

ORIGINAL

Decision No. 89598) OCT 31 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE GRAY LINE, INC., a
California corporation,
Complainant,

vs.

O. K. TOURS,
Defendant.

Case No. 10387
(Filed August 2, 1977)

CALIFORNIA PARLOR CAR TOURS
COMPANY, a California
corporation,

Complainant,

vs.

O. K. TOURS,
Defendant.

Case No. 10391
(Filed August 10, 1977)

Richard M. Hannon, Attorney at Law, for
The Gray Line, Inc. and California
Parlor Car Tours Company, complainants.
Allan M. Schuman, Attorney at Law, for
O. K. Tours, defendant.

O P I N I O N

Complainant, The Gray Line, Inc. (Gray Line) is a passenger stage corporation engaged in the transportation of passengers and their baggage in sightseeing and pleasure tour service pursuant to authority granted by this Commission in Decision No. 66165 dated October 15, 1963, as amended. Complainant California Parlor Car Tours Company (Parlor) is a passenger stage corporation engaged in the transportation of passengers and their baggage in sightseeing and pleasure tour service pursuant to authority granted by this Commission

in Decision No. 62340 dated July 25, 1961 and amended by Decision No. 71669 dated December 6, 1966. Gray Line is authorized to transport passengers in sightseeing and pleasure tour service to various points of interest within the City and County of San Francisco as well as to various points of interest outside of San Francisco, such as Muir Woods, Carmel and the Monterey Peninsula, and the so-called "Wine Country" in Napa County. Parlor is authorized to transport passengers and their baggage in sightseeing and pleasure tour service between San Francisco and Los Angeles over U.S. Highway 101, between San Francisco and Merced, over various highways, between Merced and Los Angeles via U.S. Highway 99, including Yosemite National Park, and other points and places of interest.

Gray Line and Parlor allege that defendant O. K. Tours (defendant), directly or indirectly, individually or in concert with others, holds itself out to provide, is arranging to provide, is offering to provide, and/or is otherwise representing to the public that defendant will provide motor passenger transportation service to the public for compensation; that the ground transportation motor carrier service offered consists of tours of San Francisco, Carmel-Monterey, the Napa Valley Wine Country, Muir Woods, and Yosemite; and, finally, that the service is over the public highways of this State, on an individual fare basis between fixed termini, for which a certificate of public convenience and necessity is required.

Gray Line and Parlor request that the Commission order defendant, or anyone acting in concert with defendant, to immediately cease and desist, directly or indirectly from providing, arranging to provide, offering to provide, holding out, and/or otherwise representing to the public that defendant will provide ground motor vehicle passenger stage services over the public highways, including (without limitation) one-day round-trip sightseeing service between San Francisco and Yosemite.

In its answer, defendant avers that it is not a passenger stage corporation as defined in Section 226 of the Public Utilities Code^{1/}; that it is not directly engaged in the transportation of passengers in sightseeing and pleasure tour service; that it does not transport passengers in sightseeing and pleasure tours on a per capita basis; that it merely arranges to provide tourist services with fully licensed and permitted carriers; and that because no per capita fares on an individual basis are charged, no passenger stage certificate is required.

Public hearing was held May 2, 1978 at San Francisco before Administrative Law Judge Banks. At this hearing, the parties asked that the matters be continued to a date to be set to enable the parties to resolve their differences. When it became evident that the differences could not be resolved, further hearing was held July 13, 1978 at San Francisco at which time the matters were submitted.

To substantiate the allegation that defendant offers to provide passenger stage service for sightseeing purposes on a per capita basis between fixed termini and over a regular route for which a certificate is required, Gray Line and Parlor presented six witnesses.

Rodney S. Colborn, regional sales manager for Gray Line, testified that on March 9, 1978 he visited the Holiday Inn in Chinatown, San Francisco, to see about purchasing a ticket for a city tour.^{2/} He stated that when he asked about a city tour at the concierge office he was given a brochure, identified as Exhibit 1,^{3/} of defendant's operation and an explanation of how to take a tour. He then purchased a "ticket" and was given a "reservation coupon"

^{1/} All references are to the Public Utilities Code unless otherwise indicated.

^{2/} A city tour is a tour of the city of San Francisco and is described in defendant's brochure as "City Tour Deluxe".

^{3/} Exhibit 1 is a foldout which describes the tours offered by defendant as "City Tour, Muir Woods/Sausalito, Napa Valley, Monterey/Carmel, Gold Rush 49er and Yosemite".

