

Decision 83 02 013 FEB 2 - 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE GRAY LINE, INC.,
a California Corporation,
Complainant,

v.

Muir Woods Tour Company,
Sylvester Burnley,
Lawrence C. Lowe, and
Does I through V,
Defendants.

Case 10794
(Filed October 15, 1979;
amended April 21, 1980)

Richard M. Hannon, Attorney at Law, for The Gray Line, Inc., and James S. Clapp, Attorney at Law, for O'Connor Limousine Service, Inc. and for The Gray Line, Inc., after the corporation was sold, complainants.

Ocampo, Millner & McGee, by Otis McGee, Jr., and Dianne Millner, for Sylvester Burnley and Muir Wood Tour, Inc., and Nina Ryan, Attorney at Law, for Connie Elliot Burnley and Sightseeing Coordinators, Unlimited, defendants.

Edward Errante, for J. Mark Lavelle, intervenor.

R. O. Collins and Masaru Matsumura, for the Commission staff.

O P I N I O N

The complaint alleges that during and subsequent to February 1979 defendants have operated and are still operating as a passenger stage corporation without authority, by transporting passengers from San Francisco to Muir Woods and return at a charge of \$9.50 per passenger. A Muir Wood Tour Company brochure is attached to the complaint, which advertises a San Francisco City Tour at \$9.00, a Muir Woods Tour at \$9.50, a walking tour, a Carmel-Monterey Tour at \$30.00, a Yosemite Tour at \$36.00, and a Point Reyes Tour at \$21.00.

An amendment to the complaint was filed on April 21, 1980 to include two additional defendants, Connie Elliot Burnley, Sylvester Burnley's wife, and Sightseeing Coordinators, Unlimited. (Connie Burnley was doing business as Sightseeing Coordinators, Unlimited. It is not a corporation.) The answers filed by defendants basically deny all allegations in the complaint and its amendment.

O'Connor Limousine Service, Inc. (O'Connor) and J. Mark Lavelle (Dolphin Tours) petitioned to intervene as co-complainants. A public hearing before the assigned Administrative Law Judge was held during five days in 1980 and one day in 1981. The matter was submitted on briefs filed on May 14, 1981.

Complainants' Evidence

An Oakland minister testified that his church had a charter-party permit (TCP-948) from 1978 to July 1981. This permit was loaned to the Burnley family who operated vans under its authority. Defendant Lawrence C. Lowe, appearing under subpoena, testified that he filed an application in his own name for a charter-party permit in May 1978 as a favor to Sylvester Burnley, and that the latter paid the permit fee. The witness stated that he entered into a written agreement on May 17, 1978 whereby Sylvester Burnley would have exclusive rights to the permit. He stated that he was informed by Sylvester Burnley that the 1975 Dodge Van listed on the application was owned by Connie Elliot, who later married Sylvester. Charter-party permit No. TCP-1011-P issued to Lowe, dba Lowe Limousine Charter, on September 7, 1978, was used by Sylvester Burnley until allowed to expire on September 8, 1980 when Lowe was informed by Sylvester Burnley that the latter had applied for his own permit. ^{1/} While

^{1/} TCP-1438P was issued to Muir Wood Tour, Inc. on June 3, 1980.

Sylvester Burnley operated under Lowe's permit, the equipment used in the operation was covered by assigned risk plan due to Burnley's traffic violations and the numerous accidents involving Muir Wood Tour Company vehicles. All accident reports and Sylvester Burnley's driving record were maintained by Lowe in his TCP-1011-P file. Lowe estimated that 25 accident reports were in this file. The charter-party permit listed Lowe's Oakland address as the carrier's terminal while Sylvester Burnley operated out of an address in San Francisco. Lowe further testified that he was informed by Sylvester Burnley on June 3, 1980 that the latter was applying for another type of license to operate buses and in conjunction with that application requested Lowe, who also acted as Burnley's insurance agent, to add a 1962 Silver Eagle bus with a 35-40 seating capacity to Muir Wood's assigned risk plan. To protect himself, Lowe stated that he added the name of his firm to the assigned risk plan. He added that he, himself, never used TCP-1011-P while the permit was in force.

