

Decision 82 02 066 February 4, 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HARBOR CARRIERS, INC.,)
)
 Complainant,)
)
 vs)
)
 GOLDEN GATE BRIDGE, HIGHWAY AND)
 TRANSPORTATION DISTRICT and the)
 BLUE AND GOLD FLEET,)
)
 Defendants.)
 _____)

Case 82-01-02
(Filed January 13, 1982;
amended February 1, 1982)

Edward Hegarty, Attorney at Law, for complainant.
Duane Garrett, Attorney at Law, for Golden Gate
 Bridge, Highway, and Transportation District, and
Jerry Spoulter and Thomas Mannion, Attorneys at
 Law, for Blue and Gold Fleet, defendants.
Leland Jordan, City Attorney, for City of
 Sausalito, intervenor.
Philip Scott Weismehl, Attorney at Law, and
Richard Brozosky, for the Commission staff.

INTERIM OPINION

Summary of Proceeding

In this decision we determine whether defendants Golden Gate Bridge, Highway, and Transportation District (District) and Blue and Gold Fleet (Blue and Gold) should be ordered to cease and desist from operating, or allowing to be operated, ferry service between Pier 39 in San Francisco and Sausalito, pending our further order. This decision issues such an order.

Harbor Carriers, Inc. (Harbor), a California corporation, filed its original complaint in this case on January 13, 1982 naming District as the sole defendant, and requesting this Commission to

determine proper docking fees at District's Sausalito ferry terminal, under Public Utilities (PU) Code § 562, effective January 1, 1982.

(A copy of this section is attached as Appendix A.)

Then on February 1, 1982, Harbor filed a motion for issuance of an immediate cease and desist order concerning new ferry service from District's Sausalito facility to be performed by Blue and Gold, a California corporation. Later the same day, Harbor filed an amended complaint naming both District and Blue and Gold as defendants, and incorporating the allegations of the motion. The aforementioned documents were properly served on defendants.

By our powers under PU Code §§ 701 and 1701, and Rule 81.5 of the Commission's Rules of Practice and Procedure, we set a hearing on short notice for February 3, 1982 in San Francisco before Commissioner Grew and Administrative Law Judge (ALJ) Meaney,^{1/} and we are issuing this decision today. No testimony was taken at the hearing. Our order is based upon the declaration and supporting papers attached to the motion (incorporated into the amended complaint), extensive argument of counsel, our review of legal authorities, and the record in certain previous Commission proceedings of which we take notice.

^{1/} The ALJ notified counsel for the parties and the City of Sausalito (Sausalito) by telephone on February 1. No party specifically objected to telephone notice, but defendants object to the submission of the question of a cease and desist order without further time to reply to Harbor's presentation. This objection principally concerned the extensive historical review by Harbor's counsel, which counsel for defendants claimed they had no reason to anticipate. We do not rely for our background information on counsel's historical statement, nor on certain of his characterizations during argument, but rather on uncontroverted facts or particular findings and conclusions to be found in the records and decisions of this Commission, as mentioned in the following section of this opinion.

At the hearing, Sausalito filed a pleading which, although not titled as a petition to intervene, substantively amounted to such a petition. The ALJ inquired of the parties if there was any objection to intervention by Sausalito, and there was none. Intervention will be granted.

Background

Harbor, a common carrier by vessel as defined in PU Code § 211(b), transports passengers between points on San Francisco and San Pablo Bays under prescriptive operative rights and certificates of public convenience and necessity granted by this Commission. Its authority may be found in Decision (D.) 29778 dated May 24, 1937 and D.86188 dated August 31, 1978. (The latter decision is part of Application (A.) 49712, filed October 5, 1967.)

D.86188 includes authority for Harbor to transport passengers by vessel between San Francisco and Sausalito. This service has never commenced on a regular basis, and the only times during which Harbor has maintained any service was for brief emergency periods (e.g. strikes which shut down the District's ferry service).

The start of regular service has been forestalled by Harbor's inability to obtain docking space in Sausalito. The history of this problem is fully covered in the record in A.49712 (see findings in D.79143 and various subsequent decisions which from time to time extended Harbor's deadline to commence service) and in A.52409 (see the summary of the problem in D.93149 issued June 2, 1981). We take official notice of the record in those proceedings. In D.93149 we found that under conditions imposed by Sausalito the only available landing facility is that operated by District, and that District offered joint use of the facility at \$600,000 per year while Harbor countered with an offer of \$12,000 per year. We stated:

"We have no means to get the City of Sausalito and District to enter into good faith negotiations for a realistic agreement for the use of a landing facility at a reasonable cost to Harbor Carriers. Harbor Carriers' only effective recourse may be through civil court action or to the state legislature." (Slip opinion, p. 10.)

