

Decision No. 84316

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Southern California Commuter Bus
Service, Inc., a California
corporation,

Complainant,

vs.

Garlene Zappitelli, an individual,
Defendant.

Case No. 9797
(Filed September 23, 1974)

Ronald J. Hoffman, for Southern
California Commuter Bus
Service, Inc., complainant.
Garlene Zappitelli, for herself,
defendant.
John deBrauwere and Sean A.
Mahon, for the Commission
staff.

O P I N I O N

This is a complaint filed by Southern California Commuter Bus Service, Inc. (Com-Bus), a California corporation, against Garlene Zappitelli (Zappitelli), an individual, alleging that Zappitelli was operating as a passenger stage corporation without certification by the Commission, in violation of Section 1031 of the Public Utilities Code (Code) of California.

Com-Bus has been operating a commuter bus service since 1972, and filed Application No. 54141 dated June 27, 1973 for a certificate of public convenience and necessity as a passenger stage corporation, pursuant to Section 1031 of the Code, for, among others, a route between Huntington Beach in Orange County, on the one hand, and various industrial operations, including the TRW plant, in the South Bay area, of Los Angeles County. The application was granted

and Com-Bus was certificated in Decision No. 83120 dated July 9, 1974. Decision No. 83467 dated September 17, 1974 restated Com-Bus' authority, but does not affect the issues in this proceeding.

This complaint was filed on September 23, 1974 and requested an immediate cease and desist order pursuant to Section 1034 of the Code, a permanent cease and desist order, imposition of a minimum \$500 per offense penalty pursuant to Section 2111 of the Code, and an award of not less than the actual revenue lost by complainant as a result of defendant's operations. This complaint was duly served upon the defendant on September 24, 1974. On October 4, 1974 the Commission received a letter from the defendant dated October 3, 1974 requesting an extension of two weeks in which to reply to the complaint. On October 7, 1974 the Secretary of the Commission, by letter to the defendant, granted an extension as follows:

"Pursuant to your written request of October 3, 1974, you are hereby granted an extension of time to and including October 18, 1974 in which to assert defects to the complaint in Docket No. 9797. This extension of time will not excuse failure to comply with any Commission order which may issue with regard to complainant's request for interim relief." On October 8, 1974 the Commission issued an interim order requiring the defendant to cease and desist operating as a passenger stage corporation over the public highways of this State until further order of the Commission, which order was duly mailed to the parties on the date of entry. On October 24, 1974, the Assistant Secretary of the Commission issued and mailed an order of the Commission requiring the defendant to satisfy the matters complained of or answer the complaint within 10 days from the date of service of the order. On November 6, 1974 the defendant filed her answer, dated October 29, 1974, with the Commission.

A public hearing was held on December 11, 1974 before Examiner Blecher, and the matter was then submitted, subject to the filing of letter arguments by both parties, and late filed Exhibit 10 by the staff, within one week thereafter. Thereafter, late filed Exhibit 11, an affidavit of Mary Nichols, was admitted by examiner's ruling.

The Evidence

There is no substantial dispute over the facts. Ronald Hoffman, president of complainant, and J. Marshall Gage, president of another certificated operator, testified for complainant. Defendant and eight of her passengers testified on her behalf. Both staff members also testified. The material evidence may be summarized as follows:

Com-Bus has operated on the route in question since 1972, with stops on Brookhurst Street (two), Adams Avenue, and Warner Avenue. The bus has a driver, and a bus captain who collected fares, made reservations, and was in charge of the bus and its occupants. The fare is \$11.50 per passenger per 5 day week. At the end of April 1974 Com-Bus circulated a letter to its passengers advising them that Com-Bus was contemplating operating a smaller bus or van on this route, and that all existing passengers would be unable to obtain seats on it, and offering alternatives substantially as follows: Seats on the smaller vehicle would be assigned to existing passengers on a seniority basis; the others could make reservations on this or an adjoining route a few miles away, but in the interim might have to make other travel arrangements. This smaller vehicle was placed in service early in May 1974, and several of Zappitelli's present passengers were bumped, for lack of seniority, from Com-Bus' smaller vehicle. All of Zappitelli's passengers were former riders of Com-Bus, though Zappitelli never used it, but always drove to TRW during the six years she's been employed there. Com-Bus' mini-bus has been operating at capacity (15-16 passengers) since it was placed in service, but the prior bus carried in excess of 20 passengers

regularly. Mr. Hoffman testified that he is not attempting to attract car pool riders to his buses, that both commuter buses and car pools have many similar advantages and are equally desirable, but the major difference is in the degree of responsibility. Because his company is required to be certificated, it must comply with the requisite law and regulations, thus requiring certain minimum insurance coverage, costing it \$1,100 per year on the mini-bus; requiring certain safety equipment and procedures, costing about \$450 per vehicle; requiring Com-Bus to spend \$18,000 in legal and administrative expenses in a six month period to obtain the Commission certification, and requiring additional accounting costs to comply with the Commission standards, none of which costs need be borne by defendant. The other witness for complainant testified that his company, Douglas Bus Lines, is a certificated passenger stage corporation; that large car pools, remaining unregulated, compete with him and might cause him to seek authority to discontinue his operations, and that the operation of smaller vans is not economical. These opinions were also shared by Mr. Hoffman.

