

Decision 82 06 094 JUN 15 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LORRIE'S TRAVEL & TOURS, INC.;)
AIRPORT LIMOUSINE SERVICE OF)
SUNNYVALE, INC.; and MARIN AIRPORTER,)

Complainant,)

vs)

NATIONAL EXECUTIVE SERVICES, INC.,)
dba Carey of San Francisco; AD)
PASSENGER SERVICE, INC.; MICHAEL)
EL-KURD, DONALD G. ALEXANDER; DON G.)
ALEXANDER COMPANY; and JOSEPH W.)
PARGETER,)

Defendants.)

Case 10951
(February 19, 1981)

Daniel J. Custer, Attorney at Law, for
Lorrie's Travel & Tours, Inc., Airport
Limousine Service of Sunnyvale, Inc., and Marin
Airporter, complainants.

Carl Windell, Attorney at Law, for National
Executive Services, AD Passenger Service, Inc.,
Donald Alexander, Joseph Pargeter, Michael
El-Kurd, and Don G. Alexander Company,
defendants.

O P I N I O N

This is a complaint by Lorrie's Travel & Tours, Inc.
(Lorrie's), Airport Limousine Service of Sunnyvale, Inc. (Sunnyvale),

and Marin Airporter (Marin),¹ collectively referred to as complainants, against National Executive Services, Inc. (NES), doing business as Carey of San Francisco, Ad Passenger Service, Inc. (Ad Passenger), Michael El-Kurd (El-Kurd), Donald G. Alexander (Alexander), Don G. Alexander Company (Alexander Co.), and Joseph W. Pargeter (Pargeter), collectively referred to as defendants. The complaint alleges that:

1. The NES operating authority has become dormant and should be revoked.
2. There has been an unlawful transfer of the NES operating authority.
3. Assuming the NES operating authority to be operative, defendants are conducting illegal operations under the guise of that authority. One of the requests for relief was for an immediate cease and desist order.

On May 5, 1981 the Commission issued a cease and desist order to the defendants. (Decision (D.) 93020.) A hearing on whether the order should be continued in effect or terminated, together with a hearing on the merits, was set for May 21, 1981. A duly noticed public hearing was held in this proceeding before Administrative Law Judge (ALJ) Donald B. Jarvis in San Francisco on May 21, July 14, 15, September 10, and November 19, 1981. The matter was submitted subject to the filing of the transcript and briefs, which were received by January 28, 1982.

Preliminary Procedural Considerations

1. The Cease and Desist Order

D.93020 ordered the defendants to cease and desist from the following:

¹ P.S.P.A. Corporation, doing business as Airport Connection, joined as a party complainant in the complaint as filed. On April 27, 1981, P.S.P.A. withdrew as a party complainant and the caption has been revised in the light of this fact.

"(a) conducting any operations purported to be conducted under the NES operating rights in vehicles seating more than nine passengers, including the driver, (b) conducting any operations under the NES operating rights at fares other than those authorized in the NES tariff on file with the Commission, and (c) conducting any passenger stage or charter-party carrier operations not authorized by law."

At the hearing on May 21 and thereafter defendants stipulated the cease and desist order could remain in effect. Defendants admit the violations of law which were the basis for the cease and desist order and which relate to various issues in the complaint. The ensuing order will make the cease and desist order permanent. The decision will deal with the violations in the context of the issues raised by the complaint.

2. Contempt of El-Kurd

El-Kurd became affiliated with Ad Passenger in 1977. At the beginning of the hearing he was the sole shareholder. Since December 1980, Ad Passenger was purporting to conduct operations under the NES operating authority as the agent of NES.

El-Kurd was called and sworn as a witness at the hearing on July 15, 1981. Interrogation was not completed on that date. The presiding ALJ made the following order at the hearing:

"ALJ JARVIS: Excuse me, counsel. This is a good time to end for today.

