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Decision 82 10 027 OCT 6 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CLAUDE M. FERNHOLZ, elected President of the VALLEY COMMUTER ASSOCIATION, for authority to operate as a passenger stage non-profit, non-incorporated, private association in a home to work service between points in the San Fernando Valley, City of Los Angeles and the McDonnell Douglas Astronautics Co. facilities in Huntington Beach, Ca.	Application 60884 (Filed September 8, 1981)
SOUTHERN CALIFORNIA COMMUTER BUS SERVICE, INC., d.b.a. COM-BUS, Complainant, vs. COMMUTER BUS LINES, INC. and DOES 1 through 40, Defendants.	Case 11020 (Filed August 26, 1981)
CLAUDE M. FERNHOLZ, President, VALLEY COMMUTER ASSOCIATION, Complainant, vs. SOUTHERN CALIFORNIA COMMUTER BUS SERVICE, INC., d.b.a. COM-BUS, Defendant.	Case 11026 (Filed September 3, 1981)

John E. deBrauwere, Attorney at Law, for Valley Commuter Association, applicant in A.60884 and complainant in C.11026.
Ronald J. Hoffman, for Southern California Commuter Bus Service, Inc., protestant in A.60884, complainant in C.11020, and defendant in C.11026.
Cayer & Westrup, by Garv L. Marsh, Attorney at Law, for Commuter Bus Lines, Inc., defendant in C.11020.
Vahak Petrossian, for the Commission staff.

O P I N I O N

Summary

By this decision we conclude that applicants-complainants, Valley Commuter Association (VCA), a group of employees who have joined together as a nonprofit association and leased a bus to carry them between their homes and their common work location, are not operating a public utility passenger stage corporation. They are providing proprietary carriage. Therefore, their activities do not fall within the regulatory jurisdiction of the Commission.

We further conclude that complainant-defendant, Southern California Commuter Bus Service, Inc., d.b.a. Com-Bus (Com-Bus), did reinstitute service over its Route MDAC-4 (the same route over which VCA operates) as we required it to do in Interim Decision (D.) 93717. Thus, it is entitled to continue to hold a certificate to operate over this route even though it has announced that it does not plan to continue such service.

Finally, we confirm our order in D.93717 dismissing without prejudice the two complaints filed in this matter.

Background

On August 26, 1981 Com-Bus filed a complaint against Commuter Bus Lines, Inc. (CBL) (Case (C.) 11020) wherein it requested an order of the Commission directing CBL to cease and desist from conducting passenger stage operations between points in north San Fernando Valley and the plant of McDonnell-Douglas Astronautics Company (MDAC) located in Huntington Beach, California.

On September 3, 1981 Claude M. Fernholz, as president of VCA, filed a complaint against Com-Bus (C.11026) requesting an order of the Commission revoking the authority of Com-Bus to operate a passenger stage service between points in north San Fernando Valley and MDAC.[1/]

On September 8, 1981 VCA filed an application (Application (A.) 60884) for a certificate of public convenience and necessity authorizing service as a passenger stage corporation for the transportation of MDAC employees between points in north San Fernando Valley and the MDAC plant in Huntington Beach. Included in the application is a motion to dismiss for lack of jurisdiction. A similar motion was filed by CBL on September 18, 1981 in its answer to C.11020.

On November 3, 1981 we consolidated these three matters and issued an ex parte interim order, D.93717, which does three things relevant to this present proceeding. First, it states:

> "In the event Southern California Commuter Bus Service, Inc. fails to restore service over Route 4, its authority to so operate will be revoked by subsequent Commission order."

1/ The route is erroneously described in the complaint as "Route 5"; however, the text of the complaint makes it clear that the intent is to refer to Route 4.

Second, it denies A.60884 without prejudice if Com-Bus restores service over Route 4; and third, it dismisses without prejudice C.11020 and C.11026.

On November 20, 1981 Com-Bus filed with the Commission a response to D.93717 in which it states that it has complied with D.93717 by restoring the service which it had discontinued over Route 4, a route serving the north end of the San Fernando Valley, as authorized by D.84624 dated July 8, 1975 issued in A.55668 in which Com-Bus was authorized to acquire a certificate authorizing the transportation of MDAC employees between various points and the MDAC plant in Huntington Beach subject to the condition that the carrier would not be obligated to perform service for fewer than 10 passengers. Under this certificate Com-Bus was authorized to serve the San Fernando Valley along routes described as Routes 3, 3 Alternate, and 4.

On November 25, 1981 VCA filed a timely application for rehearing of D.93717.

