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Decision 84 04 102

APR 18 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of UNIVERSAL MARINE CORPORATION, a California corporation, for authority to sell and SO. CAL. SHIP SERVICES, a California corporation, to purchase a certificate of public convenience and necessity of UNIVERSAL MARINE CORPORATION and for temporary authority to conduct operations under said certificate in the interim.

Application 83-06-32
(Filed June 17, 1983)

SAN PEDRO MARINE, INC.,
Complainant,

vs.

SO. CAL. SHIP SERVICES,
DANIEL E. SEELEY, MICHAEL LANHAM,
and U.S. WATER TAXI,
Defendants.

Case 83-07-04
(Filed July 27, 1983)

Knapp, Grossman and Marsh, by Warren N. Grossman and Patricia M. Schnegg, Attorneys at Law, for So. Cal. Ship Services, applicant; and for So. Cal. Ship Services, Daniel S. Seeley, and Michael Lanham, defendants in C.83-07-04.
Brobeck, Phleger & Harrison, by William H. Booth and William Price, Attorneys at Law, for San Pedro Marine, Inc., protestant in A.83-06-32 and complainant in C.83-07-04.
Robert Bell, for U.S. Water Taxi, defendant in C.83-07-04.

O P I N I O N

Introduction

This matter initially arose as an application to transfer a certificate of public convenience and necessity (CPC&N) to conduct water vessel common carrier operations under Public Utilities (PU) Code Section 851.^{1/} The application was filed jointly by the proposed seller, Universal Marine Corporation (Universal), and the proposed buyer, So. Cal. Ship Services (SoCal).

San Pedro Marine, Inc. (San Pedro), holder of a similar certificate for operation in the same area in and around the Los Angeles/Long Beach harbor, filed a timely protest to the application which included a "request for summary dismissal". The request for dismissal is based upon a claim that the application for transfer under Section 851 is improper and could only be brought as an application for a new certificate under Section 1007.

In addition to the protest and request for dismissal, San Pedro also filed a complaint against SoCal; SoCal's principals, Daniel E. Seeley and Michael Lanham; and U.S. Water Taxi alleging that defendants were providing unauthorized and unlawful water vessel common carrier operations in and around the Los Angeles/Long Beach harbor to the detriment of San Pedro. The complaint requested the Commission issue an immediate order to cease and desist and was accompanied by a motion for a cease and desist order. The motion was renewed by San Pedro a couple of weeks later.

^{1/} Except as otherwise specified, all sections mentioned hereafter refer to the PU Code.

A consolidated hearing was held on these matters before Administrative Law Judge (ALJ) Colgan in the Commission's Courtroom in Los Angeles on October 24 and 25 and November 18, 1983. The matter was submitted on the last day of hearing; post-hearing briefs were due on January 26, 1984.

At the outset of the hearing San Pedro moved to dismiss U.S. Water Taxi as a defendant in San Pedro's complaint. The motion was granted by the ALJ.

Propriety of Request Under
Section 851

In its protest San Pedro requests that the application be dismissed because a transfer under Section 851 is improper in that Universal's authority under the certificate was allowed to lapse prior to the filing of this application. San Pedro suggests that if the application is to be considered at all by this Commission, it must be treated as an application for new certificate authority under Section 1007.

The significance of such treatment is that we have long held that the relevant inquiry in an application for transfer is whether the transfer will be adverse to the public interest. Henry Stovall and United States (1962) 59 CPUC 373, 376; Radio Paging Co. (1966) 65 CPUC 635; George Cooper (1979) D.90646. Further, we have long held that evidence on the issue of public convenience and necessity (which would be appropriate in an application for new certificate authority) is generally inappropriate in a transfer proceeding since it works as a collateral attack upon the prior decision or decisions of the Commission which already concluded that public convenience and necessity existed with respect to the operation in question. Radio Relay

Corp. (1974) 76 CPUC 545, 550; Henry Stovall and United States, supra; Radio Paging Co., supra; Frank Nolan Dravage Co. (1963) 61 CPUC 160. Thus, were we to find that Section 851 was inappropriate to this proceeding, we would be obliged to either dismiss the application altogether or at least to hold applicant, SoCal, to the standard of demonstrating public convenience and necessity.

