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ORIGINAL

Decision No. 89804 DEC 19 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Michael A. Kadletz, dba
Goodtime Tours and Company,

Complainant,

vs.

The Gray Line Tours Company,

Defendant.

Case No. 10601
(Filed June 15, 1978)

Michael A. Kadletz, for himself,
complainant.

Warren N. Grossman, Attorney at
Law, and Elizabeth T. Abreau,
for defendant.

Thomas P. Hunt, for the Commission
staff.

O P I N I O N

Michael A. Kadletz, dba Goodtime Tours & Company (Goodtime), seeks an order that the Commission permanently revoke any and all authority The Gray Line Tours Company (Gray Line) now has to operate tours to Palm Springs from the Orange County area (in which Goodtime holds authority), and that if Gray Line desires to operate and offer daily tours to Palm Springs that it be required to reapply for a passenger stage corporation certificate of public convenience and necessity (certificate) permitting it to do so.

Goodtime alleges, and it is not denied by Gray Line, that Goodtime is a sightseeing tour operator within the State of California operating under authority of Section 226 of the Public

Utilities Code granted in D.88064, dated November 1, 1977, to operate daily sightseeing tours from the Anaheim-Orange County area to points in Palm Springs and return the same day. Gray Line has authority to operate tours to points in and around the State of California as a passenger stage corporation pursuant to Section 226 of the Public Utilities Code, and was granted authority, among other things, to operate daily Palm Springs tours from the Los Angeles area by D.84749, dated August 5, 1975, and has had similar authority for approximately ten years. Pursuant to that decision, Gray Line is entitled to pick up passengers in the Anaheim-Orange County area and transport them to its Los Angeles terminal and then to Palm Springs, or transport them directly to Palm Springs from the Anaheim-Orange County area. Gray Line does not advertise, solicit, market, or sell tickets or offer this tour to Palm Springs, nor does it operate a Palm Springs tour from either the Los Angeles or the Orange County area. Gray Line ticket counters and agents are not aware of a Gray Line Palm Springs tour nor do such ticket counters or agents offer such a tour by Gray Line to the general public. Gray Line does not spend any funds to promote or operate a tour from the Los Angeles-Anaheim-Orange County area to Palm Springs, nor does it operate such a tour.

Goodtime further alleges that Gray Line has not operated a tour from Los Angeles County to Palm Springs, and does not now operate nor has it any plans to begin operations of a Palm Springs tour from the Anaheim-Orange County area. This is denied by Gray Line.

Goodtime further alleges, and it is denied by Gray Line on the basis of lack of information and belief, that Goodtime has an application pending before the Commission to offer a two-day, one-night, and three-day, two-night tour to

Palm Springs. Goodtime has been operating tours on a regular daily basis to Palm Springs since December 1977 and has more than 60 hotels acting as ticketing agencies. Goodtime has spent thousands of dollars in advertising, marketing, and soliciting business for its Palm Springs tour and intends to continue to spend many thousands of dollars for this purpose in the future. Goodtime is spending these large amounts of funds and expending many man-hours of time and great expense to build up and operate its Palm Springs tour in the hope that, within time, this tour will become profitable.

Goodtime contends that it is unfair for it to spend many thousands of dollars and contribute hundreds of man-hours of time to build up a tour and thereafter to permit Gray Line to commence to run a similar tour (activating dormant operating authority) and benefit from Goodtime's efforts and money in promoting a Palm Springs tour.

A hearing was held in Los Angeles on September 25, 1978 before Administrative Law Judge James D. Tante. The parties were authorized to present briefs in the form of letters to the hearing officer on or before October 3, 1978 and the case was submitted on that latter date.

Ms. Julie Ginder, a student who was previously an employee of the complainant; Ms. Cheryl Arnold Cagaanan, general manager of Goodtime for its Palm Springs tours; and Mr. Thomas P. Hunt, an associate transportation representative of the Commission, testified at the request of Goodtime. Mr. Bernard H. Johnsen, its vice president for marketing, testified at the request of Gray Line.

Exhibit 1, a schedule of Gray Line's 1979 tours; Exhibit 2, D.89269 dated August 22, 1978; Exhibit 3, a photograph of the various signs used by Goodtime in its Anaheim-Buena Park-Palm Springs operations; Exhibit 4, a photograph

of the van used by Goodtime; Exhibit 5, Gray Line Cal. P.U.C. Tariff No. 24, Revised Page 7; and Exhibit 6, a brochure relating to a Gray Line proposed tour between Los Angeles, Anaheim, and Palm Springs; were received in evidence.