"All right. Mr. El-Kurd, you're on the stand. you've not been completed as a witness. I would direct you to return to the Commission courtroom, San Francisco, California, September 10, 1981, at 9:30 a.m." (RT 277-78.)

El-Kurd was not present at the hearing on September 10.

His counsel stated:

"MR. WINDELL: For the record, I would like to indicate that I, personally, am not certain where Mr. El-Kurd is.

"I have had no communication since the hearing. I have been told and believe that Mr. El-Kurd sold the business, sold the AD Passenger Corporation to Loren Olson, and that Mr. El-Kurd subsequently moved to Jerusalem." (RT 280.)

The presiding ALJ cited or placed El-Kurd on notice that he may be found in contempt by the Commission for his failure to appear at the hearing:

"ALJ JARVIS: First, the record clearly shows that Michael El-Kurd was directed to be here, having been a witness on the witness stand in the last day of hearing, and he is not here this morning.

"Counsel has indicated the circumstances and I will cite Mr. El-Kurd for contempt for failure to obey the directions of the Administrative Law Judge to be present at the hearing this morning, to continue the testimony and be subject to cross-examination." (RT 282.)

Based on the above facts, El-Kurd's failure to appear after being placed on notice by the ALJ is in contempt of the Commission. Appropriate findings will be made and an order entered with respect to the contempt.

3. Untimely Material

The complaint was filed on February 19, 1981. All defendants were properly served and directed to answer the complaint. At the time of the first day of hearing, on May 21, no answer had been filed. Defendants were represented by counsel at that hearing and except for Pargeter were present in the courtroom. The presiding ALJ continued the hearing and gave leave to file an answer, which was filed. At that time the ALJ stated:

"I will also provide that there will be no continuances granted from those dates and that if counsel for the defendants is by his clients relieved or that there be other counsel, that it be perfectly understood no continuances will be granted because of new counsel.

"I am not requiring the clients to keep counsel and I am not requiring counsel to keep clients, but I am saying that the hearing is not going to be leveraged by substitutions of counsel.

"I want counsel, and more particularly his clients, to understand that if counsel is substituted for whatever reasons at the last minute, that we are going to go to hearing and that I am not going -- it will be unfortunate for new counsel, but the Commission's processes are not going to be leveraged." (RT 11-12.)

Counsel for defendants participated in all the hearings and filed a brief and reply brief as permitted under the order of submission made by the presiding ALJ. Thereafter, a document on the letterhead of NES, signed by Alexander, was transmitted to the Commission. The document states that NES's counsel omitted certain material from the brief. It is in effect an attempt to file a new brief. The document refers to alleged facts which are not in the record. The document is improper and not timely submitted. It will not be considered in this proceeding.

4. Public Convenience and Necessity

At the hearing and in their briefs, complainants contended that defendants should be required to establish that public convenience and necessity required that there was a need at this time for the operating authority contained in the NES certificate. The presiding ALJ correctly ruled that the question of public convenience and necessity was not an issue in this proceeding. (American Transit, Inc., (1970) 70 CPUC 576, 577; M. Lee (1966) 65 CPUC 635, 637.) The presiding ALJ also properly ruled that complainants had the burden of establishing the alleged disuse or abandonment of the NES operating authority. If disuse or abandonment were established, evidence of defendants' conduct and the present situation in the industry would be relevant to the issue of revocation. Complainants also have the burden of proof on this point. (Evidence Code §§ 500, 550; Shivell v Hurd (1954) 129 CA 2d 320, 324; Ellenberger v City of Oakland (1943) 59 CA 2d 337.)

Material Issues

The material issues in this proceeding are:

1. Have any of the defendants violated any law, order, or rule of the Commission?

2. If violations occurred, what action should be taken?
3. Has the NES operating authority become dormant?
4. If so, should it be revoked?
5. Was there an illegal transfer of the NES operating authority?