We will not do either, however, since, as we explain below, we disagree with San Pedro's claim that Universal's authority was allowed to lapse and that there is thus nothing to transfer. In order to make this understandable, however, it is necessary to describe some of the background leading up to this proceeding.

Universal's Background

Universal's CPC&N was granted by this Commission in Decision (D.) 86732, dated December 7, 1976 as modified by D.89353, dated September 6, 1978. According to uncontroverted testimony elicited at the hearing, three companies owing money to Universal filed for bankruptcy in August 1982. The accounts receivable from these companies had been pledged, along with Universal's other assets, as security for loans Universal received from Canadian Commercial Bank (CCB). In addition, W. E. Heller and Company (W. E. Heller) held a first mortgage on Universal's crane barge and CCB held a second on it. When the three debtor companies failed to pay their debts to Universal, CCB and W. E. Heller took possession of all Universal assets. As a result, Universal ceased operations at midnight on October 19, 1982.

Abandonment

In matters of abandonment, this Commission has long held to the position that "[a]bandonment of a certificate includes the intention and also the external conduct by which it is carried out." Emphasis added. Ringsbv-Pacific Ltd. (1971) 72 CPUC 204, 208. We think it is clear that Universal did not exhibit the intent requisite to indicate an abandonment of its certificate. During the hearing Donald Budai, president of Universal, was specifically asked about this:

"Q Was there ever any intention on your part to abandon your certificate on a voluntary basis?

"A No, none whatsoever.

"Q Was it only by force of circumstances as you've explained that you couldn't continue to operate?

"A That's correct.

"Q Had it not been for this series of bankruptcies, would you have continued in operation?

"A Absolutely." RT 168-169.

A finding of abandonment depends on the facts of the particular case. Teskey Transp. Co. (1962) 60 CPUC 92.

"Abandonment in the regulatory sense is the voluntary, intentional relinquishment of a public utility franchise." Gray Lines, Inc. (1978) CPUC 2d 80, 84. Furthermore, "[a]lthough the Commission has in the past revoked operating authority where suspension of operations was a voluntary act by the carrier (not authorized by the Commission), there is no mandatory requirement that operating rights be revoked, even though there is such voluntary unauthorized suspension. (Citations omitted.)" Clearly if this

is true, then there is no requirement that such rights be revoked when the suspension is not truly voluntary as was the case with Universal.

We conclude that the act of Universal's president in closing down the operation in November 1982 did not constitute a forfeiture of that authority. Therefore, the application for transfer under Section 851 is proper and we must deny San Pedro's request for dismissal of the application.

Recent Events

Michael Lanham and Daniel E. Seeley lost their jobs with Universal as a result of its closing down operations. Seeley had been the senior boat operator at Universal with expertise in stores and water taxi services. Lanham had been Universal's foreman and ran the crane barge, which is a 90-foot by 34-foot barge with a crane mounted on it. The crane has 90 feet of boom (and a 100-foot "reach" off the water) and can lift 13.9 tons when fully extended. The barge is moved from place to place by a tug boat. It is used to deliver stores from shore to a ship and then to lift the stores onto the ship. A "stores gang" or "strike-down gang" then puts the stores away on the ship.

Shortly after Universal's October 1982 cessation of operations, Lanham and Seeley began to operate strike-down crews for the ships in the harbor, and in mid-November 1982, they began to lease the crane barge from W. E. Heller. Lanham testified that this was done when some ships' agents contacted him "about the gap in service now that Universal Marine had gone under, and there was no one in the harbor at that time with a crane on a boat or barge that delivered stores". (RT 24.)

When questioned about his understanding of the need to have a Public Utilities Commission (PUC) certificate to perform stores deliveries, Lanham testified that he first became aware of the issue in early 1983 and that he spoke with Budai, the owner of Universal, who told him he would need a certificate if he planned to buy the barge rather than renting it.