Two investigators hired by complainant Gray Line, Inc. telephoned Sightseeing Coordinators, Unlimited on different days and arranged to take a tour from San Francisco to Muir Woods - one tour on November 6 and the other on November 10, 1980. They walked into 349 Mason Street, each on her assigned day, paid a \$9.50 fare as requested by a woman behind the counter, and received a slip to hand to the driver. The tours left 349 Mason Street, San Francisco, and proceeded to Muir Woods, where the van waited while the passengers viewed the scenery. The van then returned to San Francisco, letting passengers off wherever requested in the downtown area. The investigators who rode on vans with less than 15-passenger seating capacity stated that passengers on the tours they took, and on two other tours they observed, paid individual fares and boarded the bus as individuals. There was no indication that a charter group was being transported. Both investigators saw brochures on the premises

advertising tours to various points of interest with separate fares listed for adults and children.

One of the Gray Line witnesses testified that he has observed as many as 5 vans loading in front of defendant's Mason Street address, identified by the Muir Wood Tour Company sunburst symbol painted on the vehicles. An Eagle bus was loading at 2:30 p.m. on August 6, 1980. The license number was W-75600 and the FUC identification was TCP-1011-P. The P number identifies a charter-party permit holder, with no authority to operate a 35-passenger bus. Permit holders are limited to under 15-passenger vehicles by Public Utilities (PU) Code Section 5384(b). A Gray Line witness obtained a Muir Wood Tour Company brochure which advertised various tours on an individual and charter-fare basis.

A witness from O'Connor testified that he visited defendant's Mason Street address at noon on November 21, 1980. He placed a photograph in evidence which shows the street side of the entrance at 349 Mason Street. The words "Muir Woods Tours" and "Minibus Charter" can be seen on the sign over the entrance. There is also a list of tours on the awning over the doorway. The witness entered the premises and picked up a brochure titled "Sightseeing Coordinators Unlimited" which showed the tours and fares previously described. The witness placed a memo from "Muir Woods Tour Company" dated November 8, 1979 in evidence. The memo states that the business has moved to 550 Beale Street, San Francisco, and that a 46-passenger bus is available to handle larger charter groups.

Defendants' Evidence

Sylvester Burnley presented no testimony or evidence. Connie Burnley testified that she has been married to Sylvester Burnley since August 29, 1979. She started operating as Sightseeing Coordinators at 349 Mason Street during June of 1979. Her two

employees are tour coordinators. She has never employed tour guides. They come with the charter buses. She does not now, and has never owned, rented, leased, operated, or controlled any vehicles as part of her business. Once a tour is organized, transportation is obtained from a charter-party carrier. Sylvester Burnley, who handles more than 80% of her business, since it is all offered to him as a first choice, has furnished her with coaches with seating capacity around 40 passengers. She is billed every other week for charters transported and pays by check. She does not know how charges are computed and has never asked.

Her husband pays nothing for first choice of her charters and she paid nothing to him when she took over the sunburst trademark, formerly identified with Muir Wood Tour Company, and the premises at 349 Mason Street when Burnley moved out.

She stated that her husband has no interest in her business and she has none in his. They have different business accounts and file separate tax returns.

Operating Authority Held by Sylvester Burnley

Sylvester Burnley operated as Muir Wood Tour Company until October 1, 1979, when he incorporated as Muir Wood Tour, Inc. He is listed as all four officers of the corporation. It requested a charter-party permit on April 30, 1980, which was issued on June 3, 1980 (TCP-1438-P) to expire on June 3, 1981. An application to renew the permit was filed on June 1, 1981, but renewal was delayed for more than 9 months until applicant presented a vehicle that could pass the California Highway Patrol (CHP) safety inspection. This permit expired on June 3, 1982, but was not further renewed because the corporation did not make its equipment available for CHP inspection. Neither Sylvester Burnley nor the corporation currently have any operating authority from the Commission.

Muir Wood Tour, Inc. filed Application (A.) 59762 on June 25, 1980 to request a Class B charter-party certificate. The application was signed by Sylvester Burnley, as President. Action on this application has been withheld pending disposition of the complaint proceeding.

Discussion

Connie Burnley (as Sightseeing Coordinators, Unlimited) claims immunity from public utility regulation as a tour coordinator who owns and operates no vehicles, does not employ tour guides, and does not hire or use employees from the charter carriers who transport her tours.

