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Decision 83 04 065 April 20, 1983

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

J. MARK LAVELLE, dba Dolphin Tours, )

Complainant, )

vs. )

PACIFICO CREATIVE SERVICE (Hawaii), )  
INC., and PACIFICO CREATIVE SERVICE )  
(California), Inc., )

Defendants. )

Case 10935  
(Filed December 24, 1980)

ORDER OF DISMISSAL

Summary

In this complaint we determine that defendant Pacifico Creative Service (Hawaii), Inc. (Pacifico) does not require certification for its airport-to-hotel one-way passenger bus routes, because Pacifico is not performing common carrier-type service on such routes.

The same result is reached regarding certain round-trip sightseeing service which is part of tours sold in Japan. Additionally, this service is not passenger stage transportation under Western Travel Plaza, et al., Decision (D.) 82-09-087 (Application (A.) 59818 et al.) dated September 22, 1982.<sup>1</sup>

Background

At the time this complaint was filed, J. Mark Lavelle held passenger stage authority from this Commission under the name Dolphin Tours and was primarily engaged in offering sightseeing bus tours originating in San Francisco narrated in Japanese. This authority was revoked subsequent to the filing of this complaint.

<sup>1</sup> Petition for writ of review denied sub nom. Orange Coast Sightseeing v PUC, SF No. 24484, February 10, 1983, Petition to the Court for reconsideration denied March 10, 1983.

Lavelle alleges that defendant Pacifico<sup>2</sup> operates certain Japanese-narrated bus routes without a proper passenger stage certificate, and that Pacifico should be ordered to cease such operations until it obtains a certificate from this Commission.

In Lavelle v Pacifico, et al. (1980) 4 CPUC 2d 645 we considered our jurisdiction to regulate Pacifico's "optional" bus tours. These are sold to members of JALPAK tour parties as add-ons on an individual basis after their arrival in California. JALPAK is a trade mark of Japan Air Lines, used with its permission by its subsidiary, Japan Creative Tours (JCT), a tour wholesaler. Pacifico is a subsidiary of JCT, and JCT furnishes Pacifico with all of its business. We held that some of the tours required a passenger stage certificate.

Then in Pacifico Creative Service, \_\_\_\_\_ CPUC 2d \_\_\_\_\_, (A.58739, D.93725, November 13, 1981), after hearings, we issued certificates for the routes applied for, except for the "wedding package" and restaurant-nightlife tours which were found not to be passenger stage transportation.

In the present complaint we deal with the status of Pacifico's routes for which no individual compensation is paid. This transportation consists of two categories: (1) one-way airport bus transportation; (2) round-trip sightseeing bus routes conducted similarly to those described in Lavelle v Pacifico but as part of the prepaid tours and not available as "optionals".

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<sup>2</sup> The complaint was originally filed against both Pacifico Creative Service, Inc., a Hawaii corporation qualified to do business in California, and its subsidiary, a California corporation with the same name. In the course of Pacifico's A.58739, the Hawaii corporation was substituted as applicant. The California subsidiary is inactive. "Pacifico" hereafter refers to the Hawaii corporation.

The Japanese tourist pays a tour retailer a fee for the tour; the retailer pays JCT and makes a reservation; when the tourist arrives in Los Angeles or San Francisco, he or she is received by Pacifico, which functions as JCT's "ground operator" or "receptive agent" at those locations. Such a company handles ground arrangements for group tours at a particular destination, including ground transportation arrangements.

For purposes of the motion to dismiss filed by defendant and supported by several intervenors, the parties agree that we may rely on the factual record in Case (C.) 10732 (Lavelle v Pacifico) supra. The factual description above is based on that record. For a more complete description, see the Lavelle v Pacifico opinion.

Round-Trip Sightseeing  
Service - Jurisdiction

There is no question that under the historical view, all of Pacifico's round-trip prepackaged routes would be passenger stage routes if run frequently enough, and unless one of the defenses to the complaint is valid. However, in Western Travel Plaza et al., supra, we held that round-trip sightseeing tour service is not passenger stage service. The California Supreme Court has denied review of this decision. Since this holding covers Pacifico's round-trip sightseeing routes, we need only decide here the issues relating to the one-way airport services.

Airport Service and Foreign Commerce

The complaint alleges that Pacifico operates one-way airport service between San Francisco International Airport and

certain downtown hotels, the inbound route being combined with a city tour. According to evidence in C.10732, the tour is eliminated if a tour group's flight does not arrive during daylight hours.