Dormancy

There are two lines of cases dealing with disuse of operating authority. One group of cases deals with the question of abandonment. One element of abandonment is intent. (Valley Airlines, Inc. (1972) 74 CPUC 540, 544.) The other group of cases deals with the Commission's power to revoke operating authority for nonuse of the authority. Intent is not an element in these cases. (Holiday Airlines (1972) 73 CPUC 45; Golden Pacific Airlines (1971) 72 CPUC 766; Nevada Co. N.G.R. Co. (1945) 45 CRC 804, 810; Nelson and Harter v Haley and Mahoney (1922) 21 CRC 226.) Under either line of cases revocation of operating authority is not automatic. The Commission has discretion as to whether there should be revocation. (The Gray Line Tours Co. (1973) 74 CPUC 669, 708; 13 Am. Jur. 2d 641-2.)

The record clearly established nonuse and abandonment of the NES operating authority.

The predecessor of NES commenced operations under a charter-party carrier certificate in 1967. That authority was acquired by NES in 1969. (D.75987 in A.51024.) In September 1969, the Commission granted NES a passenger stage certificate. (Charter Sedan Service v National Executive Services, Inc. (1969) 70 CPUC 158.) At the time the authority was granted NES had 48 employees, 40 of whom were drivers. (70 CPUC at p. 160.)

There is conflicting evidence of what occurred between 1969 and the date of hearing. Most of the evidence produced in support of NES' position was self-serving and vague testimony by Alexander, Pargeter, and El-Kurd. No business records or other documentary evidence were produced to support any of the testimony. We summarize.

Alexander testified that in 1969 NES decided to acquire other operations in cities throughout the United States. In 1970, NES negotiated with Carey International (Carey) and acquired the right to use the Carey name. In 1970, NES did business as Carey of San Francisco. Alexander testified that full-scale operations were conducted until 1971. No operations were conducted from 1971 to 1975. Alexander testified that the reason for cessation of operations was that he was involved in a dispute with other Carey corporate officials over control of the operations of Carey. Eventually there was a buyout of Alexander's stock in Carey.

In 1975, Pargeter was a franchisee of Carey of Washington (a separate corporation) and doing business under the name of Nob Hill Limousine Service (Nob Hill). Alexander testified that in 1976 NES resumed operations for a short period of time in terms of an aggressive operating campaign. No corroborative evidence (sales literature, timetables, telephone listings, etc.) was produced on this point. Alexander testified that thereafter he established Nob Hill as NES' agent of record to maintain some operations and preserve the operating rights. Pargeter testified that Nob Hill became the agent of record for NES in the summer of 1975. The agreement between NES and Nob Hill was an oral one. Pargeter stated that under the agreement he was to pay the expenses and keep any profits from the NES operation.

Pargeter testified that Nob Hill conducted an on-call service for NES. During this period there was no telephone listing for NES. Pargeter testified he did some advertising for NES. No copies of the material or other records were produced to substantiate this testimony. Pargeter testified that he did not keep separate records for the NES operations nor was there a separate bank account maintained. NES filed no annual reports with the Commission for the years 1975-1980.

Alexander testified that in August 1980 he entered into another agreement with Pargeter in which Pargeter, rather than Nob

Hill, would be the agent of record for NES. (RT 116.) Again the terms of the agreement were oral. Pargeter testified that Alexander took over NES operations in August 1980. (RT 185.)

Alexander testified that NES and Alexander Co. were the same entity. Complainants introduced in evidence a certificate of inactivity filed by Alexander Co. with the Franchise Tax Board, dated September 17, 1980. The certificate, signed by Alexander, stated:

"The undersigned does hereby certify and declare under penalties of perjury that Don G. Alexander Co. TRANSACTED no business and received no remuneration from any corporate activity during the period from Jan. 1, 1977, through Dec. 31, 1979."