Defendants rely on the recent Lavelle v Pacifico Case (Pacifico), Decision (D.) 92455, Case 10732, December 2, 1980 where the tour coordinator was found to be a passenger stage corporation after it was shown that the tour guide controlled the driver and was employed by the coordinator. The vehicles and drivers were furnished by the regulated bus company. Connie Burnley also relies on the fact that her employees have no control over the vehicles used to transport the tours.

Defendants argue that Connie Burnley is a tour coordinator and not subject to Commission regulation, while Sylvester Burnley is validly operating as a charter-party carrier by transporting the tours organized by Connie Burnley who pays a fee for the use of the bus.

Even if defendants' evidence is accepted without reservation, violations of the PU Code are multiple and obvious. Sylvester Burnley did not bother to obtain a charter-party permit, as required by Section 5371, until he obtained TCP-1438-P on June 3, 1980. He operated under authority of a permit held by another person in violation of Section 5377, which forbids the transfer of charter-party permits. He operated under an authority which did not have his name

or address listed in violation of Section 5372 and the Commission Rules of Practice and Procedure, which require that an operator be properly identified. Sylvester Burnley operated a 40-passenger bus with the unauthorized permit number (TCP-1011-P) stenciled on it. This is a violation of Section 5384(b) which restricts permitted operators to vehicles with a capacity of less than 15 passengers; and Section 5371 which requires that a certificate be obtained before large buses are used.

Complainant's Motion for an Order To Produce Documents and for an Order Awarding Attorney's Fee

Sylvester Burnley appeared for a deposition scheduled by complainant's attorney on January 31, 1980, where he agreed to bring in the records on his charter operation. Nothing was produced after a series of letters and telephone calls and a formal motion for production of documents was filed on July 8, 1980 and renewed on November 20, 1980.

The records to be produced were expected to indicate what Sylvester Burnley was doing. A description of defendant's daily activity has been obtained through testimony and exhibits; production of the records would develop nothing new and information obtained thereby would be cumulative. The motion to produce documents should therefore be denied.

Code of Civil Procedure Section 2034(b) provides that "If a party or other deponent refuses or fails to answer any question propounded upon examination during the taking of a deposition, or refuses or fails to produce at a deposition any books, documents or other things under his control pursuant to a subpoena duces tecum..." the examining party may, after proper notice, "and upon a showing of good cause make application for an order to compel compliance with the request. If the motion is granted and if the court finds that the refusal or failure was without substantial justification the court may require the refusing or failing party or deponent and the party or attorney advising the refusal or failure or either of them to pay the examining party... reasonable expenses and attorney's fees". (Emphasis added.)

This is the section quoted by complainant's counsel as the basis for his request for an award of attorney's fees.

The statute requires that the motion to produce be granted before an award of attorney's fees or costs can be made. The motion to produce has been denied here which requires that the request for attorney's fees be denied.

Findings of Fact

1. Lowe obtained charter-party permit TCP-1011-P in September 1978 which he never used. He encumbered this permit to Sylvester Burnley who adopted it and used it as his own operating authority.

2. Sylvester Burnley dispatched his charter vehicles out of an address in San Francisco and had no connection with the Oakland address listed as the carrier's terminal in the permit. His name and address were not listed on the permit he was using as his operating authority.

3. Connie Burnley started as a tour coordinator under the name Sightseeing Coordinators, Unlimited, in June 1979. She married Burnley in August 1979. She advertises and organizes the tours previously described and collects an individual fare from each passenger. She then offers her husband opportunity to transport all of her individual fare paying passengers under a charter; he has the right to reject any of the business offered.

4. Sylvester Burnley operated as Muir Wood Tour Company through September 1979. He incorporated Muir Wood Tour Company on October 1, 1979. The corporation is owned and managed by Sylvester Burnley. He is listed as all four officers of the corporation and has never denied the inference that he and the corporation are the same entity.

