

ORIGINAL

Decision No. 88852 MAY 16 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GOODALL'S CHARTER BUS SERVICE,
INC., a corporation,

Complainant,

vs.

Case No. 10482
(Filed January 4, 1978)

MARR-LORR, INC., a corporation,
doing business as Dolphin Charter
Company, RALPH W. RICHEY,
GARY L. EDWARDS and EUGENE G.
WARD,

Defendants.

James H. Lyons, Attorney at Law, for
Goodall's Charter Bus Service, Inc.,
complainant.

William M. McCarty, Attorney at Law,
for Marr-Lorr, Inc., dba Dolphin
Charter Company, and Ralph W. Richey,
Gary L. Edwards, and Eugene Ward,
defendants.

John E. deBrauwere, Attorney at Law,
for George D. McAfee, dba Consolidated
Services, interested party.

Barbara Weiss, for the Commission staff.

O P I N I O N

Complainant Goodall's Charter Bus Service, Inc. (Goodall) is a passenger stage corporation. Its passenger stage operations are conducted pursuant to authority granted in D.88206 dated December 6, 1977 in A.57171. Said decision authorizes the transportation of passengers in a home-to-work service between points in San Diego County and the Southern California Edison Nuclear Generating Plant site located at San Onofre. Goodall's verified complaint alleges that

Defendant Marr-Lorr, Inc., dba Dolphin Charter Company (Dolphin), has a Class A charter-party certificate but has no authority to operate as a passenger stage corporation; that Dolphin is operating three buses driven by Ralph W. Richey (Richey), Eugene G. Ward (Ward), and Gary L. Edwards (Edwards) over Goodall's certificated routes to San Onofre, said routes being the Mira Mesa-Oceanside Route No. 5, San Diego Route No. 4, and College Grove Express Route No. 2; that Richey and Ward formerly drove for Goodall; that Dolphin enticed both drivers away from Goodall by the offer of more money; that because the drivers also work at San Onofre they are the primary contact with the other employees at San Onofre who utilize the home-to-work bus service; that Goodall notified the Commission staff of Dolphin's illegal operations; that the staff advised Dolphin to cease and desist its illegal operations; that Dolphin is totally ignoring the staff letter; that the situation is acute; and that unless Dolphin, Richey, Ward, and Edwards are ordered to immediately cease and desist the illegal operation Goodall may well lose its patronage on the other line which it is operating to San Onofre. Goodall seeks an immediate cease and desist order against each and every defendant.

Pursuant to Rule 13 of the Rules of Practice and Procedure, the Administrative Law Judge required defendants to file an Answer by January 23, 1978. On January 23, 1978 defendants filed a Motion to Dismiss or, in the alternative, a Motion to Waive Filing of an Answer. An Answer was filed at the hearing on January 26, 1978.

Defendants admit that Dolphin is operating buses driven by Richey, Edwards, and Ward; that defendants are aware of D.88206; that Dolphin is operating in violation of Sections 1031 et seq. of the Public Utilities Code; that Richey and Ward formerly drove for Goodall; that Dolphin offered them more money; and that both drivers work at San Onofre and are the primary contacts with the riders. Dolphin specifically denies that it is operating a bus within one mile from the origin point of Goodall's College Grove Express Route No. 2; that it is operating in defiance of the Commission; that it has acknowledged that it needs a

certificate of public convenience and necessity by its filing of an application for such on December 20, 1977; and that it is totally ignoring the warning of the Commission's staff. In all other respects Dolphin alleges a general denial. For affirmative defenses Dolphin alleges that it twice attempted to file applications for a certificate of public convenience and necessity in July 1977 and subsequent thereto; and that because the first application was lost, through no fault of Dolphin, and the second application was deficient, and a third application was filed on December 29, 1977, which is presently awaiting action. A second affirmative defense is alleged to the effect that Goodall's application for a cease and desist order was denied by the Commission and therefore Dolphin has not defied the Commission. A third defense raised is that Goodall's drivers are also primary contacts with the employees at San Onofre.