In December 1980, Alexander entered into an agreement with Ad Passenger which gave Ad Passenger an option to purchase the NES operating rights. The agreement provided that Ad Passenger could take over the management of NES pending the transfer. At the time of the option agreement Ad Passenger held charter-party authority from the Commission. At that time El-Kurd and Al Shehadeh (Shehadeh) were the shareholders of Ad Passenger. Between December 1980 and the time of hearing Shehadeh sold his shares to El-Kurd who was the sole shareholder at the commencement of the hearing. The option agreement was not produced at the hearing.

Alexander and Pargeter (who was supposed to supervise and assist El-Kurd during the option period) testified that the amount paid for the option was \$22,000. Alexander and Pargeter each received \$11,000 of this money. Pargeter testified that he used the \$11,000 to pay off debts attributable to Alexander and NES and kept what remained.

Samir Soudah (Soudah) owned a grocery store on Mission Street in San Francisco. He wanted to sell the store. Shehadeh and El-Kurd (the principals of Ad Passenger) entered into negotiations to purchase the store, ostensibly on behalf of El-Kurd's brother-in-law. Shehadeh eventually bought the business.

Soudah testified that in the course of the negotiations over the grocery store, El-Kurd and Shehadeh told him that there was

a shuttle bus license worth \$200,000 which could be purchased from Alexander and Pargeter for \$80,000. El-Kurd told Soudah that he could use the proceeds from the sale of the grocery store to make more money by becoming a partner in the license. The "license" was the NES operating authority. Soudah put up about \$90,000 and was given a 75% interest in the license. The \$90,000 encompassed the following: (1) Soudah purchased two new Dodge vans to be used in the operation, each van cost \$16,000, for a total of \$32,000; (2) Soudah forgave a promissory note for \$25,000 given to him by Shehadeh in connection with the sale of the grocery store; and (3) the remainder of the amount was given in cash. No application for authority to transfer the NES operating rights to Ad Passenger was ever filed.

Soudah testified that after the agreement, he assumed the duties of dispatcher and office manager in connection with the NES authority. El-Kurd handled operations. Ad Passenger was also conducting charter-party operations with which Soudah had no connection. Soudah had no knowledge of passenger stage operations.

Soudah testified that while acting as dispatcher he eventually became aware that drivers with regular rather than Class 2 licenses were operating NES vehicles. No Workers' Compensation insurance was carried on NES drivers. Some drivers were not being paid. He told El-Kurd about these things but did not receive a satisfactory response.

Soudah was not aware of the restrictions in the NES operating authority. Officials of the San Francisco Airport admonished him for illegal soliciting done by drivers purporting to operate under the NES authority. Soudah also testified that El-Kurd instructed drivers to go to hotels 10 minutes before Lorrie's scheduled pickups to pirate passengers.

Between January and March of 1981 Soudah became dissatisfied with the situation. At some point, Alexander and Pargeter told him the price for the option on the NES operating rights was \$22,000 and not \$80,000 as he believed. In March 1981 Soudah consulted an attorney, withdrew from participation in the business, and filed a lawsuit against El-Kurd et al.

The foregoing evidence clearly indicates that the NES operating rights were in disuse from 1971 to 1980. No annual reports were filed with the Commission for that period. No business records were maintained. There was no telephone listing. The certificate filed with the Franchise Tax Board indicates no corporate activity took place between January 1, 1977 and December 31, 1979. The NES operating authority is subject to revocation under the authorities dealing with disuse.

The authorities dealing with abandonment require an intent coupled with disuse. The question of intent is one of fact. The Commission is not bound by self-serving testimony in considering this question. (Evidence Code § 780; Valley Airlines, Inc., supra, at p. 544.) The evidence overwhelmingly establishes that NES had no intention of conducting operations under its rights. The only intent of NES was an inchoate one to sell them if there was an opportunity. We hold as a matter of law that an intent to abandon operations is an abandonment of the rights authorizing the operations. NES abandoned the operating rights which are subject to revocation.

Revocation

Having found that NES' operating rights are subject to revocation because of disuse and abandonment, the question next presented is should they be revoked?

