

Decision No. 91084 NOV 30 1979

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacifico Creative Service (California), Inc., a California corporation, for a certificate of public convenience and necessity for passenger sightseeing service in Alameda, Contra Costa, Los Angeles, Marin, Fresno, Mariposa, Merced, Monterey, Orange, Sacramento, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tuolumne, and Yolo Counties.

Application No. 58739  
(Filed March 14, 1979)

J. MARK LAVELLE (DOLPHIN TOURS)

Complainant,

v.

Case No. 10732  
(Filed April 11, 1979)

PACIFICO CREATIVE SERVICE, INC. and  
JAPAN AIR LINES COMPANY, LTD.,

Defendants.

ORDER DENYING MOTION TO DISMISS

Case No. 10732 and Application No. 58739 have been previously consolidated for hearing. In Case No. 10732 J. Mark Lavelle, doing business as Dolphin Tours (complainant or Dolphin) complains that Pacifico Creative Service, Inc. (Pacifico) and Japan Air Lines Company, Ltd. (JAL) are engaged directly or indirectly in unlawful passenger stage operations as more fully discussed below. Complainant also alleges that within the framework of such activity are certain anti-competitive practices subject to our order.

Both defendants have filed answers. JAL has filed a motion to dismiss the complaint. Pacifico has filed a cross-complaint

which raises certain issues concerning complainant's actions in attempting to stop what complainant believes to be unlawful activity on the part of Pacifico. The motion to dismiss and certain of these activities are considered here.

The Complaint

Although complainant is now represented by counsel, the complaint was apparently drafted personally by Mr. Lavelle and contains certain argumentative matter as well as the direct allegations. Summarizing those allegations which directly concern alleged unlawful passenger stage operations, the complaint avers that Pacifico and JAL hold no authority from this Commission to operate as an intrastate passenger stage corporation; that the defendants:

"...directly or indirectly, individually or in concert with others, has [1/] held itself out to provide, and/or is otherwise representing to the public that JALPAK will provide, motor transportation service consisting of Japanese language narrated sightseeing tours originating from San Francisco which are more particularly described in Exhibits 1-10 [affidavits and supporting material attached to the complaint]."

The complaint further states:

"Exhibits 1-10 [publicity] have been and are being disseminated by defendants, directly or indirectly, in concert with others, and said exhibits represent to the public that Defendants have provided, are providing, are offering to provide, will provide, and/or holds [sic] out to provide intrastate ground motor transportation service consisting of Japanese language sightseeing service within and without the City and County of San Francisco, said tour service being sold on a per capita basis."  
(Emphasis added.)

Starting with the lower half of page 5, the complaint details what

---

1/ The allegations here read in the singular but the context makes it clear that they are directed against both JAL and Pacifico. Pacifico is referred to as "JALPAK" in the complaint (a name apparently used to advertise tours).

complainant believes to be the system used by defendants in selling such transportation, with references to the attached exhibit material. The beginning of paragraph 8 states:

"The services which JALPAK has held out to provide, holds out to provide, is providing, is arranging to provide, consist of passenger stage corporation services over the public highways of this state, regularly or with some degree of frequency, between fixed termini or over route [sic] partly within and partly outside a municipality for compensation."

The complaint contains allegations or statements to the effect that a system has been developed among defendants and others which results in the monopolizing of Japanese tourist business in San Francisco (pp. 5-7) and that the system of selling tour packages to Japanese tourists results in diverting such tourists away from complainant and other lawful operators to the defendants' allegedly unlawful transportation operations.

Complainant requests, among other things, that we order defendants to cease and desist immediately from their allegedly unlawful operations.

The answers of both defendants deny that they are operating or furnishing any unlawful transportation. Defendants admit that they hold no passenger stage authority from this Commission.

The Motion to Dismiss of JAL

JAL filed a motion to dismiss the complaint alleging (1) that it operates no passenger stage service; (2) that its activities in California are exclusively in foreign commerce (i.e., international air transportation), and (3) that the complaint, generally, fails to state a cause of action against JAL.