After duly published notice, two days of hearing were held on January 26 and 27, 1978 before Administrative Law Judge Bernard A. Peters in San Diego. The matter was submitted on the latter date subject to the filing of concurrent briefs due 20 days after the filing of the last transcript. This date was subsequently extended one week. The briefs have been timely filed and the matter is ready for decision.

The Issues

1. Whether Dolphin is conducting operations as a passenger stage corporation over the routes of another certificated carrier without proper authority?
2. If Dolphin is found to be operating without proper authority, are there mitigating factors to be considered?
3. If there are mitigating factors, should Dolphin be ordered to cease and desist its operations?

The Evidence

The record shows that Goodall operates as a charter-party carrier of passengers pursuant to a grandfather certificate and as a passenger stage corporation pursuant to authority granted by D.88206 dated December 6, 1977 in A.57171. Goodall first commenced operations April 16, 1956 in the charter and school bus business. It has grown to a fleet of approximately 60 buses (Exh. C-5). The passenger stage operation commenced on October 18, 1976 in response to requests from several employees working at San Onofre. Because of the increased demand for this service, Goodall filed its application for a certificate of public convenience and necessity on March 24, 1977. By D.88206 of which we take official notice, it was granted authority to operate over seven routes to San Onofre (Exh. C-2). Tariffs and timetables were filed immediately. Operations were commenced and continued on all seven routes until October 11, 1977. During the week prior to October 10, 1977, Goodall's former drivers, Richey and Ward, were approached by Dolphin and offered \$200 per week (double the amount Goodall was paying them) to drive for Dolphin. On October 10, 1977 Richey and Ward showed up at the pickup points on Goodall's Routes Nos. 4 and 5 with Dolphin buses. They picked up all the passengers even though Goodall's buses were there. Goodall attempted to service these routes again on October 11, 1977 with the same experience as on the 10th. Goodall then stopped providing service since it appeared to be an exercise in futility and to avoid altercations between drivers and passengers. On or about November 11, 1977 Dolphin started service at a point (Jamacha Road at Sweetwater Road in Spring Valley) near the start of Goodall's Route No. 2, making the same stops on the way to San Onofre as on Goodall's Route No. 2. Approximately 40-43 passengers per day patronized Route No. 2. After Dolphin started in this area, the passenger count dropped to 33-36 per day. With respect to Routes Nos. 4 and 5, during the week prior to October 10, 1977, Route No. 4 produced revenues of \$1,030 and Route No. 5, \$582 per week. These routes are the best revenue producers of the seven routes and subsidize some of the lesser producing routes.

Goodall stands ready to immediately reinstate service on Routes Nos. 4 and 5 if a cease and desist order is issued against Dolphin. Testimony was also elicited that there is not enough business to support three operators in the field and that there is excess capacity in equipment among the two operators presently authorized to provide service to San Onofre.

Dolphin's president, Ms. Laliberte, was called by Goodall as an adverse witness under Section 776 of the Evidence Code. She admitted that Dolphin enticed Goodall's drivers to work for her company by offering double their weekly pay; that said drivers would bring Goodall's riders with them; and that Dolphin is operating without the required certificate, but denies that such operation is in deliberate defiance of the staff's letter (Exh. C-6) which states that said operations should be discontinued until a certificate is obtained. It is also admitted that Dolphin's Routes Nos. A, B, and C in the application correspond to Goodall's Routes Nos. 4, 5, and 2. Ms. Laliberte admitted that she attended the prehearing conference on Goodall's application for a certificate and that both Goodall and George D. McAfee (McAfee) dba Consolidated Services were granted certificates to serve San Onofre. She stated that in connection with her application which she attempted to file three times, she talked to several people at the Commission and was told that she could continue operating until her application was acted upon; that she believes she is not in defiance of the staff's letter because she should be afforded the same treatment as Goodall and McAfee received. Ms. Laliberte also pointed out that if a cease and desist order is issued it would jeopardize her Small Business Administration (SBA) loan of \$130,000 on which the monthly payments amount to \$2,200. This loan was obtained August 6, 1976 in connection with the charter operations after the corporation was formed. Ms. Laliberte stated that she was originally contacted in November of 1975 by a worker from San Onofre to start bus service there; but because she was so busy with obtaining the SBA loan, nothing was done about it at that time. It was only after the bankruptcy of two firms with which the corporation had charter contracts that service to San Onofre was started

