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Decision No. 85144

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AIRPORTRANSIT OF CALIFORNIA, a corporation,

Complainant,

vs.

JAMES R. NYHAN and MARJORIE R. NYHAN,

Defendants.

Case No. 9623
(Filed October 12, 1973)

Chickering & Gregory, by Robert W. Tollen, Attorney at Law, for Airportransit of California, complainant.
Carl T. Windell, Attorney at Law, for Robert Nyhan, defendant.

O P I N I O N

This is a complaint by Airportransit of California (Airportransit) against James R. Nyhan and Marjorie R. Nyhan (Nyhan). Airportransit seeks an order revoking the passenger stage certificate granted to Nyhan in Decision No. 82011 or, in the alternative, the imposition of penalties for alleged violations of the Public Utilities Code.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis in San Francisco on January 19, 1974. It was submitted subject to the filing of the transcript and briefs, the last of which was received on May 6, 1974.

On April 2, 1974, prior to submission, Airportransit filed a Petition for Proposed Report. The Commission is of the opinion that a proposed report is not warranted in this proceeding and that the petition should be denied.

The Commission makes the following findings:

1. A proposed report is not warranted in this matter.

2. The Commission takes official notice (Rule 73, Evidence Code Section 452, Breidert v Southern Pacific Co. (1964) 61 CA 2d 659; Pratt v Coast Trucking Co. (1964) 228 CA 2d 139) that Nyhan filed Application No. 54241 on August 15, 1973.

3. The Commission takes official notice that a copy of Application No. 54241 was served on Airportransit on August 24, 1973 and that a copy of the amendment to the application was served on Airportransit on September 5, 1973.

4. The Commission takes official notice that Airportransit filed a protest to Application No. 54241 on September 25, 1973.

5. The Commission takes official notice that a Protest and Request for Oral Hearing in Application No. 54241 was filed by Bel-Mateo Enterprises, Inc.; Mid-Peninsula Cab Co., Inc.; and Peninsula Yellow Cab, Inc. on September 25, 1973.

6. The Commission takes official notice that on October 12, 1973, Airportransit filed in Application No. 54241 a Certificate of Counsel, which recited that it was a protestant to the application and that it was filing the complaint here under consideration. A copy of the complaint was attached to the certificate.

7. On October 16, 1973 the Commission entered Decision No. 82011, which granted Nyhan a certificate of public convenience and necessity to operate as a passenger stage corporation between various hotels near the San Francisco International Airport and Union Square in San Francisco.

8. The Commission takes official notice that on October 19, 1973 Airportransit filed a Petition for Reconsideration in Application No. 54241. On November 2, 1973, Nyhan filed a Response to Petition for Reconsideration. On November 5, 1973, Airportransit filed a Supplement to Petition for Reconsideration. On December 4, 1973, Airportransit filed a Memorandum of Points and Authorities in Support of Petition for Reconsideration.

9. On December 4, 1973, the Commission entered Decision No. 82204, an Order Denying Reconsideration of Decision No. 82011.

The material issues presented in this proceeding are:
1. Was extrinsic fraud involved in procuring Decision No. 82011?
2. Did Nyhan violate the Public Utilities Act? If so, what, if any, penalty should be imposed?

Airportransit contends that Nyhan should not have been granted the passenger stage certificate provided for in Decision No. 82011 because it is alleged that Nyhan had, prior to its issuance, operated illegally without authority from the Commission. "The general rule is that common carrier operating authority will not be granted on a showing which rests upon unlawful operations. (20th Century Delivery Service (1948) 48 CPUC 78, 84.) However, exceptions have been carved out of the rule when the public interest so requires. Fleetlines, Inc. (1952) 52 CPUC 286, 294; Inglewood City Lines (1943) 44 CRC 704, 707-08; T. W. Gilboy (1942) 44 CRC 457, 459; Circle Freight Lines (1950) 49 CRC 377, 384; N. A. Gotelli (1941) 43 CRC 491, 494; E. C. Coats (1923) 23 CRC 30; cf., Holiday Airlines (1966) 66 CPUC 537, 542-43; The Gray Line Tours Company (1973) Decision No. 81036, Attachment A, p. 37 fn. 14.)" (John R. Zavaleta (1973) 75 CPUC 361, 369.) Thus, assuming prior illegal operations by Nyhan, the Commission was not without jurisdiction to grant the certificate awarded in Decision No. 82011.

