

ORIGINAL

Decision No. 89469 OCT 3 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of A.C. CAL SPANISH TOUR SERVICE, a partnership consisting of Victor Meneses and Graciela Arturi, and AGENTOURS, INC., a corporation, to transfer Certificate of Public Convenience and Necessity issued under authority of Decision No. 79688, as amended by Decision No. 85084.

Application No. 57371  
(Filed June 9, 1977)

William F. Alderman, Attorney at Law, for A.C. Cal Spanish Tour Service and Agentours, Inc., applicant.

Richard M. Hannon, Attorney at Law, for The Gray Line, Inc., and Walter H. Walker, III, Attorney at Law, for SFO Airporter, Inc., protestants.  
Masaru Matsumura, for the Commission staff.

O P I N I O N

Victor Meneses and Graciela Arturi, partners doing business as A.C. Cal Spanish Tour Service (A.C. Cal), apply to transfer A.C. Cal's passenger stage certificate of public convenience and necessity to Agentours, Inc. (Agentours), a California corporation, the other applicant herein.

Decision No. 79688 dated February 8, 1972 (Application No. 52570) granted A.C. Cal a passenger stage certificate authorizing it to provide four sightseeing tours in the San Francisco area, limited to the transportation of round-trip passengers, and requiring that the narration on the tours should be conducted in foreign languages only. The certificate restricts A.C. Cal to carrying not more than ten fare-paying passengers in any vehicle.

There was no protest to that application.

A.C. Cal subsequently filed Application No. 55258 (filed October 18, 1974 and amended February 28, 1975) which requested authorization to transport its tour groups on a regular basis between the downtown hotels and the San Francisco International Airport (airport) charging each passenger \$3.50 as a one-way fare, the proposed service being operated on an on-call basis and restricted to passengers having an advance reservation on one or more of the A.C. Cal tours.

That application was protested by SFO Airporter, Inc. (known at the time as Airporttransit of California). According to Decision No. 85084 dated November 12, 1975, the basis of the protest was that protestant was already furnishing adequate service, and that an advance reservation could include an oral reservation on a few minutes' notice.

We found that the protestant would not provide the service offered by the applicant and we therefore granted A.C. Cal authority to transport its tour groups between the airport and downtown San Francisco, with the restriction as proposed by A.C. Cal that airport passengers must have purchased one other A.C. Cal tour.

In the present application, Agentours seeks to purchase the authority from A.C. Cal. The principal issue is whether A.C. Cal has abandoned the service. SFO Airporter contends the evidence shows that all of the authority granted has been abandoned, and that even if the Commission takes a different view of the evidence regarding the tour service, that A.C. Cal has abandoned that portion of its certificated authority consisting of the airport to downtown San Francisco route. We have held that actual operation is an essential ingredient of an operative right and that when operations cease, the right becomes impaired and is not the subject of transfer (Lee B. Hawkins (1942) 43 CRC 303). This is true even when cessation of operations may have been unintentional (Pacific Coast Terminal Warehouse Company (1952) 52 CPUC 17).

Meneses' testimony establishes the following relative to A.C. Cal's history: while the operation was certificated in 1972 Meneses could not verify his testimony on the extent of his operation from any records for the period prior to April 1976. Meneses asserted that because he had no airport operating connection prior to 1975, he had difficulty soliciting business. It was shown, however, that while he was awarded his limited airport route on November 12, 1975, he did not file a tariff for the service until April of 1976, shortly before The Gray Line, Inc. (Gray Line) went on strike. This strike lasted from May 5 to November 11, 1976, and is a key factor in analyzing A.C. Cal's operation.

During 1975, according to Meneses, A.C. Cal carried about 1,400 passengers and experienced a net profit of about \$5,000 (this was not verified by any business records). He obtained most of his business by soliciting through hotel personnel, tour desk and gift shop operators, and travel agencies. Then, at the start of the Gray Line strike, some hotels asked him if he would provide tours for English-speaking people. He did so, during the strike, in considerable volume. By Meneses' own testimony, the great majority of his business was of this sort. He carried so much of it that his passenger volume increased to approximately 10,000 for 1976, resulting in gross revenues of \$105,000 and a net partnership profit of \$30,000. (The computation of this \$30,000 was never explained; see transcript pp. 109-110. Nor was there any breakdown of English-speaking versus non-English-speaking passengers.) In the last month of its operation alone (October 1976, the last month of the strike), A.C. Cal carried about 2,600 passengers.