In April 1983 Lanham and Seeley formalized their business operations by incorporating as So. Cal. Ship Services. Shortly prior to that, however, on March 11, 1983 CCB held an auction at which CCB offered, for sale, Universal's machinery and equipment, as well as Universal's PUC CPC&N. SoCal was the high bidder.^{2/} When questioned about CCB's right to sell the certificate without first acquiring the certificate from this Commission, CCB's portfolio manager, Harvey Weinberger, testified that he contacted the Commission in San Francisco and spoke to someone on the phone. Though he pointed to nothing specific in that conversation that would lead to such a conclusion, Weinberger was nonetheless left with the impression that CCB's interest in the certificate was secured and CCB had a right to sell it. Likewise, the bidders, or at least SoCal, apparently believed they were bidding on something of value since SoCal's successful bid was for \$47,000 and SoCal made a \$20,000 down payment to CCB.

SoCal was informed at the time that it would still have to have Commission approval to operate under the certificate if it were purchased at this auction.

^{2/} Interestingly after the opening bid SoCal was bidding only against San Pedro which already had an interim certificate granting essentially similar authority.

About 2½ months later in June 1983 SoCal began buying the barge. A couple of weeks after that SoCal filed the transfer application with the Commission. The application properly lists Universal, not CCB or W. E. Heller, as the seller of the certificate.

Commission Jurisdiction

The strike-down crew operations of SoCal do not fall within our jurisdiction. Nor do the activities involving use of the barge crane to lift and deposit stores at a single location. However, use of the barge itself (or any other vessel for that matter) to transport stores or any other freight or passengers is an activity which requires a certificate from this Commission.

Universal's certificate authorizes precisely such activity. In relevant part it states:

"Universal...is authorized to conduct vessel common carrier operations in the transportation of passengers and their baggage and/or freight between (1) all docks, wharves, ships, and points and places within the Los Angeles/Long Beach Harbor, on the one hand, and on the other hand, all ships, vessels, marine installation, and rigs located within the Los Angeles/Long Beach Harbor and, (2) all docks wharves, ships, points and places within the Los Angeles/Long Beach Harbor, on the one hand, and on the other hand, marine installations and rigs, ships, and vessels located at points offshore of the counties of Los Angeles and Orange..."

To the extent that SoCal engaged in these jurisdictional activities after Universal closed down it violated Section 1007 by operating a vessel for "transportation of persons or property, for compensation, between points in this state, without first having obtained from the commission a certificate..." Furthermore, the "purchase" of Universal's certificate at the auction did not bestow any rights upon SoCal since neither CCB nor W. E. Heller held any operative rights in the certificate at the time of the auction. Then, as now, the operative rights were held by Universal.

Lanham's testimony indicates that he and Seeley began to lease the crane barge in mid-November 1982 in order to make available a barge that both delivered stores and had a crane on it. He explained that none was available after Universal shut down.

At the time Universal shut down, San Pedro was operating in the harbor but only had Commission authority to transport ships' stores when it was in conjunction with a delivery of lube oil. On October 28, 1982 San Pedro filed for interim authority removing the lube oil restriction so that it could deliver stores alone. That interim authority was granted by the Commission less than three weeks later, and on May 4, 1983 (about two months after the auction which San Pedro bid up to \$46,000 on what was purported to be Universal's certificate) the authority was made permanent. San Pedro purchased a crane and installed it on its vessel, the Vicki Ann, some time in the spring of 1983. Until that time the crane on SoCal's barge and cranes available on the ships themselves were the only ones available except on shore. Testimony indicates that the ships' cranes were often inadequate

for the lifts required on jobs done by SoCal during this time. Testimony also indicates that San Pedro's crane was limited by the U.S. Coast Guard to lifting 2,000 pounds and that much of the lifting done by SoCal's crane was in excess of 2,000 pounds.

During the hearing Lanham, whose understanding of his obligations under the PU Code, seemed at best, imprecise, testified that from November 11, 1982 onward SoCal had an agreement with Bay Tankers, Inc. which was described as an "oral charter agreement". Lanham said that it was his understanding of the agreement that whenever Bay Tankers wanted the services of SoCal or wanted SoCal to stand by, SoCal had an obligation to Bay Tankers to be available. However, when asked about his understanding of SoCal's availability to render service to other companies, he stated that his lawyers advised SoCal that they "could not run to any other vessels besides Bay Tankers" (RT 142). Lanham testified that after hearing this advice he believed that his ability to service other ships was restricted to situations where San Pedro was unable to immediately service the ship in question.