Zappitelli has admittedly operated her 12-passenger Dodge Maxi-Wagon (which could carry 15 passengers) since May 6, 1974, as alleged. She and her husband had two passenger vehicles prior to obtaining the Dodge on March 21, 1974 (which she claims to have ordered in September, 1973). One was a Honda 600, a small, four-passenger vehicle, and the other was an old eight-passenger station wagon which her family outgrew. She had always driven one of those vehicles to work, except for an occasional sharing of rides with one friend. She had driven the Dodge to work regularly since it was delivered. She never solicited any riders or passengers, but was approached by several co-employees to start a pool with her Dodge. After some inquiry, she set \$8.00 weekly or \$1.60 per day, as the ride cost. She collects this sum in advance each Monday, and credits

her rider the next week if any rides were missed during the week paid in advance. She never discussed a rebate for lower priced gasoline with her riders, nor did she keep any records, except for monies collected, until this proceeding commenced. She has averaged eight full passengers per week and has driven them regularly except for her summer vacation and several absences from her employment. She admits receiving the cease and desist order from the Commission shortly after issue, saying she contacted Mary Nichols, an attorney, who, after checking with the Commission told defendant that the order was a clerical error and could be ignored. This is disputed by the late-filed affidavit of Mrs. Nichols, admitted as Exhibit 11. In any event, defendant has continued the same operation since the entry of the order, at least to the date of hearing.

Defendant must deviate from her ordinary route from home to work to pick up her riders, entailing about a 1-3/4-mile variance. She picks up most of her riders at Brookhurst and Adams, across the street from where Com-Bus picks up its riders, as defendant felt it was not right to stop at the same corner as Com-Bus did. She picked up some passengers further down on Brookhurst. All the passengers drove to the locations where defendant picked them up. All the riders but one worked at TRW, and this rider was dropped off first at another plant.

Before she started taking riders, Zappitelli checked with her insurance agent, and increased her liability coverage to \$50,000/\$100,000 at an alleged cost of \$23.20 for the period of May 6, 1974 to October 4, 1974, the inclusive dates of defendant's computation of receipts and expenses of her pool. Her then monthly insurance premium on the Dodge, including service charge, was \$35.88. Mrs. Nichols obtained a copy of the Commission staff guideline for determining the status of car pools (Exhibit 5) and sent it to defendant at the end of October 1974, when defendant prepared the above computation. On May 3, 1974 defendant spoke to Mr. deBrauwere

of the Commission staff who advised her of Sections 654.1 and 654.2 of the Penal Code of California,^{1/} which defendant alleges exempts car pools from Commission jurisdiction.

Defendant does not know if her liability insurance has a "for-hire" exclusion; she drives the Dodge and does not share in the expenses; the expenses for driving alone would be the same as for driving with her riders, except for the insurance expense; she would probably use her Honda if she drove without riders, because it only costs \$4-\$5/week for gas. Some riders said they would have continued to ride Com-Bus if it had not reduced the size of its vehicle. Defendant furnishes pillows to her riders, and all the riders said Com-Bus' fare was too high and that this was a factor in their riding with Zappitelli.

1/ The pertinent portions of 654.1 and 654.2 are as follows:

654.1 "It shall be unlawful for any person,...to sell or offer for sale or, to negotiate, provide or arrange for,...transportation of a person or persons on an individual fare basis over the public highways of the State of California unless such transportation is to be furnished or provided solely by,... a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation."

654.2 "The provisions of Section 654.1 of the Penal Code shall not apply to the selling, furnishing, or providing of transportation of any person or persons

* * *

"(6) To the transportation of passengers by a person who is driving his own vehicle and the transportation of persons other than himself and members of his family when transporting such persons to or from their place of employment and when the owner of such vehicle is driving to or from his place of employment; provided that arrangements for any such transportation provided under the provisions of this subsection shall be made directly between the owner of such vehicle and the person who uses or intends to use such transportation."

