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Decision No. 89069 JUL 11 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION
OF STUART ALAN MESSNICK, dba THE
CO-ORDINATORS, FOR A CERTIFICATE
OF PUBLIC CONVENIENCE AND NECES-
SITY TO OPERATE A SIGHTSEEING
TOUR SERVICE BETWEEN LOS ANGELES,
CALIFORNIA AND SAN YSIDRO,
CALIFORNIA.

Application No. 55965
(Filed September 29, 1975)

Stuart Alan Messnick and Ronald Lee
Messnick, for applicant.
W. L. McCracken, Attorney at Law, for
Greyhound Lines, Inc.; and Knapp,
Stevens, Grossman & Marsh, by
Warren N. Grossman, Attorney at Law,
for The Gray Line Tours Company;
protestants.
Thomas P. Hunt, for the Commission staff.

O P I N I O N

On September 29, 1975 Stuart Alan Messnick, dba The Co-Ordinators (Messnick), applied for a passenger stage certificate of public convenience and necessity to operate a sight-seeing tour service between Los Angeles and San Ysidro, California. The service proposed is a one-day round-trip sight-seeing tour with pickups at hotels in the metropolitan Los Angeles area (and other areas set forth in the application). After pickup the bus tour proceeds southerly to San Ysidro, where the passengers take a tour of the city of Tijuana, Mexico. The return route would include a rest stop at San Ysidro, and a return to the hotels of origin.

Public hearings were held on the application before Administrative Law Judge Charles E. Mattson on March 8, 9, and 10, 1977 at Los Angeles, California. Counsel appeared for protestants Greyhound Lines, Inc. (Greyhound) and The Gray Line Tours Company (Gray Line). Concurrent opening briefs were mailed May 4, 1977 and concurrent reply briefs were mailed May 18, 1977 on behalf of the applicant and both protestants.

Applicant's Present Operations

By Decision No. 84186 dated March 11, 1975 in Application No. 54963 Messnick was granted a passenger stage certificate of public convenience and necessity to operate a sightseeing tour service between certain points in Buena Park-Anaheim-Santa Ana to the Mexican border at San Ysidro. The history of Messnick's operations is set forth in Decision No. 84186 and will not be repeated herein.

Under his present passenger stage authority Messnick operates a one-day sightseeing and shopping tour to Tijuana, Mexico. As the application states, Messnick now requests authority to operate an identical sightseeing tour from all hotels in the metropolitan Los Angeles area, West Los Angeles area, Beverly Hills, and the Hollywood-Universal City areas. The proposed pickup areas are set forth in Exhibit H to the application.

At the time of hearings the applicant's advertising brochure in use was Exhibit 10. Witnesses on behalf of both the applicant and protestants described in detail the present tour operations of applicant. Messnick will pick up from all significant major hotels in the Santa Ana, Anaheim, and Buena Park areas. If necessary, passengers are collected at a terminal at 304 Katella Way, the Town Tour Fun Bus terminal at the Continental Trailways terminal building, Anaheim, California. Exhibit 9, an earlier brochure of Messnick (no longer used) indicated that the one-day sightseeing and shopping tour would originate at The Box Office, 1650 South Harbor Boulevard, Anaheim, California.

A representative tour is set forth in Exhibit 33, an exhibit presented by a protestant, Gray Line as follows:

The witness sponsoring Exhibit 33 reported that after purchase of a ticket at the terminal located at 304 Katella Way, the bus departed the terminal with 35 passengers, a driver, and a tour escort. The bus entered the freeway and proceeded southbound to San Juan Capistrano. The bus departed the freeway and drove around the block at the San Juan Capistrano Mission, viewing the mission and then continued back onto the freeway southbound.

