all the way to the Mexican border, serving all intermediate points, with a 20-mile lateral radius on the main north-south and practically all east-west routes. He indicated that Alltrans holds some authority which does not duplicate Delta's, primarily on Highway 101 from north of Willits to Crescent City and on Highway 99 north of Project City to Eureka, Hilt, and the Oregon border. There are also some small areas in the Merced region on Highway 140.

He indicated that the duplicatory authority to be acquired will be merged with that Delta already has and that

The nonduplicatory authority will be treated as an addition to Delta's existing rights. All the rates, rules, and regulations of the two operations will be modified to eliminate any differences. He explained Delta plans to continue Alltrans' intrastate operations as a separate entity, in competition with Delta and the CME-CMT divisions which are now presently in existence. The new division would temporarily use the Alltrans name on a nonexclusive basis, sharing it with Alltrans' retained interstate and warehouse operations. In the duplicated territory the operation would continue to utilize Alltrans' terminals. It may be feasible in Santa Rosa, Chico, and Santa Maria to dovetail the two carriers' terminal operations, thereby eliminating duplication. At Eureka, Delta may take over Alltrans' terminal.

In this witness' opinion, if Delta is allowed to complete the contract, it will be able to serve all or nearly all of Alltrans' present intrastate customers in the same manner to which they have become accustomed. If the application is denied, he is of the opinion that the traffic now enjoyed by Alltrans would be competed for by nearly 2,000 carriers.

The vice president of Neilsen described Neilsen's territory as including basically the greater Bay Area (including San Jose) and Highway 101 north to the Oregon border. He indicated that the Delta carriers compete with Neilsen up to Willits. At present, Delta and CME and Neilsen have an interlining agreement which generates close to 10 percent of Neilsen's intrastate traffic. He indicated that Neilsen has in the past attempted to sell its customers on the advantages of using Delta and/or CME rather than other carriers in moves which extend beyond Neilsen's territory. He was of the opinion that if the Delta carriers were allowed to merge their authority with that

69

of Alltrans, Delta would naturally wish to carry all its own freight to and from points beyond Willits rather than interline. He claimed that loss of this interlined traffic to Delta would severely compromise Neilsen's ability to render adequate service to the relatively sparsely populated area which constitutes its service area. He contended that that service area is too small, especially in light of the largely one-way nature of the traffic, to support four carriers, (P.M.T., System 99, Alltrans, and Neilsen). He is afraid that introducing the largest statewide carrier into this territory will upset an already precarious competitive situation to the disadvantage of a small regional carrier.

He estimated that for every salesman or pickup Neilsen has in the Bay Area, Delta carriers may have 20 to 25 already and that the addition of the Alltrans personnel and equipment would increase substantially the smaller carriers' present disadvantage.

He predicts that approval of this transaction would start a trend which would result in a few large carriers dominating and monopolizing the LTL traffic in California. He believes that regional carriers generally cannot survive competition with such large statewide carriers.

He claimed that the public in Humboldt County and Eureka would be better served if the Alltrans certificate were allowed to lapse.

A representative of protestant Peters indicated that that carrier had its home office in Yreka and terminals in Oakland, Sacramento, Redding, and Mount Shasta. He described the carrier's operating territory as extending from the Bay Area and Sacramento as far south as Modesto on 99 and I-5, including Highway 99E, up to Chico, across to Redding, and to the Oregon border, with ten lateral miles on both Highways 5 and 99. He indicated that Peters was generally in competition with ONC and PMT. Peters obtains a substantial amount of its freight, between five and ten percent, from interlining agreements with the Delta family of carriers. He described Peters' operating territory as having the same general characteristics as that of Neilsen.

He indicated that the loss of interline freight plus the addition of a vigorous direct competitor in Peters' territory would probably force Peters to cut back operations, especially into the smaller cities in the territory, and to lay off employees. He claimed that there would be a definite downgrading of service to the receiving and shipping public in his territory. The witness indicated that if Alltrans were to go out of business that Peters would lose about $14,000 a year in interline traffic. He conceded that there might be some offsetting replacements by traffic from the other potential interlining carriers.

Discussion

Protestants have insisted that we should view this proceeding as if there were a course of action open to us which could preserve the competitive status quo.