We issued an order granting rehearing of D.93717 on January 19, 1982 by D.82-01-96. That order notes that the three proceedings, A.60884, C.11020, and C.11026, remain consolidated. It further states that the rehearing is to be limited to two issues:

1. Whether VCA is providing "proprietary carriage" to its members and is thus exempt from Commission jurisdiction.
2. Whether Com-Bus has complied with D.93717 by fully restoring service over Route 4 and if so, whether such service would continue if the Commission concludes it has no jurisdiction over VCA.

By the present decision, we dispose in final form of these issues. This decision is based upon the record and the rehearing which was held on March 17 and 18 and April 14, 1982 before Administrative Law Judge Colgan in Los Angeles. The matter was submitted on April 14, 1982 pending receipt of simultaneous closing briefs due May 17, 1982 and simultaneous reply briefs due June 1, 1982. The final date was changed by stipulation of the parties to June 4, 1982.

Discussion

VCA is a group of MDAC employees who have formed an association for the purpose of providing themselves with transportation from their homes in northern San Fernando Valley where MDAC was formerly located to MDAC's present location in Huntington Beach.

The route followed by VCA is identical to the Com-Bus Route 4 which we found in interim order D.93717 to have been discontinued in violation of Com-Bus' operating authority.

VCA began operating shortly after Com-Bus discontinued Route 4 and announced that the route would be combined with Route 3 which commences in the western San Fernando Valley and parallels Route 4 from the corner of Burbank and Balboa Boulevards to Huntington Beach. The parallel segment of the two routes accounts for over 80% of the approximately 65-mile-long Route 4. The rest, according to testimony, would have to be driven or otherwise independently traversed by those passengers living in the north San Fernando Valley wishing to ride Com-Bus' combined route.

Most of the north San Fernando Valley passengers of Com-Bus chose instead to join together as VCA and lease a bus and driver from CBL which would continue to travel over the entire north San Fernando Valley route.

VCA members are all employees of MDAC in Huntington Beach. They pay an initiation fee of $30. In addition, they pay $30 each week for the following week's fare. And, they have assessed themselves other amounts to cover unusual expenses. They make no profit and do not intend to.

VCA is not a corporation. It is an informal nonprofit association of MDAC employees which has adopted a set of bylaws to which the members loosely adhere. No member of VCA is materially compensated or paid for his or her service to the group.

The bus driver is both an MDAC employee and VCA member. However, his function on the bus is not as a VCA member but as a part-time employee of CBL, the company from whom the bus is leased. As such he does not pay VCA's weekly fare.

The bylaws also permit the secretary-treasurer to receive a ride without paying, but she is presently paying anyway, apparently to avoid raising everyone else's fares.

Members of VCA testified that patronage would be solicited by bulletin board advertisements and the internal newspaper at MDAC. They stated that the service would only be available to MDAC employees.

Restoration of Service

There is no doubt about the answer to the question we posed regarding Com-Bus' restoration of Route 4. By stipulation at the hearing, the parties agreed that within the time set forth in D.93717 Com-Bus did offer to make its service available over Route 4. The availability of a bus was made contingent upon advance receipt of a week's fare. This was the method of payment which had previously been employed by Com-Bus and the offer was conveyed to those persons who had formed VCA. Their representative informed Mr. Hoffman, president of Com-Bus, that VCA declined to pay and chose to operate its own vehicle. Com-Bus received no advance payment and thus did not make a vehicle available.

We believe the offer by Com-Bus constitutes a full restoration of service. It was not necessary for Com-Bus to engage in the futile and expensive gesture of placing a bus on the road on the day in question when the potential riders had unequivocally indicated that they would not participate in the Com-Bus endeavor under the terms which had previously prevailed.

Before proceeding we note that Com-Bus argues that the issue of restoring service is moot because its tariff only requires it to carry passengers if there are 30 or more. This argument is premised on the following language which appears on every timetable filed for Route 4 (more precisely described as MDAC-4):

> "Route shall operate for a minimum of 30 passengers using a 38 passenger (or greater) bus, and for a minimum of 10 passengers using a minibus."

The language of a timetable does not describe the rights and duties of the certificate holder. Those are set out in the certificate which in this case obligates Com-Bus to provide service so long as there are at least 10 adult passengers. The quoted language merely describes the bus type to be employed. It does not alter the meaning of the certificate.

Continuation of Service

As to the issue of whether Com-Bus service over Route 4 will continue in the event that the Commission determines it has no jurisdiction over VCA, we conclude that Com-Bus may continue to operate if it wishes since it has complied with the requirement of D.93717. However, Com-Bus' president Hoffman stated at the hearing that Com-Bus would not continue to operate over this route with fewer than 30 passengers (RT 405-406).