The cost study attached to defendant's answer was generally found to be reasonable by the staff, though after analysis, the staff recomputed much of the data and entered it as Exhibit 10. Mr. Mahon, testifying on behalf of the Commission staff, thought all the listed expenses were reasonable, and that the guideline referred to (Exhibit 5) was not a Commission directive, but instead an internal Transportation Division memo for general use. He further stated that depreciation was a reasonable operating expense in determining the costs of a genuine car pool. The effect of the staff analysis was to increase the receipts by a proportionate share of the cost of a ride for Zappitelli and to increase the ratio of car pool usage to total usage on an annualized basis and thus increase the amount of expense attributable to pool use in each category listed by defendant.

In our analysis of the testimony and exhibits we note that defendant used the sticker price of the Dodge in her computation, while admitting that she had paid less than that sum for the vehicle, but was not sure of the exact price paid for the Dodge. She failed to produce the bill of sale for the vehicle to prove the purchase price, date of purchase, and date of delivery, though she produced the original manufacturer's sticker originally attached to the vehicle, which was meaningless, since she admitted that the vehicle's actual cost was less than the price shown on the sticker. She admitted not having purchased any new tires. Certain maintenance and repair expenses shown in Exhibit 6 were either outside the pool expenses (Exhibit 6, page 3), outside the dates of computation (page 5), or within the 12,000 mile vehicle warranty (page 4), and the entire exhibit is highly speculative as to its connection, if any, with the use of the vehicle as a pool vehicle. Defendant also failed to include any vehicle resale value in her computations. The

staff exhibit (Exhibit 10) used the figures and items given by defendant together with staff adjustments as a basis for the computations therein contained. The staff's Exhibit 10 also includes provision for normal tire and maintenance expense, regardless of defendant's actual expenditure experience. Her vehicle was equipped with seat belts. All the riders were told they would be sharing expenses, and said they would ride with defendant even if her insurance was not up to minimum state standards, but felt that if a profit were involved, it would not be a car pool.

The pertinent portions of the California Public Utilities Code provide as follows:

Section 226:

"'Passenger stage corporation' includes every...person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over any public highway in this State between fixed termini or over a regular route..."

Section 225:

"'Passenger stage' includes every...motor vehicle used in the transportation of persons,..."

Section 211: "'Common carrier' includes:

"(a) Every...person operating for compensation within this State."

"(c) Every 'passenger stage corporation' operating within this State."

Section 208:

"'Transportation of persons' includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage."

Section 1031:

"No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the Commission a certificate declaring that public convenience and necessity require such operation,..."

Section 1035:

"... Any act of transporting...any person or persons by...motor vehicle upon a public highway of this State..., where the rate, charge, or fare for such transportation is computed, collected, or demanded on an individual fare basis, shall be presumed to be an act of operating as a passenger stage corporation within the meaning of this part."

As in any complex set of rules or laws, there is some redundancy, surplusage, and omissions in the applicable rules and definitions set out above. Yet the meaning and intent are easily discernible, though the application of the rules to a given set of facts may require a frequently sought but seldom achieved wisdom. The nature of an operation, its frequency, its routing, the type of vehicle, the compensation involved, the effect upon others, the prior interpretation of the law, and myriad other factors all may have an effect upon the law's application. So also may changing times and social exigencies have an effect.

Turning to Sections 654.1 and 654.2(6) of the Penal Code, which have been used as authority for the alleged exemption of car pools from Commission regulation, we observe that Section 654.1 relates primarily to the sale of transportation and is directed at the control of unauthorized travel bureau operations by transportation agents, particularly "share expense" passenger automobile transportation arranged by such transportation agents,^{2/} and that Section 654.2(6) exempts personally arranged transportation to and

2/ 34 Cal Jur 2d - Motor Transportation Sec. 45, p. 584.

from the place of employment of the owner who drives his own vehicle. Section 654.2(6) appears to exempt the traditional "share the ride" car pool, which does not contemplate any compensation.^{3/} In any event, these sections are part of the Penal Code, which prescribes the punishment for a violation thereof,^{4/} and which, in Section 12 of the Penal Code, "...devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed." Thus, those provisions are judicially enforceable, and have no applicability or relevancy to the issues or the sections of the Public Utilities Code involved in this proceeding. Nor is the Commission asserting any jurisdiction over the traditional share-the-ride car pool as there is no compensation involved in such cases. However, where compensation is involved, we enter the broad gray area between the traditional car pool and the traditional passenger stage or bus operation, such as in the instant case.