In the Marion Lee case the Commission held that, assuming an abandonment, there should be no revocation because: "There was no interruption of service and the public continued to receive adequate service..." (65 CPUC at p. 640.) In the case at bench there was a cessation of service for 9 years.

The activity of Ad Passenger operating under color of the NES rights is attributable to NES and Alexander. (Transport Clearings - Bay Area v Simmonds (1964) 226 CA 2d 405, 419-21.) It is undisputed that Ad Passenger and El-Kurd violated provisions of law in conducting these operations. The Commission issued the cease and desist order based on these acts.

In determining whether abandoned or disused operating authority should be revoked, evidence of failure to comply with statutes and Commission regulations is significant. (Jack Woodmansee (1967) 67 CPUC 446; Re R.E. MacDonald (1958) 56 CPUC 204; Re Joseph K. Hawkins (1929) 33 CRC 868.) Such conduct exists in this case.

The case at bench is a classic example of trafficking in operating rights without regard for the public interest. Numerous decisions condemn such practices:

"Throughout the cases, like an unbroken thread, runs the principle that an operator, weary of the burden of performing an unprofitable service, may not shift that obligation to another, either permanently or temporarily. If he desires no longer to continue the service, he should apply for permission to withdraw.

"In a decision which may be regarded as typical, we said:

'We are of the opinion that ordinarily the public interest will not be served by permitting a lease of an operative right when the owner obviously desires to divest himself of the burden thereof, yet seeks to preserve his certificate because of possible future value. If the public need requires that the service be continued and another is ready to render such service, his interest therein should not be limited to that of a mere lease.'

"In re Pickwick Stages System, 31 C.R.C. 410, 413." (United Motor Transport Lines, Inc. (1940) 43 CRC 69, 76-77; Investigation of Highway Express (1944) 45 CRC 312.)

After the NES rights had been disused for 9 years, Alexander and NES sought to profit by selling them without regard for the public interest.

They were only concerned with the economics of the transaction, not in how the public was served or how operations were conducted. Not only is NES charged with the conduct of Ad Passenger

as a matter of law, the testimony indicates an indifference to how Ad Passenger conducted operations. Pargeter testified:

"A The first thing we did after legal counsel, after El-Kurd got legal counsel and set himself -- we set up everything at the office, set him up a new office, NES is what I mean, office, a desk and phones and what he had to have and what would be his best approach to the operation, log sheet. We conflicted in our way of starting the operation. But that was his business, if he didn't want to listen. Just the general operation." (RT 203-04.)

The transaction between NES and Ad Passenger (which involved El-Kurd) was never presented to the Commission for approval. On September 10, 1981, when El-Kurd failed to appear at the hearing, counsel for NES stated that El-Kurd "sold the Ad Passenger Corporation to Loren Olson..." At the continued hearing on November 19, 1981, Alexander testified:

"National Executive Services has agreed to the continuation, if I can use the word, of the option to buy to the current Ad Passenger Service Company owner. Heretofore, it was obviously Ad Passenger Service was owned by, as a corporation, owned by several people. Mike El-Kurd ultimately became the sole stockholder. He has sold that corporation to Loren Olson. Loren Olson is now the, at least, the majority stockholder. And the option to purchase the NES certificate, I have agreed to that being a continuation of agreement that I made initially." (RT 289.)

Olson testified briefly at the hearing. No documents relating to the transaction between El-Kurd and Olson were produced at the hearing. The transaction has not been submitted to the Commission for approval.²

² On February 16, 1982, along with the material heretofore rejected, NES transmitted a letter to the Commission which stated that "National Executive Services, Inc. has mutually canceled its appointed agent of record relationship with Ad Passenger Services, Inc." The matter contained in the letter is at variance with the testimony adduced at the hearing and has not been subject to the scrutiny of examination or cross-examination under oath. It will not be considered herein.

The Commission is of the opinion that the NES operating rights should be revoked for abandonment and disuse. If there is a present public need for such rights it can be established in a proceeding by a qualified applicant.