5. Muir Wood Tour, Inc. was issued, on June 3, 1980, a charter-party permit which expired on June 3, 1981. At the request of the CHP it was not renewed immediately since the vehicles listed in the application for renewal could not pass the CHP safety check. Muir Wood Tour, Inc. qualified in February with a 1982 van after certifying that the van would be the only vehicle used in the charter operation. The permit was reissued on February 26, 1982. The permit expired on June 3, 1982 (June 3 was the original date of issue). Muir Wood Tour, Inc. applied to renew the permit on June 1, 1982, two days before it expired. The permit has not been reissued since the vehicle listed on the application for the permit has not been available for the CHP safety inspection. Defendant has had no operating authority from this Commission since June 3, 1982.

6. Muir Wood Tour, Inc. filed A.59762 on June 25, 1980 to request a Class B charter certificate. The application was signed by Sylvester Burnley as president and in it he is identified as all four corporate officers. The processing of this application has been deferred pending disposition of Case 10794.

7. Sylvester Burnley and Muir Wood Tour, Inc. have operated a 1962 Eagle (40-passenger) bus under color of permit authority issued to Lowe which expired July 1980 and under TCP-1438-P. The permits on their face note that holders of the permit are restricted to using vehicles under 15-passenger seating capacity and under 7,000 lbs. gross weight.

8. Prior to October 1979, defendant Sylvester Burnley, doing business as Muir Wood Tour Company, distributed brochures advertising tours of San Francisco, Muir Woods, Carmel-Monterey, Yosemite, Point Reyes, and other points. Individual fares are listed for all tours.

The brochures described the tours as leaving at the same time every day and traveling between the same points over the same route. These brochures were also available to the public after the defendant's business was incorporated.

9. Sylvester Burnley transported the tours prior to October 1, 1979 when he incorporated Muir Wood Tour Company. The corporation also transported the tours after it was incorporated. The person or company specifically responsible is sometimes difficult to ascertain. Defendants have operated under several permits held by different people.

10. Connie Burnley presently issues the Muir Wood Tour, Inc. brochures and collects individual fares for transportation performed as an agent for her husband, who originally transported the tours as Muir Wood Tour Company and later under his corporate identity.

11. The tours are offered on schedule, everyday, proceeding between the same points and over the same route with fares charged on a per capita basis. Passengers pay and get on and off the bus as individuals.

12. Lawrence C. Lowe, although shown as a defendant, does not possess any current operating authority from this Commission.

13. Defendants hold no operating authority from this Commission under which they can perform the passenger bus and sightseeing operations described in the above findings.

14. Defendants should be ordered to cease and desist any passenger bus operations within California until they obtain appropriate operating authority from this Commission.

Conclusions of Law

1. Defendants Sylvester Burnley, Connie Burnley, and Muir Wood Tour, Inc. have violated provisions of the PU Code requiring an appropriate operating authority from this Commission before conducting passenger bus operations.

2. A cease and desist order should be issued.
3. Gray Line's motion for an order to produce documents should be denied.
4. Gray Line's motion for an order awarding attorney fees should be denied.

Defendants are hereby placed on notice that any further violations of the Public Utilities Code would subject them to penalties pursuant to lawful procedures.

O R D E R

IT IS ORDERED that:

1. Defendants Sylvester Burnley, Connie Burnley, and Muir Wood Tour, Inc. shall cease and desist from offering and providing passenger stage service over the public highways of the State of California, except under an appropriate operating authority issued by this Commission.
2. The motion to produce documents is denied.
3. The motion for an order awarding attorney fees is denied.

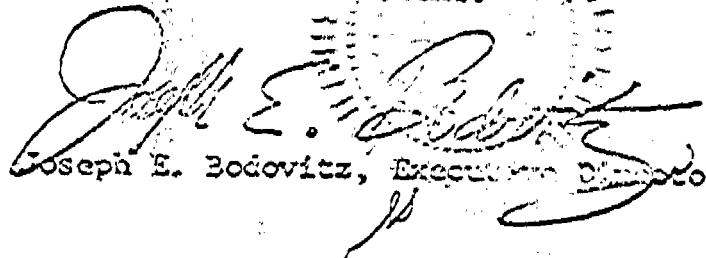
4. The Executive Director shall have personal service of this order made on Sylvester Burnley and Connie Burnley.

The effective date of this order shall be the date of service on either Sylvester Burnley or Connie Burnley.

Dated FEB 2 1985, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

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


Joseph E. Bodovitz, Executive Director