(Exhibit 2) and instructed to return later in the day, present the reservation coupon to the driver, pay the balance due, and then take the tour. Mr. Colborn stated that when he returned to the Holiday Inn at about 2:15 p.m., the driver picked him up in a van and proceeded to a hotel to pick up other passengers. The driver then proceeded to a location on Sutter Street. At 752 Sutter Street, the office of defendant, the driver collected the balance due from Mr. Colborn and the two other passengers, went into the office, returned, and proceeded with the tour. Three persons were on the tour.

On cross-examination Mr. Colborn stated that the van in which the tour was taken carried no markings by which it could be identified with defendant.

Mr. James J. Mulpeters, executive vice president of Gray Line, testified that Gray Line is a passenger stage corporation operating sightseeing tours sold on an individual fare basis over regular routes and charters buses for convention groups, etc. Based upon his personal knowledge and information received from employees working for him, Mr. Mulpeters stated that it was his belief that defendant's operations require passenger stage operating authority.

Mr. Robert W. Bowen, an employee of Pinkerton Investigations, was engaged by Gray Line to take a tour offered by defendant. Mr. Bowen stated that he took defendant's tour of Muir Woods on May 1, 1978 at a cost of \$8.50. He stated that he booked the tour over the telephone; that the driver collected the fare after making up a ticket; and that there were six other passengers on the tour.

Mr. Richard W. Brunelle, also an employee of Pinkerton Investigations, testified that he, too, was engaged by Gray Line to take one of defendant's tours. Mr. Brunelle stated that on July 11, 1978 he contacted defendant by telephone at 10 a.m. and asked if there was a tour scheduled for later that day. He was advised that the morning tours had left, but that a tour would be going to Muir Woods in the afternoon. He made a reservation over the telephone and was

told to go to 752 Sutter Street at 2 p.m. Upon arrival at 752 Sutter Street, he purchased a ticket for a tour of Muir Woods, was given a reservation coupon (Exhibit 5), and was informed that the tour would begin at 2:30 p.m. While waiting at the coffee shop next door to 752 Sutter Street, he was told by a driver to meet him at the blue limousine parked out front of 752 Sutter Street at about 2:15 p.m. At 2:15 p.m. the driver stated he had to pick up other people and told Mr. Brunelle to "just hang around for awhile". Mr. Brunelle stated that the license plate on the limousine was "O-K-L-I-M-O". The tour began at 2:50 p.m. with ten other passengers.

Mr. Brunelle also stated that on July 12, 1978 he purchased a city tour and that the same procedure was encountered. He stated that while purchasing the city tour he heard the counter man at the 752 Sutter Street office advise a driver to charge \$7 for children on his tour (the city tour). Finally, he stated that on both the 11th and 12th of July 1978 he witnessed the purchase of individual fare tickets.

On cross-examination Mr. Brunelle stated that he was told by one of the drivers of the vans that he, the driver, worked for defendant. He also stated that he did not read the provision on defendant's brochure that only charter tours were provided.

Mr. Barrie Broadbent, testifying for Parlor, stated that he went to the Canterbury Hotel on July 10, 1978; that inside the hotel at a sundry counter was a sign reading "Tickets Sold Here"; that while leafing through a brochure he was asked by the girl behind the counter if he was "interested in a tour"; that after he answered "yes" the girl made him a reservation for a tour of Yosemite; and that after payment of a \$7 deposit was given a reservation coupon (Exhibit 6). Mr. Broadbent did not take the tour.

On cross-examination Mr. Broadbent identified Exhibit 7 as the brochure he obtained at the Canterbury Hotel from which he booked the Yosemite tour. He stated that he did not read that part of the

brochure which states that defendant acts as a "organizer/broker" and that "the prices shown represent the equivalent per person breakdown only if a full charter is organized."

Mr. Andrew Willis Citizen, general assistant for Parlor, also testified. Mr. Citizen stated that on July 10, 1978 he went to 752 Sutter Street and booked a tour to Yosemite for July 12, 1978. At the time of the booking he was given a reservation coupon (Exhibit 8). The price of the tour was \$45. At the time of purchase there was no statement about an additional charge if a charter was not completed, or a refund if a charter was not completed.

Mr. Edward Flynn, president of defendant, testified that it does not operate as a passenger stage corporation; that it is an organizer of tours only and uses permitted charter carriers to take the tour group. Mr. Flynn stated that what sets defendant apart from a passenger stage corporation is that it does not use vehicles; that a "group is organized"; and that a holder of a charter permit is called to take the "group" on the tour. In explanation of what he meant by selling tickets, Mr. Flynn stated "selling tickets in order to put the group together, in order for another carrier to come in and take the group." He also stated that on a mileage basis 98 percent of defendant's charters were conducted in the City and County of San Francisco and that all of defendant's tours are conducted in limousines, not vans.