The bus departed the freeway at San Clemente and drove past the entrance to the Richard M. Nixon estate. The bus continued back onto the freeway southbound. The bus departed the freeway at Solana Beach for a brunch stop at the Jolly Roger Restaurant. After lunch, the tour group departed the restaurant and continued their bus trip southbound on Interstate Highway 5. The bus turned off the freeway at the commercial vehicle exit for a border crossing. The bus stopped on the American side and the tour guide walked the group across the border where they met a Mexican bus.

The Mexican bus took the tour group into Tijuana and dropped the group off. The tour guide accompanied the group and told them to meet again at the drop-off point in Tijuana at 3:10 p.m. At 3:15 p.m. in Tijuana the tour group met the same Mexican bus and was taken back to the border. They departed the bus on the Mexican side of the border, walked through customs, and the same Co-Ordinators tour bus was waiting for them on the American side. They proceeded northbound on Freeway 805 and joined Freeway 5 north of La Jolla, continued northbound to Hadley's Orchards in Carlsbad where the group stopped for a snack. They departed Hadley's and continued northbound to Anaheim, dropping people off at the first hotel approximately 6:30 p.m. and returned to the originating terminal at 7:00 p.m.

The Co-Ordinators bus and driver stop at San Ysidro on the American side of the International Border. The tour groups depart the Co-Ordinators' vehicles, walk across the International Border into Mexico, and board Mexican buses for transportation into Tijuana. The tour guide accompanies the tour group throughout the entire day, unless members of the tour group wish to depart the group while in Tijuana for shopping or sightseeing. Co-Ordinators has authorization from Mexican authorities to take tour groups into Tijuana, Mexico, and has an arrangement with the Mexican bus company whereby it pays the Mexican bus company for the tour groups transported into Tijuana from the border and return. Payment is made by The Co-Ordinators to the Mexican bus company on a ten-day cycle for the transportation furnished in Mexico. Customers who purchase a ticket for the sightseeing and shopping tour are promised a very complete visit to Tijuana, Mexico, and the price of their ticket includes the transportation into and out of Tijuana.

Applicant's Request

Applicant testified that he provides service to the major hotels in the Anaheim and Buena Park area where there are approximately 10,000 hotel rooms. His present application, to serve the Los Angeles area, is a request for a service area where there are in excess of 20,000 hotel rooms. At the date of hearing applicant testified that he owned five buses. When he needs additional equipment he leases buses. When leasing buses he provides his own tour guides. If his request for additional service area was granted, he intended initially to add two large buses and two mini-buses for the expanded operations. His plan is to establish a terminal operation at the Ambassador Hotel for the Los Angeles service area, and originate tours to Tijuana from the Ambassador Hotel.

The applicant testified that his earlier operations from the Orange County areas had been successful and that, in fact, he has exceeded the projected passenger operations which he had presented at hearings on his earlier application (Application No. 54963). In his judgment the passenger counts in the requested service area would be at least equal to or greater than those with which he currently operates. He is requesting the additional service area because his investigation has indicated that service is not, in fact, being provided and that a need exists for the requested service (a one-day sightseeing tour).

Applicant's personal financial statement attached to the application indicated a net worth of \$230,461, including cash on hand in excess of \$50,000. Applicant introduced into evidence a letter from the manager of Barclay's Bank, Anaheim, dated March 4, 1977 stating the bank has maintained commercial accounts and credit accounts for Stuart Alan Messnick, Co-Ordinators Travel, and that the account and credit experience has been entirely satisfactory. The letter states that the bank is prepared to help applicant with financial needs he may have in expansion of his business into the Los Angeles area, dependent upon the financial data supplied at the time of such request.

Applicant presented pro forma profit and loss statements for his proposed sightseeing tours from Los Angeles to San Ysidro. The proposed rates are \$22.50 for adult passengers and \$20.50 for children under 12 years old (round-trip service). Applicant proposes that the tour shall be operated for a minimum of eight passengers. The pro forma estimates assumed ten adult passengers on a 14-passenger mini-bus and 25 adult passengers on a 49-passenger coach. Applicant estimated that he would have a gross profit before taxes of \$11.40 on the mini-bus and \$121.50 for the 49-passenger coach.