Goodtime has Commission authority to operate tours from the Anaheim-Orange County area to points in Palm Springs and return the same day, or the next day, remaining one night at Palm Springs, or the third day, remaining two nights in Palm Springs (D.89269 dated August 22, 1978). It has been operating tours on a regular daily basis to Palm Springs since December 1977 and has approximately 97 hotels in the Anaheim-Buena Park area participating with it in its Palm Springs tours from that area.

Gray Line has authority to operate daily Palm Springs tours from the Los Angeles area and is entitled to pick up passengers in the Anaheim-Orange County area and transport them to its Los Angeles terminal and then to Palm Springs, or under certain circumstances, to transport them directly to Palm Springs from the Anaheim-Orange County area.

Before World War II and from 1948 to approximately 1965, Gray Line operated its tours between Los Angeles, Anaheim, and Palm Springs, but after 1965 and to the date of the hearing, it did not operate such tours and such tours were not available to the public. Gray Line has since 1948 operated local sight-seeing tours in the Palm Springs area.

Goodtime's general manager testified that on October 3, 1978 she telephoned Gray Line's main office in Anaheim and inquired about a tour to Palm Springs. She was told that no such tour was available, that there had been no requests for such a tour, but that one would be available beginning in October 1978. She stated

that Goodtime operates the tour to Palm Springs daily and has transported a few persons on occasion to demonstrate reliability and accommodate the sellers of tickets. She stated that it is her opinion that the number of passengers will increase and compensate for the present operation at a loss.

Gray Line's witness testified that Gray Line has had no intent to abandon its authority to operate between Anaheim and Los Angeles, on the one hand, and Palm Springs, on the other hand, and return. On May 5 or 6, 1978, prior to the date the complaint herein was filed and prior to the time that it had knowledge of the intent of Goodtime to file the complaint, Gray Line determined to reinstate its one-day tours to operate, as set forth in Exhibit 6, twice a week, every Tuesday and Saturday beginning October 3, 1978, after the Palm Springs hot weather subsided.

Gray Line intends to operate only two days a week because it believes that in doing so the public will be adequately served and the operation will be economically feasible. In the event that it appears that it is necessary to increase the number of days of its operation, it intends to do so.

Discussion

Where a common carrier willfully and without consent of the Commission abandons its operations, its operative rights are subject to forfeiture and the certificate may be revoked. (J. R. Martin (1926) 28 CRC 210.) Discontinuance of passenger stage service and abandonment of the operative right under which service has been rendered subjects such right to revocation. (Nevada County Narrow Gauge R.R. (1945) 45 CRC 804.) A finding of abandonment depends on the facts of the particular case. (Teskey Transp. Co. (1962) 60 CPUC 92.)

Abandonment in the regulatory sense is the voluntary, intentional relinquishment of a public utility franchise. It includes the intention to abandon and the external act by which such intent is carried into effect.

Suspension of service with no intention of reestablishing it clearly constitutes abandonment of operating rights, and rights so relinquished should be revoked. (In re Operating Rights, Operations and Practices of Common Carriers by Vessel (1940) 43 CRC 50.)

In a complaint proceeding the burden of proof of whether a sightseeing service has abandoned any route is upon the party so asserting. (Gray Line Tours Co. (1973) 74 CPUC 669.) The party asserting abandonment must show that the carrier which allegedly has abandoned its operation did not promote the services and that its failure to operate was not due to a lack of public demand. (Gray Line Tours Co. (1973) 74 CPUC 669, 676.)

Although the Commission has in the past revoked operating authority where suspension of operations was a voluntary act by the carrier (not authorized by the Commission), there is no mandatory requirement that operating rights be revoked, even though there is such voluntary unauthorized suspension. (Furniture Mfrs. Ass'n v Turner (1961) 58 CPUC 691) (unreported opinion); Radio Paging Co. (1966) 65 CPUC 635; Gray Line Tours Co. (1973) 74 CPUC 669.)

The Commission's current policy with respect to suspension of operating rights is set forth in Decision No. 88886, issued May 31, 1978, in Application No. 57971, Pacific Southwest Airlines, as follows:

"We put PSA on notice that we will look with disfavor on extending this order granting suspension. If PSA is not going to provide air passenger service between San Francisco and Stockton, its certificate should be amended to delete this operating authority.