First, it should be noted that the frequency of the tours advertised and conducted by defendant shows that less than 98 percent of the total mileage operated in the City and County of San Francisco. Thus the exception provided in Section 226 is not applicable.

In Decision No. 64960 dated February 13, 1963 (Case No. 7192), the Commission instituted an investigation to enable interested parties to present views on how to interpret and apply the Passenger Charter-party Carriers' Act. In that decision, it was stated that the transportation of tour groups requires either a certificate of public convenience and necessity or a passenger

charter-party carrier permit, and that when an individual fare is charged it raises a rebuttable presumption (under Section 1035 of the Public Utilities Code) that the operation should be certificated.

Section 1035 of the Public Utilities Code provides in part:

" . . . Any act of transporting or attempting to transport any person or persons by stage, auto stage, or other motor vehicle upon a public highway of this State between two or more points not both within the limits of a single city or city and county, where the rate, charge, or fare for such transportation is computed, collected, or demanded on an individual fare basis, shall be presumed to be an act of operating as a passenger stage corporation within the meaning of this part."
(Emphasis added.)

From the evidence introduced and as testified to by witnesses, there is little doubt that defendant is offering transportation on a per capita basis to the public which raises a presumption under Section 1035. Exhibits 1, 3, and 7 are brochures distributed to the public by travel agents and hotel personnel. As noted earlier, these brochures outline the various tours offered and all quote an individual adult and child fare, with a reference to "conditions". The "conditions" located in another section of the brochure state that, "O. K. Tours merely organizes charters. The prices shown represent the equivalent per person breakdown only if a full charter is organized. If a charter is not organized, your money will be refunded." However, one must first note the asterisk appearing opposite the quoted adult fare and then locate the "conditions". Nowhere does the brochure indicate what constitutes a full charter. Further, it is stated that groups are arranged from 1 to 10 implying that any number from 1 to 10 is sufficient to constitute a charter group. Finally, it should be noted that the various witnesses testified that only the "equivalent per person" fare was collected notwithstanding the number of patrons on the tour.

Exhibits 2, 4, 5, 6, and 8 are reservation coupons received by Gray Line's and Parlor's employees or agents when booking a tour for defendant's services. These coupons show only the name of the person, the hotel or site where the tour was sold, the tour and the date, the time, the price, any deposit with balance due, and the agent who sold the tour. There is nothing on the coupon to indicate a charter service. A literal reading leads one to the conclusion that an individual fare is being charged. It is also significant to note that, as testified to, the defendant conducted tours with less than what could be termed a group which would be required to obtain the charter price.

The brochures distributed also indicate that some tours are offered at least once daily over a fixed route and between fixed termini, i.e., San Francisco and Muir Woods, San Francisco and Carmel/Monterey, or over a regular route currently served by a certificated passenger stage corporation.

With respect to defendant Flynn's testimony that he is an organizer/broker who merely puts groups together and then uses charter-party permit carriers, the evidence is simply to the contrary and shows that the operation is that of a passenger stage corporation. The brochures are distributed at the various hotels, motels, and restaurants advertising per capita fares although the tickets sold are allegedly to complete a "group" for a charter. On many occasions defendant uses his own employees to drive and conduct a tour. Further, the operation of defendant is strikingly similar to that of D. W. Kean in Application No. 55636, wherein it was proposed that Kean would organize tours, sell tickets, and then charter a vehicle from a licensed carrier to provide the transportation. In Decision No. 85581 dated March 16, 1976 we concluded that:

"We are of the opinion that applicant does require a certificate of public convenience and necessity to operate as a passenger stage corporation before he can provide the proposed service.

"The sections of the Public Utilities Code which are involved in this proceeding are the

following: Section 225 defines a passenger stage, as including '...every stage, auto stage, or other motor vehicle used in the transportation of persons, or persons and their baggage ... when such baggage ... is transported incidental to the transportation of passengers.' Section 226 defines a passenger stage corporation as including '...every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over any public highway in this State between fixed termini or over a regular route. ...' Section 211(c) includes passenger stage corporation within the definition of common carrier. Section 216(b) provides in part that any common carrier that performs service for the public or any portion thereof for compensation is a public utility subject to the jurisdiction of the Commission and the applicable provisions of the Public Utilities Code. Section 1031 requires a passenger stage corporation to obtain a certificate of public convenience and necessity prior to the operation of any passenger stage over any public highway in the State. Section 1035 provides in part that where fares are computed, collected, or demanded on an individual fare basis, it is presumed that the operations are those of a passenger stage corporation.

