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Decision 83 06 107 JUN 29 1983 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GREYHOUND LINES, INC. for authority to discontinue and abandon a specific route of Route Group 12, San Joaquin, Stanislaus and Merced Counties.

Application 82-05-57
(Filed May 24, 1982)

OPINION AND ORDER DENYING MODIFICATION

By this application, Greyhound Lines, Inc. (Greyhound) sought authority to terminate scheduled service to and from Gustine, Newman, Crows Landing, Patterson, and Westley. The Stanislaus Area Association of Governments (Association) protested and a hearing was held. After hearing, Decision (D.) 83-01-37 authorized the discontinuance. The evidence of need was found insufficient to support three-day-a-week service or detouring Route 99 schedules to serve these communities. The order became effective 30 days from the date of issuance, January 12, 1983.

A pleading entitled Application for Rehearing was filed by the Association on February 11, 1983. Since the pleading was filed one day too late, it was retitled and docketed as a Petition for Modification.

The petition contends that the Commission decision was unlawful since it applied different legal standards than those in effect at the time of the hearing. It claims that at the time the hearing was conducted, existing California law required a showing that an abandoning carrier had attempted to become more competitive.

The petition argued that therefore the Commission should not have applied the procedural or substantive standards adopted by 49 U.S.C. Section 10935 in the federal Bus Regulatory Reform Act (Act). As noted in the decision,

> "This statute gives both substantive and procedural advantages to discontinuing carrier and will greatly limit a state's regulatory powers to prevent the discontinuance of bus routes operating at a loss."

The petition also included a conclusory allegation that there was inadequate evidence to support the Commission's findings.

A third claim of error is that the Commission failed to apply its Rule 17.1 by failing to require an environmental assessment.

Greyhound has not filed a response to the petition.

Federal Legislation

The Act is intended to prevent state regulatory agencies from imposing burdens on interstate commerce by forbidding the discontinuance of unprofitable intrastate bus services by interstate bus carriers. If a state does not permit discontinuance of such a service within 120 days of a properly filed application, the interstate carrier may invoke the jurisdiction of the Interstate Commerce Commission (ICC). The Act gives the ICC the power to override any state order prohibiting discontinuance, unless a protestant proves that the service is economically justified and needed by the public.

Before the Act, California could require a needed service to be continued, even though revenues did not offset expenses. Because Greyhound and similar carriers had limited monopolies, state regulators could compel their other passengers to pay higher fares to subsidize losing operations. The Act now limits our power to use inter-route subsidies to preserve needed services. To keep needed services operating at a loss, the affected citizens must be willing to subsidize a carrier to offset its losses.

Effect of Late Filing

Under the Public Utilities (PU) Code sections quoted in footnote 1,[1] the Association's failure to file a timely petition for rehearing effectively bars it from seeking relief from any of the alleged errors of law. However, § 1708 of the Code authorizes the Commission to reconsider a decision even after it has become final.

A petition under § 1708 calls for an exercise of the Commission's discretion. This discretion, while broad, must be exercised within the limits of certain generally accepted principles.

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[1] "§ 1731. . . . No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 30th day after the date of issuance, ..."

"§ 1732. The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

The discussion which follows explains why modification of D.83-01-037 is not warranted. We should note that the principles cited do not necessarily apply to other types of proceedings such as those in rate cases where the Commission has continuing jurisdiction to render a series of decisions as circumstances change. As noted above, the Commission did specifically reserve some continuing jurisdiction in D.83-01-037. Denying modification does not in any way diminish Association's rights to invoke that continuing jurisdiction.

Discussion

As in most cases where there was a simple adversary relationship between the parties to a commission proceeding, public policy favors the finality of D.83-01-037; a parallel policy requires a strong showing before a litigant can obtain equitable relief from a court's judgment.

> "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice..." (Pico v Cohn (1891) 91 C 129, Olivera v Grace (1942) 19 C 2d 570.)

Consequently, the allegation that this decision is erroneous is not in itself sufficient grounds for relief. The error must have been so severe as to preclude a "fair adversary hearing." (Cf. U.S. v Throckmorton (1878) 25 L ed 93, Flood v Templeton (1907) 152 C 148.) One further requirement is a showing that the aggrieved party has a reasonable chance to prevail if he were given a second opportunity to be heard. (Olivera v Grace (supra), New York Higher Education etc. v Siegle (1979 91 CA 3d 684).)