Proprietary Carriage

We turn now to the question of whether VCA is providing proprietary carriage to its members, rendering it exempt from Commission jurisdiction.

We used the term proprietary carriage to describe the "transportation of one's own commodities" in D.91780 (San Fernando Valley-Northrop Assn. of Passengers, Inc. (1980) 3 CPUC 2d 666) in which we held that applicant bus corporation was operating on a nonprofit cooperative basis carrying only its shareholders (to and from work) and was therefore a cooperative service, proprietary in nature, and not a public utility passenger stage corporation.

Although VCA has not formed itself into a corporation, we do not find that fact pivotal in determining that the rationale employed in Northrop is applicable to VCA as well. VCA's organization is less sophisticated, but the purpose and general scheme are the same as Northrop's.

Com-Bus argues in opposition to such a finding. It claims that Public Utilities Code Section 226[2/] permits the exemption of only one type of commuter bus from Commission jurisdiction - one with a seating capacity of 15 passengers or less. This implies that our holding in Northrop, supra, was also wrong. In relevant part Section 226 states:

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

Clearly, Section 226 regulates only those bus services which operate "for compensation". "For compensation" means with the intent, purpose, or potential of making a profit. More particularly, "compensation" in Section 226 means having material gain from transporting others, and not from transporting owners of the carrier-entity. From among these profit-making services the Legislature has seen fit to specifically exempt those where the vehicle carries 15 or fewer passengers and the driver is on his or her way to work.

2/ All further references to code sections, unless otherwise identified, refer to sections of the Public Utilities Code.

It is reasonable to assume that the Legislature meant by this exemption to discourage commuters' use of automobiles with one or two passengers in a manner and to an extent which would not interfere significantly with ordinary for-profit passenger stage operations. This exemption is narrow enough to accomplish such goals because it generally encompasses only two trips per day and generally remains on a rather fixed route, though there is no restriction on where the passengers live or work. The incentive held out by the Legislature for such service is that the driver is permitted to make a profit like any other passenger stage operator, but without the regulation associated with Section 226.

The case at hand is not within the jurisdictional ambit described by Section 226 for the simple reason that it is not intended to be a profit-making enterprise. It is simply not a service operated for profit or the potential for profit. Rather, it is a proprietary endeavor. The evidence clearly shows that the money collected by VCA is solely for the purpose of meeting actual operating expenses including the cost of renting a bus driver. No VCA member is or is meant to be financially enriched from those funds. The service is limited to a private group of commuters working at MDAC in Huntington Beach. It is a nonprofit entity; any surplus over expenses will flow back to the rider-members. The only inconsistency is an unimplemented bylaw which purports to allow the secretary-treasurer to ride without paying a weekly fee.

VCA is not a public utility passenger stage corporation. It does not hold out its service to the public on an individual fare basis, but rather transports only its owners or members.

Com-Bus also argues that Sections 216(b) and 207 oppose the conclusion we reach here. We disagree. Sections 216(b) and 207 make it clear that a public utility is one which provides a service to the public or some portion of the public. This service is not offered to a portion of the public. Rather, it is restricted to a private group, its owner-members. That is the basic distinction between a public utility passenger stage corporation and a proprietary carrier.

Com-Bus further claims that we are prevented from finding we lack jurisdiction over VCA by Section 1035. The relevant part of that section states:

> ". . . Any act of transporting or attempting to transport any person or persons by stage, auto stage, or other motor vehicle upon a public highway of this State between two or more points not both within the limits of a single city or city and county, where the rate, charge, or fare for such transportation is computed, collected or demanded on an individual fare basis, shall be presumed to be an act of operating as a passenger stage corporation within the meaning of this part."

Even if we assume, for argument, that the money paid by VCA members is computed and collected on an individual fare basis, we point out that Section 1035 merely describes a presumption. Presumptions are rebuttable and we are convinced that VCA has adequately rebutted the presumption that it is a passenger stage corporation.

As stated above we addressed this jurisdictional issue previously in D.91780, the Northrop case. There we found that a non-profit corporation, whose shareholders were its riders, was not a passenger stage corporation:

> "Applicant proposes to operate as a nonprofit entity or cooperative, and to provide transportation services only for its shareholders. The shareholders/riders own the carrier entity which will transport them. This is not the typical relationship a public utility has with its ratepayers or passengers. In essence, this is a nonprofit cooperative transportation service that will be engaged in 'proprietary carriage' for its owners. (Proprietary carriage is the term meaning the transpprtation of one's own commodities.)" (3 CPUC 2d 666, 668.)