It was often unclear during Lanham's testimony whether he was describing service over which the Commission has jurisdiction or not, but SoCal clearly did engage in jurisdictional service to others besides Bay Tankers from time to time. So, it cannot be assumed, as SoCal suggests in its response to San Pedro's motion for a cease and desist order, that SoCal is exempt from Commission regulation because it has dedicated its crane barge to the exclusive use of Bay Tankers and thus is not holding itself out to the public as a common carrier. The testimony shows that, in fact, SoCal did provide stores transportation to ships other than Bay Tankers'.

However, it also seems certain that these acts were not done due to blatant disregard for the requirements of the law but, rather, due to the inattention and lack of understanding of SoCal's principals. As a consequence we are not convinced that SoCal's violative actions demonstrate that SoCal is not fit to hold the certificate authority, as San Pedro claims.

On the other hand, we do not condone Lanham's obvious inattention to the details of the business he is attempting to establish. His willingness to sign a verification under penalty of perjury which states that he knows the contents of a document filed in this matter to be true, and then to blithely testify to facts which are inconsistent with the contents of that document at the hearing certainly raises some doubt about his ability to run SoCal in a manner consistent with the public interest.

However, considering the record as a whole, it appears that SoCal's illegal activities were minimal. Most of its work was outside the jurisdiction of this Commission and its illegal activities resulted from relying on information from persons other than the Commission or legal counsel until at least late spring of 1983, shortly before SoCal filed for this transfer. Thus, the record has not established that the requested transfer would be adverse to the public interest. Since it has been established in prior proceedings that public need exists for this service, we will therefore grant the transfer to SoCal.

Findings of Fact

1. Universal ceased operations under its CPCAM in and around the Los Angeles/Long Beach harbor on about October 19, 1982.

2. Universal's cessation of operations occurred when its creditors, CCB and W. E. Heller, took possession of all Universal's assets.

3. Two former employees of Universal, Michael Lanham and Daniel E. Seeley, calling themselves So. Cal. Ship Services (SoCal), began leasing the crane barge formerly used by Universal from W. E. Heller in mid-November 1982.

4. SoCal began offering various services including transportation of stores to ships in the Los Angeles/Long Beach harbor in late 1982 or early 1983.

5. Transportation of stores is an activity within the jurisdiction of this Commission and requires a CPC&N.

6. On March 11, 1983 CCB held an auction at which it purported to sell Universal's CPC&N.

7. At no time was CCB granted any interest in Universal's CPC&N by this Commission.

8. SoCal bid \$47,000 for the certificate at this auction and paid CCB a down payment of \$20,000.

9. SoCal's president was told by another in early 1983 that he would need a certificate from this Commission if he planned to buy, rather than rent, the crane barge. He was also informed in about March 1983 that even after his apparent purchase of Universal's certificate at the auction he would still have to have Commission approval in order to operate under the certificate. The record does not indicate whether SoCal had any contact with the Commission or with legal counsel prior to or during these communications.

10. In June 1983 SoCal and Universal filed the application for transfer which is the subject of the present proceeding. CCB was not a party to the application.

11. A complaint has been filed by San Pedro Marine, Inc. (San Pedro) against SoCal and its principals alleging that they were providing unauthorized and unlawful water vessel common carrier service and requesting a cease and desist order.

12. Complainant, San Pedro, moved at the hearing for dismissal of U.S. Water Taxi as a defendant; the motion was granted by the ALJ.

Conclusions of Law

1. Universal did not abandon its CPC&N and had not lost its operating rights under the certificate at the time this application for transfer was filed. Therefore, dismissal of the application would be inappropriate and protestant's request for it should be denied.

