

ORIGINAL

Decision No. 91780 MAY 6 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of San Fernando Valley-Northrop
Association of Passengers, Inc.,
a California corporation, for
authority to operate as a
passenger stage corporation in a
home-to-work service between
points in Los Angeles County and
the Northrop Corporation
facilities in Hawthorne, California.

Application No. 59129
(Filed September 7, 1979)

John E. deBrauwere, Attorney at Law, for
applicant.

Christopher Ashworth, Attorney at Law, for
Southern California Commuter Bus Service,
Inc., protestant.

Marc E. Gottlieb, for the Commission
staff.

ORDER GRANTING APPLICANT'S MOTION TO DISMISS

On September 7, 1979 applicant filed the instant application requesting authority to operate as a passenger stage corporation between points in the San Fernando Valley, on the one hand, and the Northrop Corporation (Northrop) facility located in Hawthorne, on the other hand. The proposed service will be provided only to persons employed at Northrop who purchase stock of the applicant. During the second day of hearing, October 18, 1979, after a discussion between all counsel and the assigned Administrative Law Judge, counsel for applicant made a motion to dismiss the application for lack of jurisdiction. The motion was taken under submission subject to the filing of briefs. A brief supporting the motion was filed by applicant. Briefs opposing the motion were filed by protestant, Southern California Commuter Bus Service, Inc. (Comm. Bus), and by the Commission staff.

Applicant is a California corporation. As of September 7, 1979 (the date the application was filed), applicant had not commenced business and, accordingly, has acquired no assets nor incurred any liabilities. The articles of incorporation authorize the issuance of 100,000 shares of capital stock, all of one class, which will be sold to persons desiring to ride the proposed bus service between the San Fernando Valley and Hawthorne. Each passenger will be required to purchase 50 shares at a par value of \$1 per share, such revenues to cover applicant's initial start-up costs. Subsequent costs of operating the bus business will be met by the weekly fares the applicant will collect from its passengers, and from further share of stock sales as may be required. It is contemplated that under a proposed weekly fare of \$17 per passenger and an estimated average ridership of 45 passengers applicant will realize \$765 per week which it estimates will cover its operating, accounting, and other legal costs of conducting business.

In the event that a passenger no longer wishes to ride the bus, his shares would be repurchased at their initial cost (\$50) by the applicant corporation or, in the alternative, they could be transferred to another passenger upon approval of the board of directors.

Witness for applicant, James Maddox, testified that it was the intention of applicant's directors to retain enough funds prior to any year-end distribution to allow for potential stock repurchases from persons no longer wishing to patronize its bus service. He also testified under redirect examination that patronage for the bus business would be solicited by advertisements on bulletin boards and through the house organs of Northrop. Advertisements would also be placed in the Valley Green Sheet, a

newspaper distributed throughout the San Fernando Valley area of Los Angeles County, in order to attract additional patronage. The objective is to carry as many passengers as possible or to attract sufficient patronage to operate with a high load factor.

At the end of each fiscal year any amounts remaining in corporate accounts would be distributed to all shareholders/riders on an equal basis. No salaries are contemplated for officers, directors, or administrators.

Discussion

The question before us is whether the applicant's proposed operations are that of a public utility passenger stage corporation as defined in the Public Utilities Code (Code), for which a certificate of public convenience and necessity is required.

At the outset we note that there are ownership and operational features of the applicant's proposed service which are unique and, most importantly, distinguish the circumstances and operations of the applicant's service from those featured in the cases cited by the staff and protestant. Applicant proposes to operate as a nonprofit entity or cooperative, and to provide transportation services only for its shareholders. The shareholders/riders own the carrier entity which will transport them. This is not the typical relationship a public utility has with its ratepayers or passengers. In essence, this is a nonprofit cooperative transportation service that will be engaged in "proprietary carriage" for its owners. (Proprietary carriage is the term meaning the transportation of one's own commodities.)

Given the cooperative and proprietary nature of the operation proposed, does it become a public utility service as a result of Section 216(b) and 207 of the Code? We think it does not. Section 216(b) of the Code provides that an operation is a public utility subject to the jurisdiction, control, and regulation of the

Commission whenever it is performed "for the public or any portion thereof for which any compensation or payment whatsoever is received". Section 207 of the Code defines the phrase "public or any portion thereof" to mean "the public generally, or any limited portion of the public, including a person...for which the service is performed...". Here applicant will not transport all commuters between certain points so long as they simply tender an individual fare. Certain significant conditions precedent must be met before transportation will be provided to the "public or any portion thereof". Thus, there is not a holding out of transportation services in the usual sense. Further, to fulfill the condition precedent to becoming a rider, the prospective passenger must become an owner of the transportation entity; thereafter, he must bear a pro rata share of the expense so long as his ridership continues. These conditions are such that the applicant is not holding out to the public service as a public utility passenger stage corporation. Rather, the applicant is holding out to sell shares in a nonprofit business enterprise that will provide a service to its shareholders. That the applicant proposed to advertise and solicit for shareholders/riders among the general public does not constitute holding out as that term is used in public utility status determination. We find no evidence or suggestion that the applicant has structured itself so as to evade or otherwise thwart California's regulatory scheme for passenger stage service. Were there proposed managers' fees or payments which would enrich the operators, such that they would be compensated along the lines of the typical public utility operator through the use of a device, the determination we reach herein could be different.