At the same time that A.C. Cal engaged in the substantial (illegal) carriage of English-speaking passengers, Meneses testified that he lost his regular (i.e., non-English speaking) business to illegal operators who undercut his prices or paid greater commissions to gift shop operators, etc., resulting in almost all of such business

being steered to this competition. In sum, by Meneses' own testimony, almost all of his passenger volume during the strike was outside the scope of, and in violation of, his certificate and by November of 1976 (the end of the strike) he had lost "almost all" of his foreign language business (transcript, p. 18).

The sequence of events after the conclusion of the strike is as follows: Meneses decided to let A.C. Cal's insurance lapse in November 1976. (It actually expired November 5, six days prior to the end of the Gray Line strike.) He stated his reasons were, first, a major increase in insurance premiums; second, the devaluation of the Mexican peso which drastically reduced Mexican tourism to the United States (Meneses states that a great deal of his foreign tourist volume came from Mexico); and, third, that by the end of the strike he had lost most of his non-English-speaking customers.

Because he permitted his insurance to expire, his authority was suspended by the Commission on November 9, 1976. As a result of this suspension, Mr. Alderman, counsel for A.C. Cal, wrote to the Executive Director of the Commission on December 20, 1976. The body of this letter reads as follows:

"This will respond to your letter of November 24, 1976 to Victor Meneses and Graciela Arturi regarding the suspension of passenger stage authority for A.C. Cal Spanish Tour Service pending the filing of a certificate showing renewal of liability insurance coverage.

"A.C. Cal Spanish Tour Service has not conducted passenger stage operations since November 5, 1976 when its liability coverage terminated. The devaluation of the Mexican peso has brought to a virtual stop the flow of Spanish-speaking tourists to San Francisco, especially during these winter months. Mr. Meneses and Ms. Arturi expect to be out of the country for the next two months and to resume the operations of A.C. Cal Spanish Tour Service after filing an insurance certificate upon their return.

"If the Commission or staff anticipates that any prejudice to the authority of A.C. Cal Spanish Tour Service to conduct passenger stage operations could arise from a further voluntary suspension of two months, I would appreciate being so informed at the earliest opportunity."

After the suspension, Meneses initiated discussions with John P. Jenkins of Agentours concerning the transfer of authority. These discussions began in December of 1976 and finally resulted in a contract for the sale of the business to Agentours on January 7, 1977 (Exhibit "A" to the application).

Also in January 1977, and as a result of the above quoted letter from A.C. Cal's attorney, the Commission issued Resolution No. PE-345 authorizing A.C. Cal to suspend operations as a passenger stage corporation until March 1, 1977 (Exhibit 8).

Meneses testified that after signing the agreement he made a trip to South America in order to attempt to rebuild the volume of Spanish-speaking tourists lost because of the devaluation of the Mexican peso. This trip, according to Meneses, was not productive. He claims that as a result of this trip he did not receive the aforementioned Commission resolution and saw it for the first time on July 25, 1977, a date subsequent to the filing of this application, when discussing his operating authority with Mr. Matsumura of the Commission staff.

The service was not operated again until October 10, 1977. When asked why, Meneses stated that until about that time he was not aware his operating authority was in danger by way of abandonment (transcript, p. 138).

According to the protestants, the cross-examination tends to establish that Meneses' service was at a minimal level, at best, except during the Gray Line strike when he carried mostly English-speaking passengers. Protestants point to the fact that he ceased

operating after his business increased eight-fold from 1975 to 1976. On cross-examination in this connection he was asked whether the reason he did not renew his insurance was that if business went back to the 1975 level, he would lose money under the new higher premiums. He answered, "Probably." (Transcript, p. 58.)

Protestants also point out that the "illegals" were not competing for foreign language business during the Gray Line strike, but rather for the ordinary English-speaking tourist. Advertisements by the illegals (Exhibit 2) are in English.

Meneses introduced Exhibits 3 and 5 to show that he advertised for Spanish-speaking tourists. Exhibit 4 is a card in English which he states he used with hotel personnel to acquaint them with airport pickups for his tours. Meneses stated that at no time did he intend to abandon the service (transcript, p. 36).