Applicant presented three witnesses experienced in the tour business in support of his request. The record indicates that all three witnesses were experienced in marketing sightseeing tours and all three expressed the opinion that a one-day bus tour from the Los Angeles area to Tijuana would be an attractive tour to offer tourists, and that there was a potential for marketing such a tour.

The Jurisdictional Issue

Protestants Greyhound and Gray Line contend that the California Public Utilities Commission lacks jurisdiction over the proposed passenger bus service and proper jurisdiction lies with the Interstate Commerce Commission (ICC). Protestants have raised a jurisdictional question which was not presented in the proceedings in Application No. 54963 which resulted in Decision No. 84186 dated March 11, 1975.

The basic claim of protestants is that Part II of the Interstate Commerce Act, Section 202(a) (49 U.S.C. Section 302(a)), vests regulatory jurisdiction over the transportation of passengers in foreign commerce with the ICC (references will be to the Interstate Commerce Act, Part II). Section 203(a)(11) defines "foreign commerce" as commerce moving by motor vehicle between any place in the United States and any place in a foreign country. Section 202(b)(1) provides that nothing in the part shall be construed to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

The protestants in their opening briefs presented a detailed review of decisions of the ICC, the courts assigned the responsibility of reviewing decisions of the ICC, and decisions of the California Public Utilities Commission regarding the question of whether operations conducted wholly within one state are interstate or foreign in

nature. We have reviewed the authorities set forth in the briefs in detail. We conclude that applicant's operations involve the transportation of passengers in foreign commerce within the provisions of the Interstate Commerce Act.

The applicable rule is that if a passenger carrier is operating solely within one state and engages in through ticketing or common arrangements with connecting out-of-state carriers he is engaged in interstate commerce. On the evidence before us it is clear that while applicant's passenger carrier operations are conducted wholly within the State of California, the tour operation includes a common arrangement and through ticketing with connecting Mexican passenger carriers. The operations of the applicant are clearly distinguishable from operations involving motor carrier passenger transportation between points in a single state where the intrastate carrier sells no through tickets and has no common arrangements with connecting out-of-state carriers. In this latter situation, the ICC has not deemed the fact that the intrastate carrier may drop passengers near a state or international border, and that such passengers intend to cross a border and continue their travel, to be controlling. Greyhound v Allen, 99 MCC 1 (1965); see also Portland Airport Limousine Service, 118 MCC 45 (1973).

While we agree with the contentions of the protestants on the jurisdictional question as set forth above, we do not accept certain of the arguments presented on this issue. Protestants contend that the California Commission has only jurisdiction to certificate a service which is confined to intrastate commerce, and since applicant's operations involve foreign commerce the agency possessing exclusive economic jurisdiction is the ICC. Protestants further argue that if the California Commission determines that a carrier is conducting foreign operations, it should refuse to extend jurisdiction over them and defer to the ICC and the uniform national regulation of commerce with other nations.

It would appear more reasonable to regard a one-day sightseeing tour operation involving foreign commerce in southern California to be largely a matter of State concern. No apparent reason exists to assume that one-day sightseeing tours to Tijuana, Mexico, from points in southern California involve matters requiring uniform national regulation of commerce with other nations. Part II of the Interstate Commerce Act appears to authorize an appropriate procedure for intrastate carriers desiring to conduct such sightseeing tours. Section 206(a)(6) of the Act provides, in part, as follows:

"(6) On and after the date of the enactment of this paragraph no certificate of public convenience and necessity under this part shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. Such operations in

interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Such rights to engage in operations in interstate or foreign commerce shall be evidenced by appropriate certificates of registration issued by the Commission which shall be valid only so long as the holder is a carrier engaged in operations solely within a single State,..."