The employees of Northrop who formed the association and filed the instant application are in large measure commuters or former passengers of protestant Comm. Bus. Comm. Bus brought to

our attention the following which it terms "practical considerations" against our denying jurisdiction over the applicant's proposed operations (pp. 9-11, protestant's brief):

"The most obvious practical consideration centers around the notion that passengers, on a particularly well-attended route of a common carrier, should not be able to 'skim off' desirable traffic and thereby jeopardize the carrier's ability to serve other certificated routes which are not so successful. Protestant Southern California Commuter Bus Service, Inc., has approximately forty authorized routes. As observed by the protestant's president upon examination at the hearing, not all of the routes can be run profitably. Indeed, it is necessary for the good routes in essence to subsidize the bad ones. It requires no citation to note that utility regulators have always adhered to the position that certain profitable lines of work should subsidize unprofitable (but socially necessary) operations. One of the most conspicuous 'for instances' is the determination by the United States Congress in 1968 to amend the Interstate Commerce Act to create on behalf of the existing intercity regular route carriers a virtual monopoly on charter certificates for the express purpose of having profitable charter work subsidize the unprofitable regular route intercity operations.

"On the record developed to date in this case, it would be socially undesirable to have a profitable route taken away from a carrier who had unprofitable and marginal routes to subsidize. While the staff in this proceeding may well elaborate on this theme, the protestant cannot help but point out that unless there can be some genuine protection against random incursions into the field, there will be very little motivation for a person to start a passenger stage corporation at least for commuter work. The actual and tangible benefits of having certificated carriers obliged to perform to cross a broad spectrum of route profitability is not exceeded by some abstract notion that passengers should be permitted to start their own passenger stage corporation just because their route is fortuitously the profitable one.

"An additional and practical limitation inheres in the commuter area which is less prevalent elsewhere. The commuter bus operations similar to the one under consideration here tend to be operated on relatively luxurious equipment for employees employed by high technology corporations. There is more fluctuation or cyclical employment variations in high technology businesses and [sic] elsewhere, and as a consequence historically, a 'profitable' route in one year turns into a non-existent route in a future year simply because the target employer has shifted work to another plant or has simply lost a contract. As a consequence, it is more desirable to have a carrier with a large number of routes which can be recombined and manipulated in order to accommodate fluctuations of the various target corporations. It will be noted that the protestant, Southern California Commuter Bus Services, Inc., (and probably a fair number of other commuter operations) has specific authority in its certificate to change and combine routes and destinations in order to accommodate these fluctuations of employment. A single-interest group such as the applicant shareholders simply do not have the kind of flexibility needed to accommodate what are virtually certain fluctuations in the employment picture at (e.g.,) Northrop Aircraft Corporation."

Comm. Bus points out what concerns any business, coping with competition or potential competition. Public utilities frequently compete with nonregulated enterprise and, if a good service at a fair price is offered, they survive. For example, transit districts compete with passenger stage carriers on certain routes; telephone utilities compete in the terminal equipment market with nonregulated vendors; and highway carriers compete with the threat of traffic going proprietary if shippers dislike their service and rates. Likewise, passenger stages providing commuter service inherently compete with the prospect of commuters forming car pools. The strict protectionism preferred by Comm. Bus does not necessarily provide the public the best possible service. Rather, the threat of competition by another carrier should spur Comm. Bus into providing the most well-run, desirable, and innovative service possible, and not resting on its laurels. Those not willing

and able to stand the test of meeting competition, and not anxious to apply their business acumen to provide service that attracts and continues to attract ridership in the face of competition, should not be in the business of serving the public.

In conclusion, we note that our holding that applicant's service is not that of a public utility does not mean there will be no regulatory scrutiny. The California Corporations Commission will oversee the conduct of applicant and its stock issuance, and the Highway Patrol will inspect its equipment to ensure safety standards are met.

Findings of Fact

1. Applicant is or will be completely owned by its shareholders/riders.
2. Applicant will operate on a nonprofit cooperative basis, with any accrued earnings being returned to the shareholders/riders.
3. To become a user of applicant's transportation service, the prospective passenger must buy an ownership interest in the applicant's corporation.
4. Applicant is a bona fide California corporation.

Conclusions of Law

1. Applicant's proposed service is proprietary in nature since it will transport only shareholders, and is a cooperative undertaking and not that of a public utility passenger stage corporation.
2. Application No. 59129 should be dismissed.
3. The following order should be effective the date of signature so that the applicant can proceed to commence operations at the earliest date.

IT IS ORDERED that Application No. 59129 is dismissed.
The effective date of this order is the date hereof.
Dated MAY 6 1980 , at San Francisco, California.

John E. Bayon President
William L. Strauss
Richard W. Gould
Charles T. DeLoach
James W. Baker Commissioners