In July 1977. It would take four to six months to build up the charter business again to where she could handle the SBA loan payments. The buses used in the San Onofre operation are also used for charter purposes on the weekends.

Dolphin presented Mr. Young, a vice president of Dolphin, who had been in the position only three months, but had worked with Dolphin during July 1977. His work at that time consisted of a charter contract with Dolphin under the name of Troubleshooters, Inc., (Troubleshooters). Young arranged a lease of a Dolphin bus, with driver, to provide home-to-work service to San Onofre. The operation was conducted at a loss for approximately three months at which time the service and contract were terminated. Troubleshooters made a down payment of about \$1,000 on the lease, but made no other payments to Dolphin. During this period Troubleshooters attempted to file an application for a certificate of public convenience and necessity to serve San Onofre. Young believed that perhaps Dolphin joined in this application.

Richey, Ward, and Edwards were called by Dolphin. Richey and Ward affirmed the fact that they had been former drivers for Goodall and they left to work for Dolphin because of the offer of more money. Ward stated that he is employed by Bechtel Power Corporation as a pipe fitter at San Onofre; that he was approached by Dolphin during the week prior to October 10, 1977; that he notified the riders on Goodall's bus that he would be driving a Dolphin bus the following week; and that he transferred to Dolphin because he believed he would get a better bus, as well as more money. Ward initially operated Dolphin's bus over Goodall's Mira Mesa route until about November 10, 1977, making all of the same stops as when he worked for Goodall. Ward then started a route for Dolphin which originated at Jamacha and Sweetwater Roads in Spring Valley because he lived in the area and could bring the bus home during the week. He started this route with six riders, three of which were Goodall's, the balance apparently being Consolidated Services (Consolidated) riders. At present, according to Ward, there are 17 buses serving San Onofre, of which 14 are from the San Diego area consisting of three from Dolphin, three from Consolidated, and seven from Goodall. Ward also stated that

he would not return to ride with Goodall if Dolphin's operations are stopped, nor did he believe his riders would, unless the condition of Goodall's buses improved.

Edwards stated that he is employed at San Onofre as a pipe-fitter. He started driving for Dolphin on November 14, 1977 when Ward started another route for Dolphin; that initially he was paid \$100 per week and is now being paid \$150 per week. He operated Dolphin's bus over Goodall's Mira Mesa route carrying an average of 35 passengers daily. Edwards stated that he turns down an average of 10 passengers weekly; that his bus has a capacity of 38 passengers; and that at the time he started driving for Dolphin, 26 of the riders were former Goodall passengers, but this number has dropped to 19 because of layoffs at San Onofre.

Richey stated that he is employed by Bechtel Power Corporation as an ironworker at San Onofre. He formerly drove for Goodall, but left and started driving for Dolphin on October 10, 1977 upon being offered double his Goodall salary. At the time he left Goodall he was carrying 34 passengers. These passengers transferred to Dolphin when Richey left Goodall. At the present time he is carrying 15 former Goodall passengers. Initially he operated over the same route and stops as he formerly did when he worked for Goodall. Richey expanded the route to a new pickup point at the Fedmart located at Euclid and Plaza Boulevards in National City. It is Richey's belief that the riders belong to him rather than to his employer since he is the primary contact with them and develops the routes. It is also his belief that his present riders would not use Goodall's services if Dolphin is required to cease its operations, but would resort to carpooling or use vans.