Economic and Need Issues

It was not error to consider the Act in determining whether Greyhound's service could and should be preserved. However, even if the Association's legal theory were correct and even if a timely

challenge had been filed, a victory on this point would not have changed the ultimate outcome. At best, such a "victory" would simply have forced the applicant to commence a new proceeding which unquestionably would have been governed by the Act. This service could not be maintained on a permanent basis unless the Association can carry the burden of proof specified by the Act, or without offering Greyhound a subsidy. Consequently, modification would be a wasteful and useless undertaking unless there appears to be a substantial likelihood that the Association could prevail not only before this Commission but before the ICC, using the Act's standards. The petition gives us no basis for believing that the Association could make a stronger case on either the economic or need issue if given a second chance.

The demonstrated disparity between revenues and expenses is so great that it would make it difficult to require continuance of a badly needed service even under pre-Act standards. The Association apparently has no evidence to show that the operating deficit could be reduced, that it is willing to subsidize the operation, or that there is any immediate prospect of a subsidy from either state or federal funds.[2]

It is even more unlikely that the Association could make a stronger showing on need. The record already shows that local governments operate and subsidize a Dial-A-Ride Service. Where traffic is as light and sporadic as that exhibited here, a Dial-A-Ride operation has certain inherent advantages over any scheduled service operating large buses. If a second hearing were held, Greyhound possibly would be able to show that Dial-A-Ride service could satisfy the need with:

1. More convenience to patrons (due to its lack of fixed routes and schedules), and

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[2] The decision reserved jurisdiction to consider a restoration of service if a subsidy were offered.

2. Greater economy and reduced fuel consumption (since it operates smaller vehicles and should have less deadhead mileage).[3]

Thus, unless the Association has some very convincing evidence which it has not yet disclosed, there is every reason to anticipate findings that Dial-A-Ride is better able to serve the public need than Greyhound's service and could do so with a significantly smaller subsidy. Such findings would lead to a conclusion that "...a reasonable alternative to...(Greyhound's) service is available." (49 USC § 10935(g)(2)(c).)

Since the petition gives us no reason to believe that the Association could make a stronger showing we could not justify holding a § 1708 hearing on either economic or need issues.

Environmental Issues

Rule 17.1(h)(1)(I) declares that any certificate revocation proceeding which does not ordinarily involve significant environmental effects is exempt from the Rule's provisions.

Since the Association's protest to the application did not allege that this discontinuance would produce significant effects, Greyhound was entitled to assume that the exemption would apply, and that it had no duty to provide support for findings or conclusions on any environmental issue.

Under Rule 17.1(h) the Association should have filed such an allegation within 30 days after it was notified of the application. One filed 30 days after an adverse decision is clearly too late.

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[3] Greyhound might also be able to show that a Dial-A-Ride would be environmentally superior since lower fuel consumption would be expected to lower emissions.

The extraordinary delay in raising the issue is material. If a timely filing had been made, the Commission would have had nearly a year, rather than less than 120 days to satisfy Government Code § 65950. Moreover the Act (supra) gives us an even shorter time period to complete all phases of a bus discontinuance proceeding. An applicant carrier can insist that we complete all phases of a discontinuance proceeding within 120 days or lose jurisdiction to the ICC.

The Association has offered no explanation or excuse for its failure to raise these issues in time to permit orderly consideration. Nor has it offered us any reason to believe that environmental considerations would justify an order, either by this Commission or the ICC, requiring the service to be continued.

<u>Conclusions of Law</u>

We conclude that modification is not warranted in that:

1. There are no grounds to believe that a different outcome is likely if a § 1708 hearing were held on economic or service issues.
2. The petition does not show that:
    a. Significant environmental effects are likely, or
    b. There is any excuse for failure to make a timely claim of non-exemption.

IT IS ORDERED that the petition for modification is denied.

This order becomes effective 30 days from today.

Dated June 29, 1983, at San Francisco, California.

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

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

Joseph E. Bodovitz, Executive Director

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Application of GREYHOUND LINES, INC. for authority to discontinue and abandon a specific route of Route Group 12, San Joaquin, Stanislaus and Merced Counties.	Application 82-05-57 (Filed May 24, 1982)

OPINION AND ORDER DENYING ~~RECONSIDERATION~~ modification

By this application, Greyhound Lines, Inc. (Greyhound) sought authority to terminate scheduled service to and from Gustine, Newman, Crows Landing, Patterson, and Westley. The Stanislaus Area Association of Governments (Association) protested and a hearing was held. After hearing, Decision (D.) 83-01-37 authorized the discontinuance. The evidence of need was found insufficient to support three-day-a-week service or detouring Route 99 schedules to serve these communities. The order became effective 30 days from the date of issuance, January 12, 1983.