The certificates of passenger air carriers should reflect and contain only the authority operated, and should not reflect dormant or essentially abandoned authority."

We amplified on the above statement in a policy letter (dated July 26, 1978) sent to all passenger air carriers, as approved at our conference of July 25, 1978, as follows (the quoted discussion applies equally to public utility common carriers as well as passenger air carriers):

"We think it is worthwhile to generally explain our policy and, by this letter, provide notice to the air carrier industry we regulate.

"First, we, as an industry's regulator, should not issue operating authority that will not be used. We never knowingly issue new operating authority under such circumstances. This principle applies to all areas of transportation utility regulation. Operating authority is issued because it is required by public convenience and necessity. If the operating authority is not used, that necessary service intended for the public is not provided. It is consistent then, as sound regulatory policy, to revoke unused operating authority. By not operating the service required to serve public convenience and necessity, an air carrier generally concedes that such public convenience and necessity no longer exists, or that the carrier does not wish to serve the public. In either circumstance, air carriers do not deserve to retain unused operating authority.

"Second, operating authority, and segments thereof, that is 'entry mileage' for larger intrastate air carriers, may be main-haul mileage or routes for smaller air carriers. Smaller carriers may be reluctant to apply for

authority to serve between points where larger carriers hold unused authority. We are not saying it is axiomatic that when another carrier applies for the same authority, that the carrier holding dormant authority will re-activate it and protest the new application, but the potential surely exists.

"Finally, it is not in our opinion adequate service to the public in affected communities for air carriers to provide service on an on-again off-again basis, be the routes involved entry mileage or not. By allowing suspension of authority, and extending such suspensions we would contribute to such service inadequacy.

"It is this Commission's position and policy that we will not extend the first voluntary suspension period unless there are unusually compelling circumstances, and we will carefully evaluate circumstances before authorizing an initial voluntary suspension period.

"The remedy, for air carriers who wish to recommence operations sometime in the future (after having deleted such rights from their certificates) between points, is to re-apply and explain the need for the authority. The authority may be granted ex parte or provisionally, pending hearing. This solution, although not as expedient as PSA's proposal, is not, in our opinion, burdensome.

"We expect our staff to implement the policy set forth above."

Gray Line has been engaged in the sightseeing business in southern California since the early 1900's. It has long held the Anaheim-Palm Springs authority and, with the exception of a few years during World War II, conducted operations pursuant thereto until approximately 1965, when apparently it made the determination to suspend the operation of this tour.

Gray Line's witness testified that at no time did Gray Line intend to abandon its Anaheim-Palm Springs authority. Early in May its present management determined to reinstate the Palm Springs tour from Anaheim and Los Angeles commencing early in October 1978; and that pursuant to that determination Gray Line made preparations for the implementation of the tour including the printing and distribution of brochures, the preparation of a detailed itinerary, and a familiarization tour for sales agents.

We believe from a review of the evidence presented in this proceeding that Gray Line has abandoned its passenger stage operating authority between Palm Springs and the Orange County area. The fact we find most critical in our determination is that from 1965 until the date the complaint was filed Gray Line did not operate the authority or offer tours over the route in question. Further, we regret the fact that our attention was not directed to this situation earlier because unused operating authority should be revoked. It is not equitable nor in the public interest for carriers to retain or collect unused operating authority, which they can activate or put in dormant status at will. Public convenience and necessity must be demonstrated before the public utility franchise can be issued, and a long period of voluntary nonuse by a carrier demonstrates that public convenience and necessity either cannot or will not be served by the carrier, or that such public convenience and necessity no longer exist.

Here, for approximately 13 years, Gray Line chose not to operate the authority in question. The inequity of allowing dormant unused authority to be retained by carriers is well demonstrated in this case; because the complainant, which at considerable expense obtained similar authority and is seeking to establish patronage and to serve the public, is suddenly faced with a competitor who, for whatever reason, decides it is a convenient time to again give the service a try. To some extent Gray Line may benefit from the market development efforts of complainant. The record reflects that it is likely that the traffic market may not support two carriers at this time, and the carrier who deserves an opportunity to establish an economically viable public service enterprise is the one who has aggressively undertaken to institute service. Gray Line has clearly treated the Palm Springs to Anaheim-Buena Park tour area route with benign neglect and has abandoned its public utility franchise. Accordingly, the operating authority in question should be revoked.