JAL later filed a supplementary memorandum of points and authorities supporting its motion. Attached to it are affidavits tending to establish that Pacifico is not a wholly owned subsidiary of JAL, and not JAL's alter ego. The thrust of this supplementary filing is to attempt to show that if there is any unlawful passenger stage operation, it is not under JAL's control, and, further, that JAL is not an indispensable party to the action.

### The Cross-Complaint of Pacifico

The cross-complaint shows that Pacifico is a Hawaii corporation, with a local office in San Francisco. The cross-complaint contains several allegations of improper conduct directed at Dolphin's fitness to operate under its certificate. In this decision we will consider only the allegations that Mr. Lavelle, owner of Dolphin, used an official-looking "Notice of Violation" form for the apparent use of the Transportation Division of this Commission in its investigatory function. Supporting material to the cross-complaint indicates that Lavelle used the form to serve Pacifico with an unauthorized "official" Notice of Violation, relating to a bus tour occurring on May 3, 1979 aboard a vehicle belonging to Eastshore Lines.

Mr. Lavelle also wrote a very strongly worded demand letter (also an exhibit to the cross-complaint), but this was written on Dolphin's own letterhead and does not carry the color of official authority. Questions concerning this letter and other alleged actions of Lavelle are reserved.

### Position of the Commission Staff

The staff filed a memorandum of points and authorities in which it recommended that the motion to dismiss should be denied, and that the request for cease and desist orders should also be denied.

Regarding the motion to dismiss, the staff argues (1) the complaint does not ask the Commission to regulate anything beyond its jurisdiction; (2) JAL's affidavits are an inadequate substitute for a hearing; and (3) the application of the alter ego doctrine does not require dismissal.

### Discussion

It is our opinion that the motion to dismiss by JAL should be denied. The complaint is not jurisdictionally defective; it alleges that JAL illegally participated (and continues to participate) in a passenger stage operation in California, without proper authority. Some of the complaint's allegations (see previously quoted excerpts)

may be criticized as inartful or redundant, but they are clear enough to give the defendants adequate notice of complainant's claims regarding alleged unlawful passenger stage operations.

We also note that the complaint contains a mixture of allegations and legal argument, and that some of the allegations, not quoted previously in this decision, appear to have as their subject matter an alleged attempt to monopolize Japanese tourist trade in San Francisco. Insofar as such alleged monopolistic practices do not deal directly with whether illegal passenger stage operations are taking place, they are matters for the appropriate court and not this Commission. Such allegations are surplusage, however, and do not render the complaint fatally defective.

For JAL to argue that it is a foreign corporation whose operations solely concern international air travel is, at this point, to beg the question. It is elementary that a foreign corporation is subject to California law in conducting intrastate business in California, and whether JAL is conducting such business in addition to its international air operations is the very point in question.

We agree with the complainant and the staff that JAL's affidavits and other matter attached to its motion to dismiss are not a proper substitute for an evidentiary hearing at which complainant may either prove, or fail to prove, his case. We note that at this time (to our knowledge) there has been no discovery by which the allegations in JAL's motion have been tested. This Commission does not have a strict "code pleading" format, but a motion to dismiss in the form JAL has filed it must be regarded as analogous to a motion for summary judgment. Such a motion may be made when it is contended an action has no merit (CCP § 437c), and is not a device for trying disputed issues of fact. (Joslin v. Marin Muni. Water Dist. (1967) 67 Cal 2d 132, 147; 60 Cal Rptr 377, 387.) Summary judgment must be denied if any issue of material fact must be decided in order to render judgment. (Walsh v. Glendale Fed. Sav. & Loan Ass'n (1969)

1 Cal App 3d 578, 583; 81 Cal Rptr 804, 807; (disapproved on other grounds in Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n, 9 Cal 3d 731, 108 Cal Rptr 845).) The federal courts take a similar view. (Curto's, Inc. v. Kirsch-New Jersey, Inc. (N.J. 1961) 193 F. Supp. 235.) The California Supreme Court has called summary judgment a drastic remedy and has stated that it should be used with caution so that it "does not become a substitute for the open trial method of determining facts." (Pettis v. General Tel. Co. (1967) 66 Cal 2d 503.)