"Here, the various types of equipment applicant proposes to use for the transportation of his customers and their baggage are all included in the definition of passenger stage in Section 226. His operations are clearly those of a passenger stage corporation as defined in Section 226. While he does not own the equipment, he will lease or rent it and will exercise control over it and operate it over a regular route and between fixed termini for compensation. Although there could be some variation in the particular wineries visited, the route would be substantially the same for each tour. Also, the origin points at San Francisco and the San Francisco International Airport, the two overnight stops at Monterey, and the two overnight stops at Napa, the destination will not vary. Being a

passenger stage corporation, he is a common carrier, and since his service is designed for and offered to that portion of the public with a particular interest in wine making and is for compensation, he is a public utility and subject to Commission regulation as provided in Section 216(b). Furthermore, his charges are on an individual fare basis, and, as stated in Section 1035, it is presumed that his operations are those of a passenger stage corporation. The evidence herein supports this presumption. Since he is a passenger stage corporation, he must obtain a certificate of public convenience before commencing the proposed service as required by Section 1031. The fact that applicant will offer only two tours per month for a limited number of months and will cancel any tour for which less than four participants have signed up is irrelevant and in no way alters our determination that his proposed operations are those of a passenger stage corporation. There are no provisions in the Public Utilities Code that set any minimum standards regarding frequency of service in determining passenger stage corporation status. Here, all the elements of a passenger stage corporation operation are present, and a certificate is required." (Emphasis added)

"We recognize that the service applicant proposes is a sightseeing tour which extends over a five-day period and, in addition, has certain additives, including lodging, some meals, visits to various wineries and other points of interest, admission charges, a tour guide, and certain tips. However, the transportation is certainly not incidental to the proposed offering as contended by applicant. It is an integral part of it. We have consistently held that transportation for the purpose of sightseeing is not separately treated by the Public Utilities Code and that operators of extra-city sightseeing service are passenger stage corporations as defined in Section 226 and require a certificate of public convenience and necessity as provided in Section 1031. (See The Gray Line Tour Co. (1973) 74 CPUC 669.)"

Findings

1. Gray Line is a passenger stage corporation engaged in the transportation of passengers in sightseeing and pleasure tour service as authorized by this Commission.

2. Parlor is a passenger stage corporation engaged in the transportation of passengers in sightseeing and pleasure tour service as authorized by this Commission.

3. Defendant does not possess a certificate of public convenience and necessity to operate as a passenger stage corporation.

4. Defendant distributes brochures advertising tours of San Francisco, Muir Woods/Sausalito, Napa Valley, Monterey/Carmel, Gold Rush 49er, and Yosemite. The brochures distributed indicate a total charter price with a breakdown per individual fare.

5. Defendant's brochure states under a heading entitled "Conditions" that it acts as an organizer/broker using Public Utilities Commission Charter-party Carriers and the prices shown represent the equivalent per person breakdown only if a full charter is organized. There is no explanation of what constitutes a full charter, but it is stated that groups are arranged from 1 to 10. Tours with less than 10 persons are actually conducted.

6. A person, desiring to take one of defendant's tours purchases a ticket, is given a reservation coupon to present to the driver of the tour, and pays the driver any balance due before taking the tour.

7. The reservation coupon received by customers indicate only the tour to be taken, the name of the passenger, the hotel, the number in the party, the cost, deposit, balance due, and the agent's name. There is no indication that a charter service is being provided.

8. Defendant's tours are offered on a regular basis over fixed routes and between fixed termini with fares charged on a per capita basis.

9. Defendant uses his own drivers to drive and conduct tours when charter-party carrier drivers are not available.

10. Defendant is engaged as a passenger stage corporation for compensation over the public highways of this State between fixed termini over a regular route for which a certificate of public convenience and necessity is required.

11. In order to halt the unlawful passenger stage operations of the defendant at the earliest possible time, the following order should be effective the date of personal service upon the defendant.

Conclusion

The Commission concludes that defendant is offering transportation of persons over the public highways of this State for a fare computed and collected on an individual fare basis for which a certificate of public convenience and necessity is required. The cease and desist order should be issued.

O R D E R

IT IS ORDERED that defendant O. K. Tours shall cease and desist from offering and providing passenger stage service over the public highways of the State of California, except pursuant to certification by this Commission.

The Executive Director is directed to have a certified copy of this order personally served on the defendant.

The effective date of this order shall be the date of personal service of this order on the defendant.

Dated at San Francisco, California, this 3/21 day of OCTOBER, 1978.

Robert Batyminich
President

William S. Givens, Jr.

Vernon A. Stutzman

Charles D. Howell

Clair T. DeBruin
Commissioners