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Decision No. 86576

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of MARIN AIRPORTER INC. for a class "B" certificate to operate as a charter-party carrier of passengers. (TCP-44-B)	Application No. 56084 (Filed November 18, 1975; amended March 18, 1976)

William G. Melbern, for Marin Airporter Inc., applicant.
James A. Drucker, for Franciscan Lines, Inc.;
Keith L. Grimm, for K & G Bus Transportation Service, Inc; and Alan T. Smith, for Falcon Charter Service; protestants.
R. E. Douglas, for the Commission staff.

O P I N I O N

Statement of Facts

William G. Melbern (Melbern), doing business as Airport Limousine Service, has been operating a passenger stage service under certification by this Commission since 1967 between various points in Marin County, and the Downtown Airlines Terminal in San Francisco and San Francisco International Airport.[1/]

Melbern has now organized another business entity, Marin Airporter Inc., a California corporation, and by this application, as amended, seeks a Class "B" certificate from this Commission to operate as a charter-party carrier, restricting pickup of charter groups to points in Marin County within 40 miles of Greenbrae, California.

1/ See Decision No. 72925 in Application No. 49459 dated August 15, 1967, Decision No. 79521 in Application No. 50808 dated December 21, 1971, and Decision No. 82003 in Application No. 54195 dated October 16, 1973.

Applicant proposes to operate, in conjunction with his certificated passenger stage service, 3 eleven-passenger vans and 2 twenty to twenty-five passenger buses in this operation. All vehicles are relatively late-model vehicles owned by Melbern. Applicant submitted financial data in his application which purported a net worth of approximately $16,500 as of November 1, 1975.

The application is strongly opposed by Franciscan Lines, Inc. (Franciscan); K & G Bus Transportation Services, Inc., doing business as Western Charter Tours (Western); and Falcon Charter Service (Falcon). All three hold Class "A" charter-party carrier certification. Falcon and Franciscan also hold passenger stage certification. Greyhound Lines, American Buslines, Inc., and Continental Trailways, Inc. also filed in opposition but agreed to withdraw before the hearing when applicant amended its application to restrict pickup of charter groups to Marin County.

The application was supported by a letter from the Marin County Board of Supervisors. At the hearing the staff indicated it had no objection to granting certification.

A duly noticed public hearing was held May 14, 1976 before Examiner Weiss in San Francisco. At conclusion of the hearing the matter was submitted.

Discussion

The Passenger Charter-Party Carriers' Act was passed by the Legislature "...to preserve for the public full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people adequate and dependable transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable demands by providing for the regulation of all transportation agencies with respect to accident indemnity so that adequate and dependable service

by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public."[2/]

Therefore, in order that this Commission may issue certification to an applicant it must find first that "...public convenience and necessity require the proposed transportation service, and that the applicant possesses satisfactory fitness and financial responsibility to initiate and conduct the proposed transportation services, and will faithfully comply with the rules and regulations adopted by the Commission with respect thereto..."[3/]

Historically, this Commission has held that before it will issue a certificate, an affirmative showing must be made of the public convenience and necessity to be served; and that it is incumbent upon an applicant, where the territory is already served as in the situation here, to make an affirmative showing that the transportation facilities offered by existing authorized carriers are insufficient, unsatisfactory, or do not in any other manner meet the requests and demands of the traveling public (T. A. Wilson Co. (1920) 17 CRC 817, 820). The concept being that where there is not a conclusive showing of inadequate and inefficient service, an existing carrier, or carriers, should be afforded protection against a would-be competitor with whom the business available would be divided (Chas. B. Holbrook (1930) 35 CRC 50, 54, and see James T. Agajanian (1931) 36 CRC 621, 625). In 1967, as regards charter-party common carriers, this long-held posture of the Commission was codified into law when the Legislature provided that ". . . The Commission shall not grant a certificate ...unless it can be shown that the existing charter-party carrier of passengers serving the territory is not providing services which are satisfactory to the Commission and adequate for the public."[4/]

2/ Public Utilities Code Section 5352.

3/ Public Utilities Code Section 5375.

4/ Public Utilities Code Section 5375.1.

Thus, if an applicant desires to operate in an area already served by the holder of a certificate, Public Utilities Code Section 5375.1 requires that applicant must establish and the Commission find that the existing carrier (or carriers) is not providing service which is satisfactory and adequate for the public. The section directs the Commission to refrain from issuing more certificates than public convenience and necessity require (Randolph J. Twycross (1968) 68 CPUC 641, 644).

From the foregoing it is clear that the issue raised in this proceeding which must be resolved by the Commission is whether an affirmative showing has been made that the existing charter-party carriers of passengers serving the territory involved in the application, as amended, are not providing services satisfactory to the Commission and adequate for the public. From the evidence adduced we must conclude that applicant has failed to make this showing.