Airportransit contends that the Commission can revoke Nyhan's certificate in this proceeding because the Commission was fraudulently induced to grant the certificate. Airportransit points to the following portion of Decision No. 82011 as erroneous and allegedly procured by fraud:

> "Applicants had been performing the proposed service prior to being informed by the Commission staff that they could not do so without the required certificate. They immediately ceased operations and filed the instant application. They allege that six drivers are hired for this service and request that the application be acted upon as soon as possible." (Decision No. 82011 at p. 2.)

It is argued that Nyhan did not immediately cease operations, and had this fact been before the Commission the certificate would not have issued.

The essential rules governing the consideration of Airportransit's contention are as follows:

> "If the aggrieved party had a reasonable opportunity to appear and litigate his claim or defense, fraud occurring in the course of the proceeding is not a ground for equitable relief. The theory is that these matters will ordinarily be exposed during the trial by diligence of the party and his counsel, and that the occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability or final judgments.
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> "The rule is explained in Pico v. Cohn (1891) 91 C. 129, 134, 25 P. 970, 27 P. 537, as follows: '[W]hen he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and

that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occational miscarriages of justice. . . ."
(Witkin, California Procedure, 2nd Ed., p. 3768.)

"The commonest ground for equitable relief is extrinsic fraud, a broad concept which covers a number of situations. Its essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.

"The classic statement in United States v. Throckmorton (1878) 98 U.S. 61, 65, 25 L. Ed. 93, 95, is repeatedly quoted, as in Flood v. Templeton (1907) 152 C. 148, 156, 92 P. 78:
'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side;

> these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. . . . ."
> (Witkin, California Procedure, 2nd Ed., p. 3752.)

A public hearing was not required in Decision No. 82011. (Public Utilities Code, § 1032.) The decision found that a public hearing was not necessary. (Decision No. 82011, Finding 4.) We look to the record in that proceeding to determine the merits of Airportransit's contention. The Commission has, in the numbered findings heretofore made, taken official notice of the pertinent portions of the record in Application No. 54241, which resulted in Decisions Nos. 82011 and 82204.

In the Protest and Request for Oral Hearing, filed by protestants Bel-Mateo Enterprises, Inc.; Mid-Peninsula Cab Co., Inc.; and Peninsula Yellow Cab, Inc. on September 25, 1973, it was alleged at pages 4-5 as follows:

> "Upon information and belief, PROTESTANTS further allege that the applicant is presently and has for some time been operating as a Passenger Stage Corporation, as defined in Public Utilities Code section 225, in that the applicant has held itself out to the public to provide per capita fare passenger transportation over regular routes and between fixed termini, with such passenger stage service generally being over the routes and between the points mentioned in the present application. Such Passenger Stage Corporation service by the applicant was conducted even though the applicant did not possess an appropriate Certificate of Public Convenience and Necessity from the Commission. Such operations as a Passenger Stage Corporation by the applicant were in open and flagrant disregard of the authority of the Commission. Such open and flagrant operation is all the more reprehensible

> in that such operations have been conducted knowingly, and in contumacious defiance of the Commission's authority since at least the filing of the application herein. PROTESTANTS allege that such defiance of the Commission, and the underlying Statutes, Rules and Regulations, demonstrates a lack of fitness on the part of the applicant to be granted the authority sought in the application. As with the issue of Public Convenience and Necessity, this issue of fitness of the applicant should be determined only after an oral hearing, and only after PROTESTANTS have been afforded an opportunity to cross-examine the applicant in connection with its illegal past and present operations."

The certificate filed by Airportransit's counsel on October 12, 1973 had attached thereto a copy of the complaint here under consideration. Paragraphs 4, 5, and 6 allege:

> "4. That, notwithstanding their lack of authority to operate as requested, defendants have been operating the service for which authority was requested, commencing at a time unknown to complainants and continuing until approximately October 8, 1973.
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> "5. That, on September 25, 1973, in the matter of the above referenced application, a protest was filed alleging that defendants were already operating in the manner requested in the application, although without authority, and that it was not until thereafter that defendants ceased their illegal operations.
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> "6. That defendants have published schedules of their illegal operations, showing regular routes between fixed termini on a per capita fare basis, and that Exhibit A hereto is a copy of the front and back of one such schedule."