Violations

The cease and desist order found that, assuming NES operating rights were applicable, unauthorized operations were conducted. Defendants stipulated to these violations. The Commission has found that these operations were conducted under color of authority which should be revoked for abandonment and disuse. In the circumstances the following order will require defendants to cease all operations under color of the revoked operating authority.

Illegal Transfers

Public Utilities Code §§ 851, 854, and 1031 provide:

"851. No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. . . ."

"854. No person or corporation, whether or not organized under the laws of this State, shall, after the effective date of this section, acquire or control either directly or indirectly any public utility organized and doing business in this State without first securing authorization

to do so from the commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this State shall aid or abet any violation of this section."

"1031. . . . Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission."

The following transactions have been detailed in the discussion of other issues: (1) The 1975 transaction in which Pargeter was designated agent of record; (2) the December 1980 transaction in which Ad Passenger was given an option to purchase the NES operating rights and permitted to assume the management of NES and operate under the NES rights; and (3) the 1981 transaction in which El-Kurd sold Olson the stock in Ad Passenger together with the option to purchase the NES operating rights. As indicated, none of these transactions has ever been presented to the Commission for the authorization required by law. Each of these transactions was void. ✓
(Transport Clearings Bay Area v Simmonds, supra; Marnell v United Parcel Serv. (N.D. Cal. 1966) 260 F Supp 391, 407; Nevada Co. N.G.R. Co., supra.) ✓

It is not necessary to enlarge this decision with a discussion of the illegal transfers. This conduct was weighed in the determination to revoke the operating rights. No other action need be taken.

Findings of Fact

1. On July 15, 1981, El-Kurd was called and sworn as a witness in this proceeding. His testimony was not completed before adjournment for that day. While El-Kurd was on the witness stand, the presiding ALJ, in open court, directed him to return to the courtroom in San Francisco, California on September 10, 1981, at 9:30 a.m. El-Kurd was not present in the courtroom on September 10, 1981. Counsel for El-Kurd informed the Commission that he did not

know where El-Kurd was. Counsel also stated that he believed that El-Kurd had sold Ad Passenger to one Loren Olson and El-Kurd was outside of California. Adequate and proper notice was given El-Kurd that he may be found in contempt of the Commission for his failure to appear as directed by the ALJ.

2. NES acquired passenger stage operating authority on September 10, 1969. NES' certificate provides that:

"National Executive Services, Inc., ...is authorized to transport passengers and their baggage between points in the Counties of Santa Clara, San Mateo, San Francisco, Marin, Alameda, and Contra Costa, on the one hand, and the San Francisco International Airport, Oakland International Airport, San Jose Municipal Airport, Palo Alto Airport, Hayward Airport, San Carlos Airport, Buchanan Field at Concord, and Fremont Railway Station, on the other hand.

- "(a) No passengers shall be transported except those having point of origin or destination at one of the above specified airports.
- "(b) No passengers shall be transported between the Corte Madera Shopping Center in Marin County and the San Francisco International Airport.
- "(c) No service shall be provided from the San Francisco International Airport to San Francisco unless provided pursuant to a reservation placed at least two hours prior to pickup.
- "(d) When service is rendered on an "on-call" basis tariffs and timetables shall show the conditions under which such "on-call" service will be operated.
- "(e) Service shall be provided with vehicles seating no more than nine passengers including the driver."

3. In 1970, NES negotiated with Carey and acquired the right to use the Carey name. In 1970, NES did business as Carey of San Francisco. NES conducted full-scale operations until 1971. No operations were conducted from 1971 to 1975. Alexander became involved in a dispute with other Carey corporate officials over

control of the operations of Carey. Eventually there was a buyout of Alexander's stock in Carey. After the buyout, Alexander was the sole shareholder of NES. From that time Alexander has treated NES and Alexander Co. as interchangeable entities during the option period.