Harbor was granted an extension to June 1, 1984 in which to commence service.

After that decision (and as counsel for Harbor forthrightly stated) Harbor lobbied for legislation to give this Commission special jurisdiction over District, so that matters could be brought to a conclusion. The result was PU Code § 562, effective January 1, 1982 (see Appendix A).^{2/}

This complaint was filed subsequent to the effective date of PU Code § 562.

Based on the record in this proceeding, the Commission decisions and proceedings of which we have taken notice, and a review of legal authorities, we make the findings of fact and conclusions of law which follow. Counsel raised numerous other points during the hearing which have been reviewed and which do not require specific findings or conclusions.

^{2/} Harbor also commenced certain Superior Court litigation which need not be reviewed.

Findings of Fact

1. Harbor is a common carrier by vessel, with authority as reviewed in the opinion section of this decision.

2. District is a public corporation organized and existing under Division 16, Part 3 of the Streets and Highways Code.

3. Blue and Gold, a California corporation, holds a certificate of public convenience and necessity from this Commission issued in D.91925 (A.59193). This certificate allows scheduled service between Berkeley and San Francisco, and nonscheduled service "between any points on the shoreline of San Francisco Bay and its navigable tributaries." The certificate contains a restriction on such nonscheduled service as follows:

"Transportation of passengers and baggage shall be conducted as an on-call service, on 48 hours notice, for 100 or more persons." (Exhibit 6.)

4. Sausalito is a municipal corporation.

5. Harbor's authority as a common carrier by vessel includes, and has included since 1968, a passenger route between San Francisco and Sausalito. This service has never been operated except during brief emergency periods for the reasons which are found in the decisions in A.49712 and A.52409 and the records in those proceedings.

6. Assembly Bill No. 1179 (PU Code § 562) was signed into law by the Governor in mid-1981 but did not become effective until January 1, 1982. Between the time the Governor signed the bill and the time PU Code § 562 became law, specifically on or about September 18, 1981, District solicited bids from private (vessel) carriers to commence a new San Francisco-Sausalito passenger ferry service, using District's dock in Sausalito. Harbor was invited to bid but refused on the basis of the authority issued to it by this Commission in 1968. (See "Exhibit 2" to Harbor's motion filed on January 31, 1982 herein.)

7. After the effective date of PU Code § 562, District accepted Blue and Gold's bid and entered into a contract with Blue and Gold for San Francisco-Sausalito ferry service, the contract being substantially in the form of the blank, unexecuted contract attached to Harbor's motion as an exhibit.

8. After executing the contract mentioned in the preceding finding, and on or about February 1, 1982, Blue and Gold commenced regular, daily passenger ferry service between District's float in Sausalito and the Fisherman's Wharf area in San Francisco. The service is operated according to timetable and between fixed termini, and regardless of the minimum number of passengers. (See, inter alia, Exhibit 2.)

9. Unless enjoined and restrained by this Commission, defendants, and each of them, intend to maintain the ferry service on a regularly scheduled daily basis, and to hold out such service to the general public, for the indefinite future.

Conclusions of Law

1. This Commission has exclusive jurisdiction to issue certificates of public convenience and necessity for the transportation of persons or property between points in this State. (California Constitution, Article XII; PU Code §§ 238, 562, and 1007.)

2. Since on or about February 1, 1982, Blue and Gold has been operating, and District has caused to be operated, privately owned vessels for the transportation of persons, for compensation, on an individual fare basis, between points in this State, to wit, San Francisco and Sausalito, without first obtaining a certificate of public convenience and necessity from this Commission, in violation of PU Code § 1007.

3. Blue and Gold's certificate issued in D.91925 does not provide for such operation.

4. The service is not "charter" as that term is employed in maritime law, and even if it were, state law provisions defining common carrier service would control. (Harbor Carriers, Inc. v Cal. Inland Pilots Assn. et al., (1971) 72 CPUC 518.)

5. Blue and Gold is a private corporation which owns, operates, controls, and manages a system for the transportation of people by water, on a regularly scheduled basis between points in this State, to wit, San Francisco and Sausalito, as a common carrier and a public utility unlawfully and without first having obtained proper authority from this Commission. (Cal. Const. Art. XII § 3; PU Code § 1007.)

6. Defendant Blue and Gold is unlawfully providing passenger ferry transportation service for defendant District without first obtaining a certificate of public convenience and necessity from this Commission authorizing such operations. (PU Code § 562(c).)