We see no such course of action. Alltrans has consumed its original dedicated capital in performing a public service. It therefore has, under due process conecpts, a unilateral right to discontinue operations at any time. Lyon & Hoag v R.R. Commission (1920) 183 C 145. Rather than exercise its right, it has deferred discontinuance temporarily to give the Commission an opportunity, however brief, to accept an alternative proposal which would preserve competition in at least a portion of Alltrans' territory and save the jobs of 400 out of 450 employees.

Given this setting, it would be adverse to the public interest to grant any of the motions of the protestants' group. A decision to delay the proceeding would render the alternative moot, destroy competition, and put 400 men out of work unnecessarily. [cf. Calif. Motor Transport v Trucking Unliminated (1972) 404 US 508]. For the same reason, we could hardly deny the substantive relief sought by applicants. Maintenance of even a portion of the competition previously afforded by Alltrans can be presumed to be in the public interest.[3/] We have always viewed job security as an important aspect of the public interest in mergers or discontinuances.[4/]

3/ The Commission will not, in a transfer proceeding, entertain a claim that there are too many carriers in a particular market. Lawson Taylor Line, Inc. (1964) 63 PUC 392.

4/ Richmond & San Rafael Ferry and Transport Co. (1953) 52 PUC 520, Glendale City Lines (1963) 61 PUC 772.

Discontinuance offers no benefits to the public. The proposed transfer, while it may offend theoretical principles of anti-trust[5/] law, is clearly superior to discontinuance and it must be selected. Our action herein is not final, in the sense that a court's judgment becomes final. We have continuing jurisdiction and responsibility for the markets involved herein. If a serious competitive imbalance appears, we have the power to cure it by granting new certificates.

Findings

1. Alltrans has a negative net worth of $1.5 million. Substantially all of its losses were incurred in rendering a public service.

2. Alltrans' management will commence its discontinuance plan if the application is not approved on or before August 16, 1974.

3. The Commission can choose between only two feasible alternatives, authorizing the execution of the contract or total discontinuance of Alltrans' carrier operations.

4. If Alltrans discontinues service:
   - (a) At lease 400 men will be unemployed.
   - (b) Competition will be reduced in those territories where Alltrans has operating authority and Delta does not.

5. If Alltrans is allowed to execute the contract:
   - (a) At lease 400 of Alltrans' 450 employees will remain employed.
   - (b) The existing level of competition, in territory where Alltrans has authority and Delta has none, will be preserved.

6. Under either alternative, the amount of competition in territory where both carriers have authority would be reduced

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5/ It would appear, however, that proof that an enterprise is failing may be a defense to a claim that a transaction such as this violates anti-trust laws (International Shoe Co. v F.T.C. (1931) 280 US 291, 302-303.

7. The public interest is better served by authorizing the proposed transfer than by discontinuance.

8. Any significant delay in arriving at a final decision in this matter would have made it impossible to preserve either jobs or competition.

9. The authorization granted is not a finding of the value of the rights and properties authorized to be transferred.

Conclusions

1. A carrier which has expended all of its original capital in losses incurred in rendering common carrier service cannot, consistent with due process, be prohibited from discontinuing service. The Commission will not prevent Alltrans from discontinuing its intrastate carrier operations.

2. It is not appropriate in this proceeding to consider issues of public convenience and necessity.

3. When duplicate operating authorities are held by the same person, they merge by operation of law and become as one.

4. The authority which Delta may acquire herein together with the existing authorities of the Delta corporate family should be restated in single in-lieu express and highway common carrier certificates, which should be issued by supplementary order.

O R D E R

IT IS HEREBY ORDERED that:

1. On or before September 1, 1974, Alltrans Express California, Inc. may sell and transfer the operative rights and property referred to in the application to Delta Lines, Inc. and its affiliated corporations.

2. This authority is granted on condition that:

(a) Delta Lines, Inc. and its affiliated corporations shall accept from this Commission a single highway common carrier certificate and a single express company certificate, which certificates shall encompass all of the authorities of each type now held by any of said companies with the duplications omitted.

(b) Delta Lines, Inc. and its affiliated corporations, shall restate, reissue, or refile all of its tariffs consistent with (a) above.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 6th day of AUGUST, 1974.

Vernon L. Sturgeon
President

William Symons Jr.

J. P. Vukasin Jr.

Thomas Moran

Commissioners

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.