Dolphin called a member of the Commission's staff as one of its witnesses for the purpose of explaining Exhibit C-6. The witness pointed out that Exhibit C-6 is a more or less standard form of letter frequently used to advise carriers of illegal operations and pointing out that such operations should be discontinued until proper authority has been granted. The letter also points out that if the carrier does not abide by the instructions, such action could lead to a formal cease and desist order issued by the Commission.

Another witness on behalf of Dolphin, David Foss, Ms.

Maliberte's son, testified that he had contacted Goodall's drivers to persuade them to go to work for Dolphin, but he denied that he offered them \$200 per week salary; that he drove one of Dolphin's buses to San Onofre for a week in September 1977; and that this was during the period Troubleshooters was leasing the bus.

Dolphin also presented McAfee as a witness. McAfee testified that he was granted a certificate between the same points as Goodall by D.88206; that five of his drivers went to work for Goodall; that he was paying these drivers \$80 per week; that one of the drivers said Goodall would pay him \$100 per week; that he lost a considerable number of passengers to Goodall when the drivers left to go to Goodall, even though he continued to service the routes; that he now operates over three routes, where previously he had five; that he has nine buses in his fleet; that he has not lost many riders to Dolphin; that Dolphin's routes also parallel or operate in the same vicinity as his routes, as do Goodall's; that in a sense the drivers do have control over the passengers, but generally the passenger is more interested in getting to and from work on time; that it is for more money that the drivers change employers; and that in his opinion, there is insufficient business for two operators.

In rebuttal, Goodall's witness pointed out that its buses are maintained by the company every night, except two which are on the so-called country runs; that the buses used in the home-to-work operation are used exclusively for this purpose and not used in charter service; that the home-to-work riders place their names on the bus seats and often leave their hard hats in the bus overnight; that Goodall's stops on its routes are close to the same stops made by McAfee; and that it is his belief there is insufficient business to support three carriers in the field because the hiring at San Onofre is now at its peak as they are now in the third phase of construction there; and that Goodall and McAfee presently have excess capacity and can and will handle additional passengers.

Discussion

Dolphin argues that no cease and desist order should issue. It claims that such an order is in the nature of equitable relief and for a claimant to obtain such relief it must come into court with clean hands. It argues that both Goodall and McAfee operated without proper authority initially and were granted certificates later. Therefore, Dolphin argues, it should be given the same opportunity. Dolphin misses the point in its argument. This is not a matter of equity, but rather of upholding the law. Dolphin has an adequate remedy at law which is to file an application for the proper operating authority. This Dolphin has done. To argue that Dolphin should be given the same opportunity as Goodall begs the issue. The circumstances are not the same. At the time Goodall started, there was no home-to-work service available to San Onofre. There was a need and demand from the public for such service which was met by Goodall until such time as a certificate could be granted. The circumstances under which Dolphin started its San Onofre operation are entirely different. The public was already being served by two authorized carriers; there was no emergency which required that a third carrier start without authority; and Dolphin was fully aware, and admits, that it needed proper authority for the service. Furthermore, it was put on notice by the staff to cease and desist its unlawful operation until such time as proper authority was obtained, but has failed to abide by such instruction. Thus, even if this were an equitable matter to be decided in accordance with the rules of equity, Dolphin would fail since it does not come into court with clean hands.

Dolphin's theory that it should be able to operate under the principles of a free enterprise system also misses the point. It overlooks the fact that for-hire transportation over the public highways is a regulated industry subject to certain statutory conditions of entry and operation, which are not present in the private sector where the principles of free enterprise are applicable.

Dolphin's argument that if it is ordered to cease its San Onofre operation such action will jeopardize its SBA loan. This argument is without merit. The SBA loan has no relationship to the facts of this matter. The loan was taken out for an entirely different purpose. The fact that the purpose for which the loan was granted failed is not justification for the proposition that we should overlook the statutory requirement of Section 1031 of the Public Utilities Code^{1/} and permit a violation of law to continue.