During 1976 A.C. Cal had nine employees and five vehicles. At present there are no employees - "just me and my wife" according to Meneses (transcript, p. 60), and he still owns two vans.

Jenkins, the owner and manager of Agentours, testified in favor of the application.

He was in the business of conducting sightseeing tours for approximately ten years in San Francisco until the early 1960s when he became a tour operator "exclusively handling foreign visitors to California". He holds a charter-party permit from this Commission as well as a certificate to operate scheduled sightseeing service to San Francisco and Muir Woods originating in hotels and motels in and around the airport (this certificate is in his own name and not under the name of Agentours).

Agentours has a staff of employees speaking several different languages. In addition, there are part-time persons available to conduct tours in languages which his employees do not speak.

Jenkins wishes to purchase A.C. Cal's sightseeing business and operating authority to provide economical scheduled service for small parties. Jenkins introduced Exhibit 10 which shows a list of his overseas customers and Exhibit 11 which is an unaudited financial statement. It shows that his business had a net income of \$30,000 for 1976 and a total stockholders' equity as of December 31, 1976 of \$26,000. The purchase of A.C. Cal would be financed primarily by cash. Jenkins testified that as of the date of the hearing, he had approximately \$60,000 in cash on hand.

Jenkins stated that he would maintain the airport connection to the city tours. He would not establish a booth at the airport since the airport authority is not currently allowing the establishment of such booths and forbids solicitation at the airport.

Agentours has one 11-passenger Ford van which would be adopted for the airport run. Jenkins stressed that in dealing with tour agents, it is much easier to sell "the whole loaf" for a package tour - that is, including airport transportation.

Agentours operates in San Francisco, Los Angeles, and San Diego. Its gross sales for 1975 were roughly \$1,300,000, and in 1976 approximately \$1,500,000. Jenkins did not have a breakdown of how much of this amount was attributable to the San Francisco Bay Area.

Protestant SFO Airporter presented Gordon Esposto, its general manager, who introduced exhibits which described SFO Airporter's general operation between downtown San Francisco and the airport. He stated he never saw an A.C. Cal passenger vehicle at the airport, and was never aware that such an operation took place.

SFO Airporter has 23 large intercity-type buses. The company does not use minibuses. SFO Airporter does have Spanish-speaking personnel at the terminal in San Francisco, and sometimes persons who can speak other foreign languages, depending on who is on a particular shift.

The witness objected to the transfer on the ground that the operation would be expanded since Agentours has accessible to itself many more persons who can speak different foreign languages.

On cross-examination of Esposto, it was pointed out that SFO Airporter does not specifically advertise foreign language assistance or offer specific transportation for non-English-speaking persons.

#### Discussion

The fitness of Agentours as a buyer is not challenged, and the record clearly establishes that the proposed purchaser has the finances, personnel, and experience to perform this service.

The evidence demonstrates, however, that A.C. Cal has abandoned its authority and that, therefore, a transfer cannot be authorized.<sup>1/</sup>

Much cross-examination time was expended in an attempt to show that A.C. Cal abandoned its service at or near the end of the Gray Line strike, when Meneses decided not to renew A.C. Cal's insurance. This effort, in our opinion, obscures a truth much more easily demonstrated from the circumstances surrounding Meneses' testimony:<sup>2/</sup> that an abandonment took place at the beginning of the Gray Line strike, when A.C. Cal ceased to make any consistent or organized effort to attract foreign non-English-speaking clientele, in order to take advantage of the windfall provided by the strike (assuming such an effort had been made up to that time).

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1/ We do not determine, on this record, whether public need for this abandoned service exists, and nothing in this decision is intended to indicate that we would favor, or disfavor, an original application for operating authority similar to that which is the subject of this application.

2/ When reduced to the summary contained in this decision, Meneses' testimony appears much easier to follow than actually is the case. Some answers are vague or confusing, and, as pointed out, there were no records produced to document the extent of A.C. Cal's alleged passenger volumes for any year but 1976 (the year of the strike). Graciela Arturi did not appear as a witness.