There are no allegations in the complaint concerning what airport-to-hotel bus service Pacifico offers in Los Angeles. Pacifico's own evidence in C.10732, however, shows that it functions as a ground operator for JCT in Los Angeles in the same manner as in San Francisco, and that it charters buses from charter-party carriers to conduct regular bus service between Los Angeles International Airport and downtown hotels (there is apparently no inclusion of a city tour). Pacifico strongly prefers to have its own chartered buses for the JALPAK group tours in order to maintain high standards of service and a congenial atmosphere which its management feels would be destroyed by mixing the tour members with the general public.

The record in C.10732 shows that this airport service is conducted between fixed termini, and frequently enough to be passenger stage service, unless one of the defenses raised by defendant and intervenors is valid.

Pacifico and some intervenors contend that Pacifico's airport routes are part of a continuous movement in foreign commerce. The JALPAK groups begin their journey in Japan, pass through the airports, and end at the hotels, and the reverse occurs when the tourists depart. Thus, so the argument runs, even Pacifico's wholly intrastate airport routes must be considered foreign or interstate commerce. (U.S. Constitution, Article 1, § 8.) Cited in particular in this connection is United States v Yellow Cab Co. (1947) 332 US 218 and other cases<sup>3</sup> which hold that where

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<sup>3</sup> Because there are several intervenors, as well as Pacifico, dozens of cases are cited for each proposition, a detailed discussion of which would be voluminous. These cases have, however, been reviewed.

local transportation is an integral part of, and inextricably linked to, a continuous movement in foreign commerce, the local transportation is deemed to be interstate (or foreign) and not subject to state regulation.

Clearly the persons involved are engaged in a continuous movement from their place of origin to the airport in San Francisco or Los Angeles, and then to their hotels, and this process is reversed when they depart. But California does not purport to regulate, as such, the movement of foreigners into or out of the State; such regulation is clearly the sole prerogative of the federal government. California regulates intrastate transportation, including that by passenger bus. We must analyze whether the bus movements are part of interstate or foreign commerce.

We agree with Lavelle that these movements are not part of foreign commerce. In United States v Yellow Cab Co., supra, the Court held that the character of the transportation should be based on the facts of each case and the "commonly accepted sense of the transportation concept." (327 US 363.) The court added that the beginning or end of a particular type of interstate commerce must be determined by "its own practical consideration." (Id.)

We believe that as a matter of plain and common sense, airport transfer service (if it does not cross the national border or a state line) is local, intrastate service. It is provided to take persons from airports, which under modern conditions of aviation must be located considerable distances from downtown areas, to hotels or centrally located terminals, and to perform the reverse function for

individuals or groups departing from cities by air. The very nature of the business means that any airport transfer carrier is going to carry mostly persons from other states or foreign countries. These persons may also be said, as individuals, to be making a continuous journey until they reach their hotel or a downtown area. If Pacifico's airport service is not intrastate because it carries foreigners arriving from overseas (or tour members on one of its multistate tours arriving from another state) who are engaged in continuous movement from their point of origin to their hotel, then any airport transfer service which does not restrict its business to carriage of passengers arriving and departing on intrastate airlines<sup>4</sup> is engaged in interstate or foreign commerce, or both. And what airport transfer service would care to impose such a restriction on itself if it could escape regulation by not doing so?

In California (and no doubt in other states with major metropolitan airports) this result would have serious consequences. There is an immense volume of vehicular traffic at San Francisco International Airport and Los Angeles International Airport, and only so much room for bus or van stops. Nonregulation of commercial passenger vehicles by local authorities (whether one assumes the regulator to be a state commission or an airport authority) would undoubtedly lead to further congestion. Members of the traveling public, whether U.S. citizens or foreigners, also deserve protection in the form of safe vehicles, qualified drivers, and proper insurance.

It is clear that local problems associated with intrastate airport transfer service are substantial, that public policy favors local regulation of the service, and that the applicable sections of

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<sup>4</sup> And even in such a case, under this rationale interstate commerce would be involved since some of the passengers would have begun their trips from out of State.

the California Constitution and the Public Utilities Code should be applied unless there is a clear and direct holding to the contrary by the appropriate court. No such case has been presented to us. Opinions concerning shuttle transportation between two carriers or connecting services with through-ticketing arrangements are not in point.

"Package of Services" Argument

Pacifico contends that its airport bus routes are part of a package of tour services. We reject this contention here as we did (except for its "wedding package") previously.

It should be clear from the opinion in Lavelle v Pacifico and the record in C.10732 that although Pacifico performs various functions, its primary business is furnishing airport transportation and bus tours to JALPAK tour members. We concluded in Lavelle v Pacifico that Pacifico owns, operates, and controls a "system for the transportation of people" within the meaning of California Constitution, Article XII, § 3 (Conclusion of Law 8), and we adhere to that determination. No balanced analysis of Pacifico's operations can reach the opinion that the bus transportation is incidental to its other services.