2. SoCal's leasing of the crane barge was not illegal, nor was its use of the barge for servicing ships in the Los Angeles/ Long Beach harbor. However, to the extent that SoCal engaged in transporting goods to ships in the harbor its activities were illegal since SoCal did not have authority for such operations from this Commission.

3. The auction held by CCB in March 1983 did not result in the transfer of any operating rights under Universal's CPC&N since CCB held no interest in any such rights.

4. The time lapse between SoCal's commencing offering services under the jurisdiction of this Commission without possessing a CPC&N and its application for transfer of Universal's certificate was not, under the circumstances, sufficient to establish that SoCal is unfit to receive the certificate.

5. The proposed transfer is in the public interest and should be authorized.

6. Since the transfer is to be granted, an order to cease and desist illegal operations would be moot and should be denied.

7. Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

O R D E R

IT IS ORDERED that:

1. Protestant San Pedro Marine, Inc.'s request that Application (A.) 83-06-32 be dismissed is denied.

2. The Administrative Law Judge's Ruling dismissing U.S. Water Taxi as a party to the complaint in Case (C.) 83-07-04 is affirmed.

3. The complaint request for an order to cease and desist is moot as a result of the grant of authority set out below. Therefore, the requested order is denied and C.83-07-04 is dismissed.

4. Universal Marine Corporation may sell and transfer the operative rights specified in A.83-06-32 to So. Cal. Ship Services, a corporation. This authorization shall expire if not exercised within 90 days of the effective date of this order or within such additional time as the Commission may authorize.

5. Purchaser shall:

- a. File with the Transportation Division written acceptance of the certificate and a copy of the bill of sale or other transfer document within 30 days after transfer.

- b. Amend or reissue seller's tariffs. The tariffs shall not be effective before the date of transfer, nor before 10 days' notice is given to the Commission.
- c. Comply with General Orders Series 87, 104, 111, and 117.
- d. File an annual report of seller's operations for the period from the first day of the current year to the date of transfer.
- e. Maintain accounting records in conformity with the Uniform System of Accounts.

6. When the transfer is completed, and on the effective date of the tariffs, a certificate of public convenience and necessity is granted to So. Cal. Ship Services, a corporation, authorizing it to operate as a common carrier by vessel, as defined in PU Code Sections 211(b) and 238, between the points and over the routes set forth in Appendix A, to transport persons, baggage, and/or property.

7. The application is granted as set forth above and the certificate of public convenience and necessity granted by Decision 89353 is revoked on the effective date of purchaser's tariffs. The complaint is dismissed.

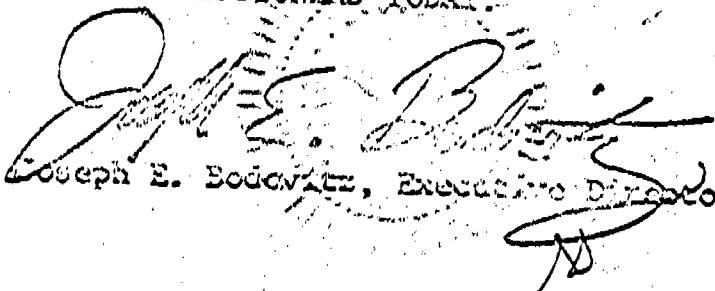
This order is effective today.

Dated April 18, 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS.

So. Cal. Ship Services, a corporation, by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to conduct vessel common carrier operations in the transportation of passengers and their baggage and/or freight between (1) all docks, wharves, ships, and points and places within the Los Angeles/Long Beach Harbor, on the one hand, and, on the other hand, all ships, vessels, marine installations, and rigs located within the Los Angeles/Long Beach Harbor, and (2) all docks, wharves, ships, and points and places within the Los Angeles/Long Beach Harbor, on the one hand, and, on the other hand, marine installations, rigs, ships, and vessels located at points offshore of the counties of Los Angeles and Orange, subject to the following condition:

No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.

7. The certificate of public convenience and necessity granted by Decision 89353 is revoked on the effective date of purchaser's tariffs.

This order is effective today.

Dated APR 18 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO

PRISCILLA C. GREW

DONALD VIAL

WILLIAM T. BAGLEY

Commissioners