Aside from Greyhound Lines, American Buslines, Inc., and Continental Trailways, Inc., who withdrew as protestants before the hearing, there remain three charter-party carriers who hold Class "A" certificates to operate statewide who presently serve the Marin County territory in which the applicant seeks entry. There was not one iota of evidence to the effect that these carriers are not providing satisfactory or adequate service. All three carriers testified at length as to the extensive business they do in the county. Applicant bases his application entirely on the fact that he would be a "local" carrier. The evidence also tended to show that the protesting three carriers provide equal or better equipped buses, frequently at the same or lesser rates than those applicant proposes. Applicant wants only Bay Area charters while the existing carriers are prepared to offer charters statewide. Applicant was vague when examined on his financial fitness, including maintenance costs - a fact attributable in part to the one-man informal nature of his operation. Although the

hearing in this matter took place six months after the application was filed, applicant was still uncertain about whether he could afford the insurance required of a charter-party operator under Commission General Order No. 101-C. He was seeking quotes from two insurance carriers and when asked about the probable cost of the requisite coverage, he admitted he might be in a financial "bind" to pay the indicated premium. He admitted that he seeks this certification because he needs it to round out his passenger stage operation to make it profitable; stating further that his present rates in that operation are not adequate to meet expenses. But the law looks not to the desires or necessities of the operator, but solely to the fact of whether the public requires the service proposed (Santa Clara Valley Auto Line (1917) 14 CRC 112, 118, and Motor Transit Co. (1923) 23 CRC 1, 3).

We wish to emphasize that qualified applicants for charter-party carrier certificates will be granted certificates by this Commission if they can show that the public will receive improved service through their operations.

Findings

1. The protestants herein hold Class "A" charter-party certificates which grant authority to originate at any point within the State of California and operate to any point within the State of California.

2. The protestants herein operate and originate many charters within the area proposed to be served by the applicant.

3. There are other certificated charter-party common carriers with nearby bases which compete with the protestant carriers in the intrastate charter business originating in Marin County.

4. Applicant has not established his fitness for charter-party service or that public convenience and necessity require the establishment of the proposed service and the issuance of a certificate therefor.

Conclusions

1. Public convenience and necessity do not require the proposed charter-party service.

2. The application should be denied.

O R D E R

IT IS ORDERED that the application herein of Marin Airporter Inc. is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 2nd day of NOVEMBER, 1976.

President

We will file a dissent.
William Symons, Jr.
Vernon L. Sturgeon

Commissioners

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

COMMISSIONER VERNON L. STURGEON, Dissenting

Is this a minor case? It seems like it. It is a denial of authority to applicant for a charter-party certificate. The reason given: lack of fitness. Yet the case is bigger than that, for it represents another in a series of decisions by this Commission which does violence to the law.

The majority engages in the same conduct which has become so familiar to us in its current effort to shove statutory minimum freight rate regulation over the cliff: to look at explicit state statutes, blink hard, and with facile verbalism, re-interpret the language inside out.

The Standards of Regulation for Charter-Party Carriers

In 1961, the Legislature created a unified and explicit regulatory framework when it enacted the "Passenger Charter-Party Carriers' Act", Public Utilities Code § 5351-5419. Section 5375.1 of that act requires that:

> "... The commission shall not grant a certificate to such an applicant unless it can be shown that the existing charter-party carrier of passengers serving the territory is not providing services which are satisfactory to the commission and adequate for the public.' ..."

On the record in this case, the statutory issue of adequacy of existing service was the principal focus of the parties. The Hearing Officer's proposed decision fully discusses the evidence which shows the existing carriers are providing satisfactory and adequate service.

However, the revised decision cut out all reference to this test. Also noted was the newly inserted language on page 5:

> "We wish to emphasize that qualified applicants for charter-party carrier permits will be granted permits by this Commission if they can show that the public will receive improved service through their operations."

The reason for these changes was not quite clear but at the conference of October 19, 1976, it was acknowledged that the author intended to depart from past tests in this area by "liberally interpreting" the statute. To launch such a policy change in a case where nobody forty miles from Marin had sufficient interests at stake to be represented is no way to deal fairly with an entire sector of our transportation industry.

Further, when faced with such explicit legislative directives, the proper approach for an agency bound to uphold the laws is not to seek clever ways of evading them. The appropriate step for those who would have the law changed is to petition the Legislature. Such an approach is recommended in the memorandum of October 26, 1976, from the Transportation Division on the subject of "Reduction of Regulation of Bus Operations". Under their evaluation such "... substantial relaxation of regulation ..." in the charter-carrier field "... will require legislation ..." (page 1).

San Francisco, California
November 2, 1976

William Symons Jr.
WILLIAM SYMONS, JR.
Commissioner

Vernon L. Sturgeon
VERNON L. STURGEON
Commissioner