4. NES filed no annual reports with the Commission, as soon required by General Order 104, for the years 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, and 1980. The sum of \$22,000 per the

5. In 1975, Pargeter was a franchisee of Carey of Washington (a separate corporation) and doing business under the name of Nob Hill Limousine Service. In the summer of 1975 Pargeter and NES entered into an oral agreement under which Pargeter became the "agent of record" for NES. Under the agreement Pargeter was to pay the expenses and keep any profits from the NES operation. He purchased the

6. Pargeter did not keep separate records dealing with NES. There was no separate bank account for NES. While Pargeter was agent of record there was no telephone listing for NES. On sporadic occasions Pargeter transported a few passengers under color of the NES operating authority. No regularly scheduled operations were conducted under the NES authority. He could use the proceeds from

7. Alexander took over the operations of NES in August 1980.

8. Alexander Co. filed with the Franchise Tax Board a declaration under penalty of perjury, dated September 17, 1980, and signed by Alexander which stated that Alexander Co. had engaged in no corporate activity during the period January 1, 1977 through December 31, 1979. The sum of \$22,000 per the

9. In December 1980, Alexander and NES entered into an agreement with Ad Passenger which gave Ad Passenger an option to purchase the NES operating rights. The agreement provided that Ad Passenger could take over the management of NES pending the transfer. At the time of the option agreement Ad Passenger held charter-party authority from the Commission. At that time El-Kurd and Shehadeh were the shareholders of Ad Passenger. Between December 1980 and the time of hearing Shehadeh sold his shares to El-Kurd, who was operating vehicles with a seating capacity of more than one passenger, including the driver.

15. While Ad Passenger was conducting operations under color of the NES operating authority, on numerous occasions it picked up passengers at San Francisco International Airport who did not place reservations at least two hours prior to pickup.

16. While Ad Passenger was conducting operations under color of the NES operating authority no Workers' Compensation insurance was carried on its drivers.

17. While Ad Passenger was conducting operations under color of the NES operating authority, El-Kurd instructed drivers to go to hotels 10 minutes prior to Lorrie's scheduled pickup times to pirate passengers.

18. Sometime between July 15, 1981 and September 10, 1981, a transaction occurred in which El-Kurd purported to sell the common stock of Ad Passenger along with the option to purchase the NES operating authority to Olson. That agreement has never been presented to the Commission for authority to implement it.

19. The NES operating rights were in disuse from 1971 to 1980.

20. After 1971, NES had no intention of conducting operations under its operating authority.

21. NES abandoned its operating authority.

22. It is reasonable and in the public interest to revoke the NES operating authority for disuse.

23. It is reasonable and in the public interest to revoke the NES operating authority for abandonment.

Conclusions of Law

1. El-Kurd is in contempt of the Commission for the facts stated in Finding 1. El-Kurd should pay a fine of \$500 which is suspended for three years upon the condition that he shall not again fail to appear at Commission proceedings when ordered to do so.

2. The transactions described in Findings 5, 8, and 17 were void under Public Utilities Code §§ 851, 854, and 1031.

3. The NES operating rights should be revoked for disuse.

4. The NES operating rights should be revoked for abandonment.

5. The cease and desist order should be expanded to include any operations under color of the rights revoked herein and made permanent.

O R D E R

IT IS ORDERED that:

1. Michael El-Kurd is in contempt of the Commission and shall be punished by the payment of a fine of \$500 which is suspended as provided in Conclusion of Law 1, above.

2. The passenger stage operating rights granted to National Executive Services, Inc. in Decision 76147 in Application 50494, entered on September 10, 1969, are revoked.

3. National Executive Services, Inc., dba Carey of San Francisco; Ad Passenger Service; Michael El-Kurd, Donald G. Alexander; Don G. Alexander Company; Joseph W. Pargeter, Loren Olson, and any person, corporation, or entity acting as its or their agent, partner, joint adventurer, or in any capacity in connection therewith shall cease and desist from conducting any passenger stage or other transportation under color of the operating authority revoked in Paragraph 2 of this order.