Meneses maintains that during the strike he continued to solicit non-English-speaking business and was undercut by illegal operators. Circumstances show that this testimony is inherently improbable. As the protestants point out, the illegals were trying to cash in on the Gray Line strike by soliciting Gray Line's regular English-speaking business. Their advertisements were in English (Exhibit 2). There is no evidence, other than Meneses' uncorroborated and undocumented assertions, that the illegal operators made any specific efforts to usurp A.C. Cal's foreign language business, and circumstantial evidence makes it clear that any foreign language business they received was incidental to their general English-speaking business (the same as Gray Line's would have been, had Gray Line not been on strike). The same can be said for A.C. Cal: its 1976 English-speaking passenger volumes, and the remainder of the evidence demonstrates that if, in fact, it conducted any foreign language tours or airport runs during the strike, such tours were on a perfunctory basis and incidental to A.C. Cal's illegal operation.

None of the acts done by A.C. Cal or its counsel subsequent to the strike served to resurrect its operating authority. The Commission resolution authorizing suspension was issued on the assumption that no abandonment had taken place, there being no evidence before the Commission at the time to make such a determination of abandonment. Assuming that Meneses started A.C. Cal's operations again on or about October 10, 1977, this step came too late. The resolution authorized suspension until March 1, 1977.

Meneses attempts to excuse the period of non-operation from March to October 1977, on the basis that he did not see the Commission resolution until July 1977, and that he only became aware his authority was in danger in October. Meneses knew, however, that his authority was suspended because his insurance had lapsed; that is why his attorney wrote to the Commission requesting a suspension.

It was Meneses' business to investigate the status of his operation promptly after returning from South America. And even assuming there is some reasonable excuse for his failure to learn the terms of the Commission's action on his request for suspension, this would not account for the non-operation after Meneses saw the resolution on July 25, 1977. Meneses attempts to justify his failure to operate the service for this period on the ground that this application had been filed in June 1977. There is no authority for the proposition that filing an application to transfer certificated authority gives the proposed transferor the right not to operate his routes, nor should we establish such a precedent since it would be detrimental to the public.

A review of previous "abandonment" cases shows that total non-operation or admitted abandonment is not necessary for operating authority to lapse by way of abandonment (cf. J. R. Martin (1926) 28 CRC 210 and F. C. Williams (1928) 31 CRC 790), and, as mentioned, abandonment may be unintentional (Pacific Coast Terminal Warehouse Company, supra). "On call" passenger stage authority allows for flexibility but does not mean that the service may be offered intermittently, perfunctorily, or at the convenience of the operator. There must be some consistent effort to promote certificated routes. Circumstantial evidence here shows that, assuming arguendo that such an effort was maintained before the Gray Line strike, it ceased during the strike, and that no subsequent act on the part of A.C. Cal served to restore the operating authority; but, on the contrary, and taken as a whole rather than as a series of isolated and unrelated acts, Meneses' actions and omissions after the strike reinforced such abandonment.

Findings and Conclusions

1. Meneses and Graciela Arturi are partners doing business as A.C. Cal.
2. Agentours is a California corporation principally owned and managed by Jenkins.

3. Agentours possesses the necessary fitness to operate the service proposed to be transferred from A.C. Cal to Agentours.

4. A.C. Cal's operation was originally certificated in 1972 and was modified in 1975 to permit an airport connection for non-English-speaking persons who purchased one or more tickets on his tours departing from San Francisco.

5. There were no records produced at the hearing from which the extent of A.C. Cal's operation prior to April 1976 could be verified. Meneses testified to A.C. Cal's carrying about 1,400 passengers in 1975 for a net profit of about \$5,000.

6. Gray Line was on strike from May 5 to November 11, 1976. During 1976 A.C. Cal carried 10,000 passengers, almost all of which were English-speaking passengers carried during the strike in violation of A.C. Cal's certificate.

7. Commencing with the strike, A.C. Cal ceased any reasonable or organized effort to solicit non-English-speaking business, thereby abandoning its certificated authority.

8. The acts and omissions of Meneses on the part of A.C. Cal subsequent to the strike served to confirm such abandonment.

9. No transfer may be authorized.

ORDER

IT IS ORDERED that the application is denied.

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

Dated at San Francisco, California, this 3rd day of OCTOBER, 1978.

Robert B. Brown  
President  
William J. Brown  
Herbert L. Stenberg  
Robert W. Noble  
Clare L. DeRish  
Commissioners