If this order has economic repercussions for Gray Line they are repercussions that Gray Line, by its conduct, has brought on itself. Gray Line, as an entity (and given its corporate affiliation), will not be seriously affected or economically disadvantaged as a result of this opinion.

Findings

1. Goodtime is a sightseeing tour operator within the State of California under authority of Section 226 of the Public Utilities Code and has authority to operate daily sightseeing tours from the Anaheim-Orange County area to points in Palm Springs and return the same day, or the next day remaining one night in Palm Springs, or the third day remaining two nights in Palm Springs. It has been operating tours on a regular daily basis to Palm Springs since December 1977 and has approximately 97 hotels in the Anaheim-Buena Park area participating with it in its Palm Springs tours from that area.

2. Gray Line has, and for many years has had, authority to operate daily Palm Springs tours from the Los Angeles area and is entitled to pick up passengers in the Anaheim-Orange County area and transport them to its Los Angeles terminal and then to Palm Springs or, under certain circumstances, to transport them directly to Palm Springs from the Anaheim-Orange County area.

3. Before World War II and from 1948 to approximately 1965 Gray Line operated its tours between Los Angeles, Anaheim, and Palm Springs, but after 1965 and to the date of the hearing it did not operate such tours and such tours were not available to the public.

4. On May 5 or 6, 1978, prior to the date the complaint herein was filed and prior to the time that it had knowledge of the intent of Goodtime to file the complaint, Gray Line determined to reinstate its one-day tours to operate twice a week, every Tuesday and Thursday, after October 3, 1978 (Exhibit 6), at which time the hot weather in Palm Springs would have subsided.

5. Gray Line has, from 1965 until the date the complaint was filed herein, not offered the public service on its Palm Springs-Orange County area segment of its operations and has, by that failure to serve public convenience and necessity, abandoned such operating authority.

We conclude that the passenger stage operating authority held by Gray Line between Palm Springs and Anaheim-Buena Park pickup area has been abandoned and should be revoked.

O R D E R

IT IS ORDERED that:

1. The authority of The Gray Line Tours Company to provide direct tours between Anaheim-Buena Park pickup area and Palm Springs is hereby revoked.

2. Appendix A of Decision No. 84749, as hereinafter amended, is further amended by incorporating Second Revised Page 8, attached hereto, in revision of First Revised Page 8.

3. Within sixty days after the effective date hereof and on not less than five days' notice to the Commission and to the public, The Gray Line Tours Company shall amend its tariffs and timetables presently on file with this Commission to reflect the authority.

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

Dated at San Francisco, California, this 19th day of DECEMBER, 1978.

Robert Bateman
President
William J. ...
Verizon L. ...
Charles D. ...
Clair L. ...
Commissioners

Item

No. SECTION I, General Authorizations--Contd.

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Direct Operations: For operating convenience and not as an enlargement of any authority granted herein, The Gray Line Tours Company may, if it deems that it has picked up a sufficient number of passengers in one of the pickup areas provided in Section II of this certificate for one of the tours authorized in Section III herein, proceed directly to the tour from the pickup area without going to its terminal. This authority, however, does not apply to the following:

- a. Item No. 420, Tour 20, and Item No. 425, Tour 21, from Anaheim-Buena Park Pickup Area to MGM and Universal City Studios.
- b. Item No. 500, Tour 32, from Anaheim-Buena Park Pickup Area to Lion Country Safari.
- c. Items Nos. 430, 440, 445, and 450 (Tours 22, 23, 24 and 25) for passengers originating at Los Angeles International Airport to Disneyland and/or Knott's Berry Farm.
- *d. Item 415, Tour 19 from Anaheim-Buena Park Pickup Area to Palm Springs. ✓

For operating convenience only and not as an enlargement of any authority granted herein, The Gray Line Tours Company may, if it deems that it has picked up a sufficient number of passengers in the pickup areas provided in Section IV of this certificate for one of the tours authorized in Section V herein, proceed directly to the tour without going to its terminal.

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Baggage Limitations: Transportation of baggage shall be that which is incidental to the transportation of passengers as herein authorized.

Issued by California Public Utilities Commission.

*Added by Decision No. 89804, Case No. 10601.