Com-Bus is a commuter bus service which clearly comes within the definition of a passenger stage corporation, and has been duly certificated, though in one sense, it may be described as a large, highly organized, profit-oriented share-the-expense pool. In analyzing Zappitelli's operation, we find the operation of a motor vehicle for the transportation of persons, for compensation, over a regular route and between fixed termini and essentially running down the same route as Com-Bus. There can be no doubt that this operation meets every standard of a passenger stage corporation, as set forth in the quoted sections of the Public Utilities Code; there is no exception in the Public Utilities Code for pooling arrangements. Nor is the use of a comparatively small vehicle conclusive, as even a passenger car-taxicab has been held to be a

3/ "Compensation" is defined later in this opinion.

4/ Section 654.3 of the Penal Code.

passenger stage corporation (Greyhound Lines Inc. v Nolen (1971) 72 CPUC 196). Nor do the laudable motives of defendant justify any attempt to read into the Public Utilities Code a meaning neither indicated by the language nor manifestly intended by the Legislature. The words "for compensation" have generated a great deal of controversy in this case. The defendant and the staff have gone to great lengths in an attempt to justify a showing of little or no profit, thus equating "for compensation" with "profit". Granting that Com-Bus and its certificated counterparts are not charitable institutions, the fact alone that Zappitelli did not intend to, nor did, profit, as she contends, is immaterial, as "compensation" is not equivalent to "profit". If the legislature intended an equivalence, clear and concise language so indicating could and would have been used in lieu of the existing language. Since there has been no judicial definition of "compensation" as this word is used in the Public Utilities Code, we shall use its usual and ordinary meaning, defined in the case of Searcy v Grow (1860) 15 C 117, 123 as "that return which is given for something else; in other words, a consideration." Webster's Third New International Dictionary Unabridged defines "compensation" as "payment for value received or service rendered", which is the equivalent of the Searcy definition. This is what occurred in our factual situation: a ride to and from work for a fixed amount of money. Nor is this payment reasonably equated with reimbursement, which is defined in the same dictionary as "to pay back; to make restoration". This was also held to be the ordinary and primary meaning of reimbursement in the case of Los Angeles County v Frisbie (1942) 19 CA 2d 634, 640. Rationally, the payment by defendant's riders was not a "paying back" but a payment for a service rendered, and thus clearly compensation, as opposed to reimbursement. Thus, whether or not a profit was

involved is irrelevant so long as the ride was for compensation, which fact cannot be disputed. We therefore conclude that Zappitelli's operation is prohibited under Sections 1031 and 1035 of the Public Utilities Code.

We believe it is necessary to distinguish between traditional car pools, where owners alternate with other riders, each driving his own vehicle to work at given intervals and riding on the other days with the other pool members, without anyone receiving any money or compensation, and the Zappitelli pool, which we may call van pooling, where one owner uses her vehicle exclusively, contributes only the driving to and from work, and receives compensation from each of her riders, admittedly in excess of the direct cost of driving to and from work. The payment of the common expenses of driving to and from work may be reimbursable in a traditional car pool (as the alternate use of vehicles without compensation is the equivalent of a common expense sharing concept), as well as in the comparatively new van pool and still avoid Commission regulation. Such cost items, for example, are gasoline, parking fees, repairs, and tolls. Expenses associated with motor vehicle operation, which cannot be easily and directly ascertained, are not direct costs, and should not be allowed as reimbursement. Additionally in this case the defendant drove to her place of employment prior to the van pool formation, and would have continued to so drive without a pooling arrangement, albeit with a smaller vehicle. The net effect of allowing depreciation, insurance costs based on a common carrier rating (as the staff recommends) which are about triple the actual cost of defendant's insurance premiums, and maintenance expenses not attributable to pooling, would be not less than to partly finance the purchase of a vehicle for the owner. Thus, the owner after paying for the vehicle, at least partly with pool funds, would have an equity (of whatever size) to which her

contribution was primarily the physical act of driving. This is clearly not reimbursement; and thus not car pooling, in our view.

Since the purpose of the Commission and the Public Utilities Code is to serve and protect the public interest, we would be shirking our duty to allow these operations to continue unregulated, as the public would not be properly served by the proliferation of such operations, which might be underinsured, as here, and which might be unsafe and unreliable. To hold otherwise would create chaos among the presently regulated carriers, who would then begin competing with Zappitelli and similar operations, and, absent all regulation, would be attempting to make the most money in the quickest and easiest manner. This can lead to underinsurance, unsafe vehicles, unskilled drivers, unreliable equipment, lack of fiscal capability and responsibility, and perhaps cutthroat competition. To avoid these conditions, and to provide the contrary, is the specific purpose of the passenger stage sections of the Public Utilities Code and the duty of the Commission.