We believe the rationale from Northrop is equally applicable to VCA.

Findings of Fact

1. Com-Bus did offer on reasonable terms and within a reasonable time to make a bus available along its discontinued Route MDAC-4.

2. Members of VCA, former riders of Com-Bus' Route MDAC-4 service, informed Com-Bus that they would not avail themselves of the reinstituted Route MDAC-4 service.

3. Com-Bus has determined that it will not continue its Route MDAC-4 with 30 or fewer riders.

4. VCA is a nonprofit association organized for the purpose of permitting its members to cooperatively procure a common means of commuting from the north San Fernando Valley to work at MDAC in Huntington Beach and home again.

5. VCA leases a bus and driver from CBL to accomplish its commuting goal.

6. VCA does not make any profit nor does it intend to do so.

7. No VCA members receive material compensation. The bylaws permit the driver and secretary-treasurer (both VCA members) to receive a free ride, as determined by their fellow members.

8. The driver is also an employee of CBL.

9. VCA membership is limited to MDAC employees commuting from the north San Fernando Valley to MDAC in Huntington Beach.

10. The route followed by VCA precisely follows that set forth in the operating authority granted to Com-Bus for its Route MDAC-4.

11. The dismissal without prejudice of C.11020 and C.11026 in our ex parte interim order D.93717 is unaffected by these findings.

12. The denial without prejudice of A.60884 in D.93717 was conditioned on a future event, the existence of which is determined by this decision. The denial assumes that we have jurisdiction over VCA.

Conclusions of Law

1. Com-Bus did comply with D.93717. Its offer constituted full restoration of service over Route MDAC-4 in light of the decision of VCA members not to avail themselves of the service.

2. Since Com-Bus did fully restore service in compliance with D.93717, it is entitled to continue to hold its certificate of public convenience and necessity for Route MDAC-4. Com-Bus' decision to discontinue Route MDAC-4 does not affect this entitlement; however, Com-Bus is obligated by the terms of General Order 98-A to file with the Commission a notice of reduction in service or, in the alternative, Com-Bus may request the Commission to revoke the authority for this route in its certificate.

3. Applicant VCA's proposed service, being a cooperative nonprofit undertaking for a private group, is proprietary in nature and not a public utility passenger stage corporation, so long as no passenger member, including the secretary-treasurer, receives material benefit from VCA.

4. The driver is an employee of CBL and not a passenger while driving the VCA bus.

5. Although Com-Bus did comply with ex parte interim order D.93717, we have no jurisdiction to grant or deny A.60884 as we assumed in D.93717. Therefore, A.60884 should be dismissed for lack of jurisdiction.

6. The dismissal without prejudice of C.11020 and C.11026 in ex parte interim order D.93717 should be confirmed.

7. In order to assure the least disruption possible to the commuter service for these employees, this order should be effective today.

O R D E R

IT IS ORDERED that:

1. The certificate of public convenience and necessity for Route MDAC-4 issued as authorized by D.84624 shall continue in effect and is permanent.

2. Com-Bus shall file with the Commission a notice of reduction in service or, in the alternative, Com-Bus shall file request to revoke the authority for Route MDAC-4 in its certificate of public convenience and necessity.

3. The application of Claude M. Fernholz, on behalf of Valley Commuter Association (A.60884) for authority to operate as a passenger stage corporation, is dismissed for lack of jurisdiction.

4. The dismissals without prejudice of C.11020 (Southern California Commuter Bus Service, Inc., d.b.a. Com-Bus v Commuter Bus Lines, Inc.) and of C.11026 (Claude M. Fernholz, president, Valley Commuter Association v Southern California Commuter Bus Service, Inc.) in interim D.93717 are confirmed.

This order is effective today.

Dated OCT 6 1982, at San Francisco, California.

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

I dissent.

PRISCILLA C. GREW, Commissioner

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

Joseph E. Bodovitz, Executive Director

It is reasonable to assume that the Legislature meant by this exemption to discourage commuters' use of automobiles with one or two passengers in a manner and to an extent which would not interfere significantly with ordinary for-profit passenger stage operations. This exemption is narrow enough to accomplish such goals because it generally encompasses only two trips per day and generally remains on a rather fixed route, though there is no restriction on where the passengers live or work. The incentive held out by the Legislature for such service is that the driver is permitted to make a profit like any other passenger stage operator, but without the regulation associated with Section 226.

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