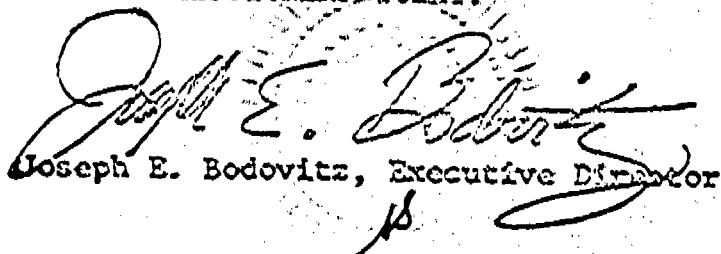
4. Complainants may cause copies of this order to be personally served on the defendants or any person, corporation, or entity acting as its agent, partner, joint adventurer, or in any other capacity in connection therewith. Complainants shall file with the Commission proof of any such personal service which may be made within 5 days of such service.

This order becomes effective 30 days from today.

Dated JUN 15 1982, at San Francisco, California.

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

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


Joseph E. Bodovitz, Executive Director

In determining whether abandoned or disused operating authority should be revoked, evidence of failure to comply with statutes and Commission regulations is significant. (Jack Woodmansee (1967) 67 CPUC 446; Re R.E. MacDonald (1958) 56 CPUC 204; Re Joseph K. Hawkins (1929) 33 CRC 868.) Such conduct exists in this case.

The case at bench is a classic example of trafficking in operating rights without regard for the public interest. Numerous decisions condemn such practices:

"Throughout the cases, like an unbroken thread, runs the principle that an operator, weary of the burden of performing an unprofitable service, may not shift that obligation to another, either permanently or temporarily. If he desires no longer to continue the service, he should apply for permission to withdraw.

"In a decision which may be regarded as typical, we said:

SS
'We are of the opinion that ordinarily the public interest will not be served by permitting a lease of an operative right when the ~~owner~~ obviously desires to divest himself of the burden thereof, yet seeks to preserve his certificate because of possible future value. If the public need requires that the service be continued and another is ready to render such service, his interest therein should not be limited to that of a mere lease.'

"In re Pickwick Stages System, 31 C.R.C. 410, 413." (United Motor Transport Lines, Inc. (1940) 43 CRC 69, 76-77; Investigation of Highway Express (1944) 45 CRC 312.)

After the NES rights had been disused for 9 years, Alexander and NES sought to profit by selling them without regard for the public interest.

They were only concerned with the economics of the transaction, not in how the public was served or how operations were conducted. Not only is NES charged with the conduct of Ad Passenger

to do so from the commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this State shall aid or abet any violation of this section."

"1031. . . . Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission."

The following transactions have been detailed in the discussion of other issues: (1) The 1975 transaction in which Pargeter was designated agent of record; (2) the December 1980 transaction in which Ad Passenger was given an option to purchase the NES operating rights and permitted to assume the management of NES and operate under the NES rights; and (3) the 1981 transaction in which El-Kurd sold Olson the stock in Ad Passenger together with the option to purchase the NES operating rights. As indicated, none of these transactions has ever been presented to the Commission for the authorization required by law. Each of these transactions was void. SS

(Transport Clearings Bay Area v Simmonds, supra; Marnell v United Parcel Serv. (N.D. Cal. 1966) 260 F.Supp. 391, 407; Nevada Co. N.G.R. Co., supra.) SS

It is not necessary to enlarge this decision with a discussion of the illegal transfers. This conduct was weighed in the determination to revoke the operating rights. No other action need be taken.

Findings of Fact

1. On July 15, 1981, El-Kurd was called and sworn as a witness in this proceeding. His testimony was not completed before adjournment for that day. While El-Kurd was on the witness stand, the presiding ALJ, in open court, directed him to return to the courtroom in San Francisco, California on September 10, 1981, at 9:30 a.m. El-Kurd was not present in the courtroom on September 10, 1981. Counsel for El-Kurd informed the Commission that he did not