Nor does the presence of a city tour on its incoming San Francisco route alter the result. Through Pacifico JCT must furnish its tour groups with airport connections; it may decide that Pacifico should add a city tour to its incoming airport route during daylight hours.<sup>5</sup> The tail wags the dog in any argument which reasons that the incoming San Francisco airport route is ancillary to a city tour.

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<sup>5</sup> JCT dominates Pacifico by sending it 100% of its business and by interlocking personnel arrangements. The tours are planned in Tokyo by JCT, although Pacifico makes recommendations.

We have reviewed the various "package of services" cases cited by defendant and intervenors. While those cases may have been correctly decided on their own facts, their logic does not apply to Pacifico's operations. Such an analysis might require more weighty consideration if JCT had no subsidiary here and ran its own ground transportation, but we are not faced with that fact situation. JCT has chosen to perform its California ground operations through a subsidiary, the primary business of which is airport bus transportation and guided bus tours for JCT's groups.

Common Carriage Issue

A passenger stage corporation is a common carrier. (Public Utilities (PU) Code § 211(c).) Whenever a common carrier performs a service for "the public or any portion thereof" for compensation, it is a "public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part [Part 1 of the PU Code]". (PU Code § 216(b).) Section 207 reads:

"'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered."

Under these sections, is Pacifico's airport service common carriage?

For purposes of considering this question, the presence or absence of sightseeing features on airport routes is immaterial, and whether such amenities affect the status of the routes is the subject of defendant's "package of services" defense (see discussion under that heading).

In Lavelle v Pacifico, supra, we found that Pacifico is a common carrier regarding its optional tours. While these tours are sold only to members of JCT's JALPAK groups, they are offered on an individual basis, and sold to members of JALPAK tours after arrival



in the U.S. The airport routes are not sold individually. The individual tourist pays a tour retailer in Japan a lump sum, which includes air fare, hotels, some meals, reception and transfer service (including the bus service from airport to hotel), and miscellaneous amenities, and the guided bus tours - that is, the nonoptionals which are part of the tour price. If a member of a group should decide not to participate in a presold tour, no partial refund is offered nor is any other compensating amenity provided in its place. (See a more complete description in Lavelle v Pacifico (1980) 4 CPUC 2d 645, 659-667.)

Pacifico maintains that its airport transfer is not offered to the public or to any segment of the public. Some of the intervenors support this contention.

Under the statutory provisions quoted previously, the Commission and the California Supreme Court have wrestled with the concept of "common carriage" ever since the establishment of this Commission. The issue is confused by the fact that while PU Code § 226 states that a passenger stage corporation includes "every corporation or person engaged as a common carrier" (if the other requisites are met), § 211(c) defines "common carrier" to include "Every 'passenger stage corporation' operating within the state." ✓

In Talsky v Public Utilities Commission (1961) 56 Cal 2d 151, a highway trucking operation was found to be a common carrier, and the Commission's determination was upheld. This was true even though Talsky made some efforts to restrict his business and to perform operations under contracts (which the Commission found were a sham). In upholding the Commission's decision, the majority opinion relied upon the common-law test of common carriage: "an unequivocal intention to dedicate the property to public use..." (56 C 2d 162, citing the Court's previous decisions of Souza v Public Utilities Commission (1951) 37 C 2d 539 and Samuelson v Public Utilities

Commission (1951) 36 C 2d 722.) The majority opinion did, however, comment unfavorably on the "unfortunate circularity" of certain definitions similar to that discussed above, and the dissenting opinion said (56 C 2d 167):

"There has been no clear formula established in California which can be applied to determine whether the dedication necessary to isolate the common carrier is present, no method of deciding the exact point at which a private carrier becomes a public servant, and no circumstances which invariably constitute a 'holding out to service the public indiscriminately.' (Cf. Public Utilities Regulations, 30 Co. Cal. L. Rev. 313 (1957)."

While the parties cite many post- Talsky Commission cases in support of their arguments, none precisely fits the facts here, nor are there any later California Supreme Court cases which are helpful. Certain cases cited in other fields of regulation are not direct precedent<sup>6</sup> because they do not involve PU Code § 211(c), which specifically includes as a public utility subject to our jurisdiction a common carrier which serves only a "portion" of the public. Under this statutory language, the fact that Pacifico does not serve the public generally is not controlling.