[49 U.S.C. Sec. 306(a)(6)]

Under the provisions of Section 206(a)(6) set forth above, an applicant operating within a single state can request authorization for operations in foreign commerce from the local state commission. An applicant who follows the applicable procedures, which include prior notice in the Federal Register and a review of the state proceeding, may obtain a certificate of registration from the ICC. (See Sheridan-Indianapolis Bus Line, Inc. Extension, 92 MOC 285.)

The difficulty, of course, in the case before us is that applicant has failed to comply with the applicable provisions of the Interstate Commerce Act. We find that applicant could not reasonably have been aware of the necessity of obtaining authority to conduct his intrastate operations under the provisions of the Interstate Commerce Act. Applicant's operations were in fact authorized by certificated authority issued by our Decision No. 84186 dated March 11, 1975. It is not unreasonable for applicant to conclude that in view of his grant of authority to operate a passenger stage entirely within the State of California, in conjunction with authority from the State of Baja, California, to run a shopping tour in Tijuana, that his present application for an intrastate certificate was adequate.

Public Convenience and Necessity

The arguments presented by protestants on the question of public convenience and necessity appear to rest on rather technical legal grounds. Applicant has the burden to establish that public convenience and necessity require the proposed service. Protestants argue that only three independent witnesses were presented by applicant on this issue, and that the testimony is insufficient to establish that a public need exists for the proposed tour service.

Exhibit 39 is an ICC grant of authority to Gray Line to operate round-trip sightseeing and pleasure tours from Los Angeles and Orange Counties, California, to the port of entry (located in California) along the United States-Mexico Boundary. (ICC Initial Decision, Docket No. MC-141460 (Sub-No. 1) dated February 16, 1977.) The decision finds that the present and future public convenience and necessity require the service.

Late-filed Exhibit 42 is a verified statement (dated January 4, 1977) by Gary Ballinger on behalf of applicant Gray Line, filed in the proceedings before the ICC. Mr. Ballinger's statement in support of the ICC application of Gray Line states, in part:

"Since we discontinued our operations in August of 1971, Los Angeles' tourist industry has changed. Today, large numbers of tourists are coming to Los Angeles from the Orient, Australia, New Zealand and Canada. These tourists have a greater interest in visiting Mexico than previous tourists. We have discussed our proposed sight seeing operations with travel agents, other bus companies and with companies in Tijuana, Mexico itself. Hotels and motels within Los Angeles and Orange Counties, California, receive numerous requests by tourists for sight seeing trips to and from Tijuana, Mexico. Currently, no such sight-seeing operation is available."
(Late-filed Exhibit 42, pages 7-8.)

We can conclude from the fact that Gray Line undertook to obtain a certificate of public convenience and necessity from the ICC that Gray Line found a public need existed for such service. In view of the evidence presented to the ICC by Gray Line, it is not surprising that Gray Line's argument regarding public convenience and necessity appears to concede that a public need exists, and argues that Gray Line will meet that need under its grant of ICC authority.

The evidence is that applicant proposes a one-day sightseeing tour from points in Los Angeles to Tijuana, and witnesses experienced in the travel tour business are prepared to sell such one-day round-trip tour service. It is difficult to see what additional information would be available to the applicant. The mere presentation of a parade of additional travel agents testifying that such a tour would be attractive to the public would appear to merely burden the record.

Applicant's Fitness

A major contention of protestants is that applicant's operations under his existing authority are conducted in violation of express restrictions in that grant of authority. Moreover, protestants allege that applicant has clearly conducted operations in violation of the Public Utilities Code and the rules and regulations of the Commission.