Decision No. 82011 indicated that "Protests and requests for a public hearing were filed on September 25, 1973 by Airportransit and on behalf of three taxicab companies that operate in the area sought to be served. The protests are not persuasive." (P. 2.) Airportransit's Petition for Reconsideration of Decision No. 82011 stated:

> "Bel-Mateo Enterprises Inc., Mid-Peninsula Cab Co., Inc., and Peninsula Yellow Cab, Inc. together filed a protest and request for oral hearing on September 25, 1973. In paragraph IV of that protest, those protestants alleged, upon information and belief, that the applicants were presently, and had for some time, been operating as a passenger stage corporation, even though they did not possess a certificate of public convenience and necessity. Those protesting cab companies alleged that such illegal operations had 'been conducted knowingly, and in contumacious defiance of the Commission's authority since at least the filing of the application herein' (page 5 of the protest, emphasis added). The Commission's opinion recites at page 2:
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> > 'Applicants had been performing the proposed service prior to being informed by the Commission staff that they could not do so without the required certificate. They immediately ceased operations and filed the instant application.'
>
> There is no indication that the applicants submitted evidence that they were not illegally operating subsequent to filing their application, nor that they even denied the September 25 allegation that they were. On this basis, Airportransit of California submits that the matter should be reconsidered and that a hearing should be ordered. At a minimum, the applicants should be required to admit or deny that they operated without a certificate subsequent to filing their application.

"At the time that the protesting cab companies alleged that the applicants were operating without a certificate, Airportransit of California had no information on the status of the applicant's operations. Subsequently, however, Airportransit of California engaged in investigative work that revealed the applicants had, indeed, been operating illegally without a certificate until approximately October 8, 1973, which was practically two months after the application was filed. Accordingly, Airportransit of California filed a complaint, case No. 9623, against the applicants and submitted a copy of that complaint to the Commission in the instant proceeding by means of attaching it to a certificate of counsel filed herein. Both the complaint and the certificate of counsel were filed on October 12, 1973. The complaint is presently pending before this Commission. Airportransit of California submits that the application for a certificate should not have been granted without a hearing while a complaint was outstanding alleging that the applicants had engaged in illegal activity of great relevance to the merits of their application. If the applicants had denied the allegations of the complaint (to which they have not yet responded), Airportransit of California was prepared to offer evidence, in a hearing on the application or on the complaint or in a consolidated hearing, that the allegations were true." (Pp. 2-3.)

The Supplement to Petition for Reconsideration by Airportransit alleged that:

"On October 30, 1973, the Commission executed an order directed to the applicants herein, in their status as defendants in the complaint case, to satisfy the matters complained of, or to answer the complaint. On October 31, 1973, the applicants-defendants executed and served a 'Response to Petition for Reconsideration', in which they stated as follows (page 2):

> The complaint on file by Protestant has not been answered by Applicants since it was felt that the compelling public need for applicants' proposed service would amply support and result in a certificate of public convenience and necessity, rendering such complaint moot.
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> The applicants thus apparently intend to continue to flaunt the authority of this Commission. Airportransit of California submits that the above stated attitude of the applicants is further reason for the Commission to reconsider its decision No. 82011." (P. 2.)

As indicated, the Petition for Reconsideration was denied in Decision No. 82204.

Obviously, Airportransit disagrees with Decision No. 82011. However, it is abundantly clear that all of the points sought to be raised herein were before the Commission at the time Decision No. 82011 was entered. Airportransit's remedy, after its petition for reconsideration was denied, was to seek review in the Supreme Court. (Public Utilities Code § 1756.) Having failed to do so, Airportransit is precluded from litigating herein matters decided adverse to it in Decisions Nos. 82011 and 82204. (Scott Transportation Co. (1957) 56 CPUC 1.) The Commission makes the following additional findings:

10. Neither Decision No. 82011 nor Decision No. 82204 was procured by extrinsic fraud.

11. Airportransit is precluded herein from attacking the certificate of public convenience and necessity granted Nyhan in Decision No. 82011 on the same grounds which decided adversely to it in Application No. 54241.

We next turn to the question of whether any penalties should be imposed on Nyhan for the alleged illegal operations. As indicated, Decision No. 82011 stated that Nyhan had engaged in unlawful operations which ceased upon the filing of Application No. 54241. Since a certificate has already been issued to Nyhan the issuance of a cease and desist order for past conduct would be a superfluous act. Assuming an action for a penalty would presently be available,[1] we are of the opinion that such action is not warranted in the situation here under consideration. (Golden Sedan Service, Inc. v Airport Limousine Service of Sunnyvale, Inc. (1973) Decision No. 82143 in Complaint No. 9357.)

No other points require discussion. The Commission makes the following additional finding and conclusion.

Finding of Fact

12. The instituting of a penalty action against Nyhan is not warranted under the facts herein presented.

Conclusion of Law

Airportransit is entitled to no relief herein.

1/ See Code Civ. Proc. § 340.

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O R D E R

IT IS ORDERED that the relief requested is denied.

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

Dated at San Francisco, California, this 18th day of NOVEMBER, 1975.

President

Commissioners