We acknowledge the existence of an energy and fuel shortage, as well as a concomitant conservation effort. We acknowledge that pooling is one means of achieving conservation, and we do not mean to discourage it. Traditional car pools, as we have previously discussed, may continue and are not affected by this decision. However, an operation of the scale and with the incidents of the Zappitelli van pooling arrangement comes within the provisions of present law respecting transportation of persons by passenger stage.

The Commission is disinclined to alter the existing statutory scheme where the language is unambiguous and the meaning plain. The power to effect such a change in the law, if deemed beneficial, lies with the legislative process. If the Legislature sees fit to exempt van pools from the operation of the Public Utilities Code, it may so do, and should so do forthwith.

In the interim, we shall set forth the following guidelines to individuals using vans for car pooling who wish to avoid passenger stage regulation:

1. Maximum vehicle seating capacity of nine, including driver. This permits the use of large station wagons and small vans (or larger vans with sufficient seats removed or blocked), which are not large enough to be commercially feasible.

2. Use -

- a. Only to and from vehicle owner's place of employment.
- b. Vehicle to be operated by owner or part-owner only.
- c. Pool to be arranged only by owner or part-owner, or employer.

These provisions substantially embody the provisions of Section 654.2(6) of the Penal Code, but additionally allow the vehicle owner's employer to arrange the pool for their mutual convenience.

3. No compensation is to be paid by or to anyone, except that a proportional reimbursement to the owner-driver may be allowed for the common expenses, such as the cost of gasoline, parking, repairs, and tolls, if any.

The lack of compensation and profit potential will prevent the pool from being classified as a passenger stage corporation under Section 226 of the Public Utilities Code.

4. Owner-driver is to be included in determining proportionate amount of reimbursement. (If there are 3 riders beside driver, and reimbursable costs are \$4, each of the riders (total of 4) is to pay \$1 as reimbursement.)

The sharing of costs by the owner-driver reinforces the concept of reimbursement, and negates compensation, as the owner-driver is effectively paying the direct cost of his own ride.

The purpose of these suggestions is to encourage the conservation of fuel and the alleviation of air pollution, and their corollary benefits.

The Commission has no jurisdiction to award damages, as requested by complainant.

Findings

1. Com-Bus is a passenger stage corporation certificated to operate on the route in question.

2. Zappitelli was operating a van pool between Huntington Beach in Orange County, with two stops on Brookhurst Street (along the Com-Bus route) and terminating at the TRW plant in Redondo Beach in Los Angeles County, with one other drop-off location.

3. Zappitelli operated a 12-passenger Dodge van with an average of eight passengers, excluding herself, who paid \$1.60 per day or \$8 per week as compensation to Zappitelli, for a five-day work week. This payment exceeded the reimbursement of allowable costs of the van pooling.

4. Zappitelli usually drove the van, but on several occasions, others drove it.

5. Zappitelli was employed at TRW for about six years and always drove from home to work.

6. There was an interim cease and desist order entered by this Commission on October 8, 1974, which was in full force and effect at all times since then.

7. Zappitelli was operating the van pool in violation of the order referred to in Finding 6, from the date of its entry to December 11, 1974, and has no operating authority from the Commission.

8. Zappitelli has indicated her intention to comply with all orders of the Commission.

Conclusions

1. Zappitelli was operating as a passenger stage corporation, within the meaning of the Public Utilities Code, and had not obtained a certificate of public convenience and necessity, pursuant to Section 1031. Therefore, she should be permanently restrained from operating in this manner over the public highways of California.

2. Com-Bus's complaint for damages should be denied.

3. Zappitelli has been operating as a passenger stage corporation in violation of the order of the Commission of October 8, 1974, and is subject to punishment pursuant to Section 2111 of the Public Utilities Code.

O R D E R

IT IS ORDERED that:

1. Garlene Zappitelli, defendant, shall cease and desist operating as a passenger stage corporation over the public highways of this state.

2. Complainant's prayer for damages is denied.

3. Garlene Zappitelli, defendant, shall pay a fine of \$500 to this Commission, pursuant to Code Section 2111, which fine is suspended, provided, that in the event defendant fails to comply in any manner with this decision, the suspension shall be vacated without further notice, and the fine, and any additional fine that may then be imposed, shall be payable.

4. The order of October 8, 1974 is dissolved on the effective date of this order.

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

Dated at San Francisco, California, this 15th day of APRIL, 1975.

I dissent. I would merely require ~~adequate~~ adequate insurance from car pools and van pools. Leonard Ross

Commissioner

Vernon L. Livingston
President
William S. Lyons
[Signature]

Commissioners

I dissent, with above comment Robert Schmitt

Commissioner