Decision No. 84186 dated March 11, 1975 granted passenger stage authority to Messnick to transport passengers between the points named in the certificate in Buena Park, Anaheim, and Santa Ana, on the one hand, and San Ysidro, on the other hand. The certificate provided that no passengers shall be transported except those having point of origin at one of the following points:

- (1) LeBaron Hotel and Holiday Inn, Buena Park

- (2) Sheraton Motor Hotel, Disneyland Hotel, Quality Inn Hotel, Hyatt House Hotel, The Box Office, and Howard Johnson's Hotel, Anaheim

- (3) Saddleback Inn, Santa Ana

Ordering Paragraphs 6 and 7 of Decision No. 84186 clearly provide that round-trip single-day fares only shall be offered from the points listed in Buena Park, Anaheim, and Santa Ana areas to and from San Ysidro. Passengers are not to be picked up or off-loaded at any point not specified in the attached certificate. The attached certificate of public convenience and necessity sets forth the points listed above. As protestants point out, applicant has expanded his service to pick up from hotels along his existing routes in Buena Park, Anaheim, and Santa Ana. Applicant's testimony is that he phoned a Public Utilities Commission staff member in Los Angeles and was advised that he could pick up from these service areas.

Ordering Paragraph 8 of Decision No. 84186 provides that applicant shall revise his publicity and advertising so that it fairly describes the limited nature of stops, visits, or stops at various intermediate locations as set forth in the discussion section of the opinion. Any advertising material not in compliance with the order was to be discarded prior to the commencement of operations authorized by the decision. Ordering Paragraph 9 provided that advertising should indicate that scheduled service is subject to cancellation if there are less than eight passengers.

The discussion within the decision itself states that "One is entitled to assume that a 'tour' means more than the opportunity to view certain places briefly without alighting from the bus, or, as in the case of the San Onofre generator, briefly debarking from the bus to take pictures of the plant from a distance. Messnick will be ordered to revise

his advertising prior to commencing operations authorized herein, to clearly and properly reflect the limited nature of the visits to the intermediate points of interest, including the indication of whether the passengers debark from the bus." (Mimeo. Decision No. 84186, pages 16-17.) The substantive change in the advertising card of applicant was to change the preexisting statement "Package includes: a complete tour including a list of points/" to "Package includes: a bus tour including points listed/..."

Applicant's advertising does not indicate that the tour may be cancelled if less than eight passengers are available. Ordering Paragraph 9 of Decision No. 84186 provides that applicant's advertising shall indicate that scheduled service authorized hereunder is subject to cancellation if there are less than eight passengers. Applicant testified that he never cancelled a tour if there were less than eight passengers, and that a Commission staff member at Los Angeles advised him that since he never cancelled a tour offering, it was not necessary to make a statement in his advertising that the scheduled service was subject to cancellation if there were less than eight passengers.

Ordering Paragraph 5 of Decision No. 84186 provided that applicant shall at all times employ his own drivers in the exercise of the rights under this certificate. Applicant testified that in order to meet the customer demands he would hire charter buses, including drivers, and under such circumstances he would put his tour guide aboard the bus with the tour group. Applicant testified that he employed his own drivers in the operation of his own vehicles, and in the situations where he had leased a bus and driver, he always had his own tour guide on the bus.

Applicant's brother is the manager of applicant's present operations. He is responsible for maintenance and safety of buses. Applicant's manager testified that they

operated the GMC buses under a charter-party permit. He testified that they would perform charter service which begins and ends within a 50-mile radius of the Anaheim terminal, and that they would perform that charter service for anyone that wants to charter a bus, such as an Elks Club or a Girl Scouts troop, if it was not associated with a school. The GMC buses are 45- or 49-passenger vehicles. (See Exhibit 5.) Under the provisions of Public Utilities Code Section 5384(a), applicant's charter-party operations with such GMC vehicles are limited to a 50-mile radius of home terminal. Moreover, the charter-party operations may not be offered to the general public, but may only be used to provide service under contract with industrial and business firms, governmental agencies, and private schools, or to transport certain agricultural workers, or in the conduct of transportation services incidental to another business. As protestants point out, the charter operations described by applicant's manager do not fall within the limited provisions of Section 5384(a).