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The petition argued that therefore the Commission should not have applied the procedural or substantive standards adopted by 49 U.S.C. Section 10935 in the federal Bus Regulatory Reform Act (Act). As noted in the decision,

The discussion which follows explains why reconsideration of D.83-01-037 is not warranted. We should note that the principles cited do not necessarily apply to other types of proceedings such as those in rate cases where the Commission has continuing jurisdiction to render a series of decisions as circumstances change. As noted above, the Commission did specifically reserve some continuing jurisdiction in D.83-01-037. Denying reconsideration does not in any way diminish Association's rights to invoke that continuing jurisdiction.

Discussion

As in most cases where there was a simple adversary relationship between the parties to a commission proceeding, public policy favors the finality of D.83-01-037; a parallel policy requires a strong showing before a litigant can obtain equitable relief from a court's judgment.

> "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice..." (Pico v Cohn (1891) 91 C 129, Olivera v Grace (1942) 19 C 2d 570.)

Consequently, the allegation that this decision is erroneous is not in itself sufficient grounds for relief. The error must have been so severe as to preclude a "fair adversary hearing." (Cf. U.S. v Throckmorton (1878) 25 L ed 93, Flood v Templeton (1907) 152 C 148.) One further requirement is a showing that the aggrieved party has a reasonable chance to prevail if he were given a second opportunity to be heard. (Olivera v Grace (supra), New York Higher Education etc. v Siegle (1979 91 CA 3d 684).)

Economic and Need Issues

It was not error to consider the Act in determining whether Greyhound's service could and should be preserved. However, even if the Association's legal theory were correct and even if a timely

challenge had been filed, a victory on this point would not have changed the ultimate outcome. At best, such a "victory" would simply have forced the applicant to commence a new proceeding which unquestionably would have been governed by the Act. This service could not be maintained on a permanent basis unless the Association can carry the burden of proof specified by the Act, or without offering Greyhound a subsidy. Consequently, ~~reconsideration~~ would be a wasteful and useless undertaking unless there appears to be a substantial likelihood that the Association could prevail not only before this Commission but before the ICC, using the Act's standards. The petition gives us no basis for believing that the Association could make a stronger case on either the economic or need issue if given a second chance.

The demonstrated disparity between revenues and expenses is so great that it would make it difficult to require continuance of a badly needed service even under pre-Act standards. The Association apparently has no evidence to show that the operating deficit could be reduced, that it is willing to subsidize the operation, or that there is any immediate prospect of a subsidy from either state or federal funds.[2]

It is even more unlikely that the Association could make a stronger showing on need. The record already shows that local governments operate and subsidize a Dial-A-Ride Service. Where traffic is as light and sporadic as that exhibited here, a Dial-A-Ride operation has certain inherent advantages over any scheduled service operating large buses. If a second hearing were held, Greyhound possibly would be able to show that Dial-A-Ride service could satisfy the need with:

1. More convenience to patrons (due to its lack of fixed routes and schedules), and

[2] The decision reserved jurisdiction to consider a restoration of service if a subsidy were offered.

The extraordinary delay in raising the issue is material. If a timely filing had been made, the Commission would have had nearly a year, rather than less than 120 days to satisfy Government Code § 65950. Moreover the Act (supra) gives us an even shorter time period to complete all phases of a bus discontinuance proceeding. An applicant carrier can insist that we complete all phases of a discontinuance proceeding within 120 days or lose jurisdiction to the ICC.

The Association has offered no explanation or excuse for its failure to raise these issues in time to permit orderly consideration. Nor has it offered us any reason to believe that environmental considerations would justify an order, either by this Commission or the ICC, requiring the service to be continued.

Conclusions of Law

We conclude that ~~reconsideration~~ modification is not warranted in that:

1. There are no grounds to believe that a different outcome is likely if a § 1708 hearing were held on economic or service issues.
2. The petition does not show that:
   a. Significant environmental effects are likely, or
   b. There is any excuse for failure to make a timely claim of non-exemption.

A.82-05-57 ALJ/md *

IT IS ORDERED that the petition for ~~reconsideration~~ modification is denied.

This order becomes effective 30 days from today.

Dated JUN 29 1983, at San Francisco, California.

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