7. District has no right or power, under PU Code § 562 or any other provision of law, to contract independently of Commission regulation with a private individual or corporation for ferry service between San Francisco and Sausalito, or between or among any other points, nor to regulate independently the rates, tariffs, schedules, conditions, or standards of service of such private individuals or corporations performing such service, and any attempt upon the District's part to do so is unlawful, ultra vires, and void.

8. Even without analyzing the history of Harbor's attempts to commence its San Francisco-Sausalito ferry service, the plain language of PU Code § 562(c) prohibits District from entering into the type of arrangement it has made with Blue and Gold and allowing Blue and Gold to commence the ferry operations which are the subject of this decision. However, the history of which we have taken official notice additionally supports our conclusions that, under PU Code § 562(c), the Blue and Gold service is unlawful.

9. Since PU Code § 562(c) states that this Commission "shall require that any public utility which provides passenger ferry or other transportation service for the district first obtain a certificate of public convenience and necessity authorizing such operations" (emphasis added), the Commission has an affirmative, nondiscretionary duty to enjoin unlawful ferry transportation service provided for the district, upon sufficient proof of its existence, and no irreparable injury to any other public utility need be pleaded or proved. (This is not a conclusion that we must in every case issue an interim or temporary cease and desist order upon request; it is still our task to determine the sufficiency of the proof and the necessity for full evidentiary hearings before acting. In this instance we deem the record to contain ample proof for us to act now.)

Notice of the following order did not appear on the Commission's public agenda as is normally required by the Government Code. This matter is an unforeseen emergency in that proof has been presented that defendants are engaged in the unlawful acts set forth in the preceding findings and conclusions, and we should order such unlawful acts to cease forthwith. (PU Code § 306(b): Rule 81.5.) For this reason the order in this decision should be effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. Defendants, and each of them, shall cease and desist forthwith from operating, controlling, or managing privately owned vessels for the transportation of persons between San Francisco and Sausalito, or between or among any other points within the State without first obtaining, on behalf of defendant Blue and Gold Fleet, a certificate of public convenience and necessity for such operations.

2. Defendants, and each of them, shall cease and desist forthwith from holding out such service to the public and from advertising or promoting such service as available for public use without first obtaining a certificate for it.

3. Under PU Code § 562(b), defendant Golden Gate Bridge, Highway, and Transportation District is ordered to cease and desist forthwith from permitting defendant Blue and Gold Fleet, or any other private vessel operator, to use its Sausalito dock as a terminus for any passenger ferry operation between points in this State, unless a certificate for such operation has first been obtained from this Commission.

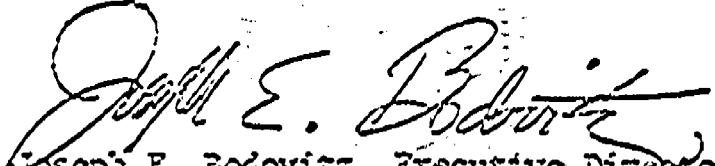
4. The City of Sausalito's petition for leave to intervene is granted.

This order is effective today.

Dated February 4, 1982, at San Francisco,
California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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


Joseph E. Bodovitz, Executive Director

APPENDIX A

CHAPTER 717

Assembly Bill No. 1179

SECTION 1. Section 562 is added to the Public Utilities Code, to read:

562. (a) Whenever the commission, on its own motion or upon the complaint of a public utility, finds that public convenience and necessity require the use by a public utility of all, or any part, of the passenger vessel terminal facilities operated or controlled by the Golden Gate Bridge, Highway and Transportation District, and the district and the public utility are unable to agree upon the use or the terms and conditions or compensation therefor, the commission shall by order direct that the use by the public utility be permitted, and prescribe a reasonable compensation and reasonable terms and conditions to be charged and observed, including, but not limited to, all related costs of construction, capital improvement, leasing or rental, and maintenance.

(b) Notwithstanding Section 27260 of the Streets and Highways Code or any other provision of law, and for purposes of this section only, the passenger vessel service of the Golden Gate Bridge, Highway and Transportation District is subject to the jurisdiction of the commission and the provisions of this part. The commission shall have no jurisdiction over the operation of passenger vessels by the Golden Gate Bridge, Highway and Transportation District or any other operation of the district except as specifically provided in this section.

(c) The commission shall require that any public utility which provides passenger-ferry or other transportation service for the district first obtain a certificate of public convenience and necessity authorizing such operations.

(d) Any public utility which initiates any complaint pursuant to this section shall reimburse the commission for its reasonable expenses in hearing and determining the complaint.

(e) The commission may establish such rules as it determines necessary to carry out this section.

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

(END OF APPENDIX A)