The inquiry boils down to this: are the Japanese tourists who have prepaid their airport bus transportation a "portion" of the

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<sup>6</sup> And a detailed analysis of such cases does not clarify the situation because some of them simply cannot be reconciled. Compare Forsyth v San Joaquin Light, etc. Corp. (1929) 208 Cal 397 with Richfield Oil Co. v PUC (1960) 54 C 2d 419 and California Water & Tel. Co. v PUC (1959) 51 C 2d 478.

public under PU Code § 207)? If they are not, Pacifico is not a common carrier, and therefore not a passenger stage corporation.

We believe the facts demonstrate that Pacifico is not a common carrier in this regard and that no certificate is required for it to transport JCT's group tour members on its airport-to-city routes.

An unequivocal intention to dedicate property to a public use need not be expressly stated and may be determined from the circumstances (Cal. Water & Tel. Co. v PUC (1959) 51 C 2d 478). An examination of Pacifico's operations shows that it does not accept airport passengers except those who have purchased a JALPAK tour before leaving Japan. JALPAK tours are promoted and sold only in Japan. Unlike the optionals, there is no promotion or sale of the prepaid tours here. While the optionals which were the subject of Lavelle v Pacifico (4 CPUC 2d 645) included a holding out to a narrow segment of the public through sale, and some promotion in California, the presold airport transportation does not include such elements.

Nor does the fact that the optionals were held to be common carriage affect this result. A company may operate part of its business as a public utility and another part as unregulated. (California Manufacturers Assn. v PUC (1954) 42 C 2d 530; Lamb v Cal Water & Tel. Co. (1942) 21 C 2d 33; Marin Water. etc. Co. v Sausalito (1914) 168 Cal 587.)

Findings of Fact

1. When this complaint was filed, complainant was a passenger stage corporation conducting certain sightseeing tours with Japanese narration under its certificate with headquarters in San Francisco. ✓

2. JCT, not a party to this proceeding, is a tour wholesaler doing business in Japan with its headquarters in Tokyo. It markets package tours to tour retailers in Japan, who in turn sell them to ✓

the Japanese public. The tours include air transportation, and airport-to-hotel ground transportation, some meals, accommodations, and, at least in the case of tours to San Francisco and Los Angeles, presold nonoptional round-trip sightseeing bus transportation, with Japanese narration, to various points of interest in California. Such tours and airport transportation are part of the package price and are paid for in yen by the tourist, prior to departure from Japan.

3. Pacifico functions as a "ground operator" for JCT, as explained in the opinion section of this opinion and in Lavelle v Pacifico 4 CPUC 2d 645, 658-660. It has now been certificated for certain bus routes which are not the subject of this complaint.

4. Pacifico's airport-to-city and city-to-airport transportation is reserved exclusively for JALPAK tour members, and neither Pacifico nor JCT promote or offer such transportation in California. This transportation is included in the price of the tour paid for in Japan.

5. Pacifico's airport service from San Francisco International Airport to downtown San Francisco includes a "city tour".

6. All of Pacifico's one-way airport routes begin and end in California.

#### Conclusions of Law

1. None of Pacifico's round-trip sightseeing routes are passenger stage transportation.

2. Pacifico's airport bus service is California intrastate commerce.

3. Pacifico's airport routes are not part of "packages of services".

4. Pacifico's presold airport-to-city and city-to-airport transportation is not common carriage, and in operating such transportation, Pacifico does not perform the service for the public or any portion of it. (PU Code §§ 207, 211, and 216(b).)

5. Pacifico does not require a certificate of public convenience and necessity for the bus transportation which is the subject of this complaint.

IT IS ORDERED that this complaint is dismissed.

This order becomes effective 30 days from today.

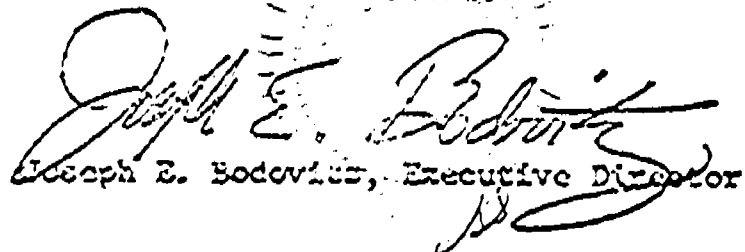
Dated APR 20 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President

VICTOR CALVO  
DONALD VIAL  
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate in the disposition of this proceeding.

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

  
Joseph E. Bodovius, Executive Director



**ORIGINAL**

Decision S3 94 035 APR 20 1983

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Background

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Round-Trip Sightseeing Service - Jurisdiction

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Findings of Fact *When this complaint was filed complainant was*

55 1. ~~Complainant~~ is a passenger stage corporation conducting certain sightseeing tours with Japanese narration under its certificate. <sup>with</sup> ~~It is~~ <sup>S</sup>headquartered in San Francisco.

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