It is uncontested that Dolphin is conducting operations as a passenger stage corporation without the requisite authority. It is also uncontested that Dolphin is operating over and along the same routes for which Goodall holds a certificate of public convenience and necessity. It follows, therefore, that the answer to the first issue must be in the affirmative.

^{1/} "1031. No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any passenger stage corporation as to the fixed termini between which, or the route over which, it was actually operating in good faith on July 29, 1927, in compliance with the provisions of Chapter 213, Statutes of 1917, nor shall any such certificate be required of any person or corporation who on January 1, 1927, was operating, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing buses on a continuous sight-seeing trip with one terminus only. Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission."

Whether there are mitigating factors to be considered in the determination of the second and third issues has been partially answered in our discussion above. The only other mitigating factors to be considered involve the question of when did Dolphin actually commence its San Onofre operations and whether the fact that it attempted to file an application several times, without success, should weigh in its favor. Ms. Laliberte's statement that she was contacted by a potential rider in November of 1975 to start operations to San Onofre is a self-serving statement without any foundation in fact. Insofar as having started service in July of 1977 before Goodall received its certificate is concerned, Dolphin's own witnesses present conflicting testimony. Ms. Laliberte stated that Dolphin actually started its San Onofre operation in July of 1977. Mr. Young, Dolphin's vice president, testified that it was Troubleshooters who started the operation by leasing a bus with driver from Dolphin and continued operations for approximately three months at a loss. Mr. Young's version of the facts appears to be more credible. It ties in with other testimony that Goodall's drivers were enticed with offers of double their pay to come over to Dolphin during the week prior to October 10, 1977 which would coincide with the time Troubleshooters ceased operations and payments on the lease to Dolphin. It is obvious that Dolphin was desperate at this point in time, having lost two charter contracts and now the bus lease of one of its buses, and resorted to the acquisition of ready-made business by enticing Goodall's drivers into its employ knowing that in all probability the passengers would follow the drivers. While such activity may be condoned in the private sector under the guise of free enterprise, it cannot be condoned in a regulated activity where it is contrary to the statutory requirement of entry into the field. While Dolphin would have us believe that these are mitigating factors militating against the issuance of a cease and desist order, we are not convinced. Therefore, we shall require Dolphin to cease and desist its unlawful operations unless and until it has received proper operating authority.

Findings of Fact

1. Goodall is a passenger stage corporation performing home-to-work transportation of workers at San Onofre under a certificate granted by D.88206.

2. Dolphin is a charter-party carrier of passengers conducting passenger stage operations without proper authority over and along the routes for which Goodall has been granted a certificate.

3. Dolphin admitted that it needs a certificate of public convenience and necessity for its San Onofre operations.

4. Dolphin admitted that it is operating over and along Goodall's routes.

5. Dolphin admitted that it enticed Goodall's drivers to work for it by offering double the salary Goodall was paying.

6. Richey, Ward, and Edwards are employed as drivers for Dolphin's San Onofre operation. As such, they are the instrumentalities of Dolphin and are not the entities against which a cease and desist order should issue.

7. The evidence with respect to the size of the market and excess capacity of the carriers is not relevant to the issues in this case. Such evidence would be material and relevant in Dolphin's pending application.

8. There are no mitigating circumstances which militate against ordering Dolphin to cease and desist its unlawful operations.

9. Dolphin should be ordered to cease and desist its San Onofre operation.

Conclusion of Law

Dolphin's San Onofre operation is in violation of Section 1031 of the Public Utilities Code.

ORDER

IT IS ORDERED that:

1. Marr-Lorr, Inc., doing business as Dolphin Charter Company, shall cease and desist from performing passenger stage home-to-work service to and from points in San Diego County and San Onofre until it has obtained the proper authority therefor.

2. In all other respects the requested relief is denied.

The effective date of this order is the date hereof.

that Dated at San Francisco, California, this 16th day of MAY, 1978.

Robert Bateman
President

William Sproun, Jr.

Gregory L. Sturgeon

Richard W. Hooley

Oliver T. Delaney
Commissioners