The evidence presented by applicant's manager supports the conclusion that the equipment utilized by applicant is satisfactorily maintained. The staff reported at hearing that applicant has on file a certificate of insurance good for any and all vehicles and any and all drivers operating under both his passenger stage certificate and his charter-party carrier passengers permit, and that such certificates of insurance are good until cancelled. The insurance carrier would have to give the Commission at least thirty days' notice prior to cancellation.

Protestants argue that the financial information provided by applicant is inadequate. We disagree. Applicant is not required to weigh his assets against those of protestants. Evidence regarding the equipment of an applicant and financial resources of an applicant should bear some reasonable relationship to the authorization requested of this Commission. To the extent

that applicant intends to operate an on-call one-day sightseeing tour service, similar to the service established from Orange County, the applicant testified that present traffic has exceeded his earlier projections, and his financial position has improved in the course of his operations from Orange County.

It is clear that applicant has been expanding his equipment as a result of his existing operations. The Orange County tour operations have been an economic success. Moreover, applicant's present estimates are based upon his recent experience with substantially the same tour from the Orange County points. It is difficult to see why more detailed financial data should be required. Applicant has demonstrated the ability to obtain adequate equipment. He has presented evidence that drivers and tour guides are properly licensed and adequately trained. Vehicle inspections are required by drivers and maintenance performed properly. The comfort and convenience of the passengers have been adequately looked after.

Discussion

We have concluded that the authorization requested involves operations wholly within a single state and also in foreign commerce. Under such circumstances, an applicant must proceed under the applicable provisions of the Interstate Commerce Act.

Gray Line appears to argue that its recent federal authority should establish that applicant Messnick's service is unnecessary. To conclude that Messnick should be foreclosed from tour operations by application of Section 1032 of the Public Utilities Code would be grossly unfair. Messnick has developed a new market, and to treat him as an applicant for operations already served by another would ignore the history of the Tijuana tour service offered by Gray Line and Messnick.

As to applicant's clear violations of the service regulations and requirements established by Decision No. 84186, we cannot condone these violations. We cannot accept applicant's suggestion that verbal advice from a Commission staff employee justified such violations.

Applicant's operating authority allowed pickups at described points, not the area-wide service offered. The advertising used by applicant should have set forth the limited nature of visits to intermediate points, including whether passengers debark. It did not. The advertising used should have indicated that service was subject to cancellation if there were less than eight passengers. It did not. Applicant was required to employ his own drivers in conducting his operations (a service regulation which clearly prohibits chartering buses with drivers employed

by others. Buses with drivers were chartered. Charter operations were conducted without regard to the restrictions applicable to larger GMC vehicles under Section 5384(a) of the Public Utilities Code. Applicant is admonished to conform to the terms of its certificate.

Protestants would have us declare applicant unfit to operate passenger stage service. Certain facts persuade us that such a conclusion is too drastic at this time. Applicant's service to the public has been good. The public safety has been protected by adequate vehicle maintenance procedures and driver training programs. Insurance requirements have been met.

Findings

1. Applicant requests authority to operate one-day round-trip passenger stage service from points in Los Angeles County to San Ysidro, California.

2. Passengers are to be provided transportation by Mexican passenger buses into and out of Tijuana, Mexico, as part of the one-day round-trip service.

Conclusions

1. Applicant's proposed operations involve the transportation of passengers in foreign commerce within the provisions of the Interstate Commerce Act.

2. Until applicant complies with the Interstate Commerce Act this Commission should not grant the authority requested.

3. Submission should be set aside and this matter should be held in abeyance until applicant has notified the Commission that he has complied with the requirements of the Interstate Commerce Act.

O R D E R

IT IS ORDERED that submission of the application is set aside and that this matter be held in abeyance pending receipt of satisfactory notice from the applicant that he has complied with the Interstate Commerce Act.

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

Dated at San Francisco, California, this 11th
day of JULY, 1978.

Robert Bateman
President

Charles D. Gault
Clair T. D. D.
Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Vernon L. Sturgech, being necessarily absent, did not participate in the disposition of this proceeding.