It is clear from the pleadings and the exhibits to the pleadings that the question of whether JAL is, directly or indirectly, operating any uncertified passenger stage routes cannot be answered summarily without a hearing. A review of the affidavit material attached to the complaint shows that defendants are promoting "optional" tours which are apparently not part of a package arrangement sold in Japan or sold only on a group basis. Individual fares are listed. It is not clear, however, whether the particular actions of the defendants extend to the activities which Public Utilities Code Section 1031 prohibits without a certificate.

With the exception of the "Notice of Violation" problem discussed hereafter, we believe that the same result must obtain regarding the requests for cease and desist orders by the complainant and by Pacifico. We agree with the staff that the present record is not so certain as to justify such orders in advance of a hearing.

It is clear, however, that there is no basis for the action of Mr. Lavelle, owner of Dolphin, the complainant herein, to purport to issue an official "Notice of Violation". Such action on his part is bound to mislead those served by him with such a notice into believing that he acts under color of state authority.<sup>2/</sup> We cannot

---

<sup>2/</sup> It should also be noted that, depending on circumstances, such conduct can be a violation of Penal Code Section 146a.

tolerate further abuses of this nature and we will order Mr. Lavelle to cease from any repetition of such an act.

Finding of Fact

On or about May 3, 1979, J. Mark Lavelle, complainant and cross-defendant in Case No. 10732, purported to issue an official Public Utilities Commission "Notice of Violation" form to defendant and cross-complainant Pacifico, warning Pacifico that it should cease and desist from an allegedly unlawful passenger stage operation.

Conclusions of Law

1. The complaint in Case No. 10732 states a cause of action against defendants within the Commission's jurisdiction under Public Utilities Code Section 1031.
2. Allegations in the complaint which are directed against alleged unfair or monopolistic business practices not concerning unlawful passenger stage operations may be treated as surplusage and do not render the complaint fatally defective.
3. The allegations in the complaint and its exhibits, and those in JAL's motion to dismiss and its exhibits, raise substantial and material issues which should be the subject of evidentiary hearings.
4. The motion to dismiss should be denied.
5. The various requests for cease and desist orders and other preliminary relief should be denied, except for ordering J. Mark Lavelle to cease from using this Commission's "Notice of Violation" forms or any other form or device which may mislead another to believe that he is receiving an official communication from this Commission.
6. Because a hearing is scheduled in the immediate future, the effective date of this order should be the date hereof.

IT IS ORDERED that:

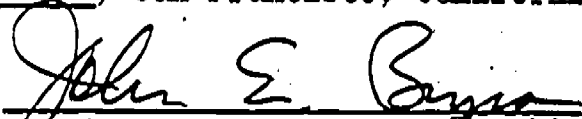
1. J. Mark Lavelle shall cease and desist from using "Notice of Violation" forms of this Commission, or any other official form or imitation of such form, and shall not, by any method or device, purport to act as an official or agent of this Commission.

2. Other requests for temporary relief are denied.

3. The motion to dismiss Case No. 10732 filed by Japan Air Lines is denied.

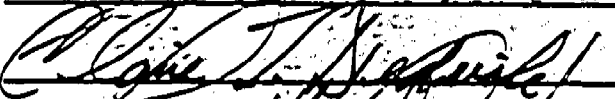
The effective date of this order is the date hereof.

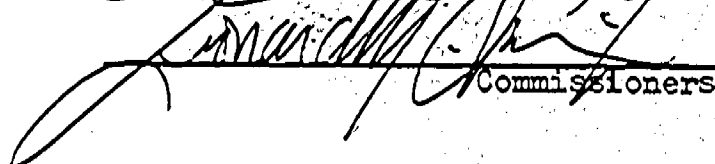
Dated NOV 30 1979, San Francisco, California.

  
\_\_\_\_\_  
President

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_  
Commissioners