

ORIGINAL

Decision No. 92083 JUL 29 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF APPLICATION OF: )  
 SANAE TOMOYASU, a partnership, )  
 for a passenger stage certificate )  
 authorizing the transportation )  
 of passengers and their baggage )  
 between certain designated )  
 points within the State of )  
 California. )

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Application No. 58943  
(Filed June 20, 1979)

David P. Roche, Attorney at Law, for Sanae  
 Tomoyasu, applicant.  
J. Mark Lavelle, for Dolphin Tours, Inc.,  
 protestant.

O P I N I O N

The business entity known as Sanae Tomoyasu (Sanae) is a partnership in which Mrs. Sanae Tomoyasu is a partner and principal investor, and Mr. Tadaaki Kinoshita is the active partner and manager. In this application it seeks a passenger stage certificate to conduct tours narrated in Japanese between San Francisco and Lake Tahoe, and between San Francisco and Yosemite National Park.

Sanae's headquarters is at 338 Grant Avenue, San Francisco, near the Beverly Plaza Hotel, which is used by many Japanese. The application states that Sanae is in the business of promoting trade and tourism between the United States and Japan and that it presently provides transportation services for its clients through other carriers.

Dolphin Tours, Inc. (Dolphin), which conducts certain passenger stage tours in Japanese, including one between San Francisco and Yosemite, protested the application. The first day of hearing was held before Administrative Law Judge O'Leary on November 8, 1979. Later hearing dates were set for January, 1980 but then continued until March 20 and 21, 1980, when the hearings were completed before Administrative Law Judge Meaney and the case was submitted subject to the filing of briefs. There were certain extensions of the briefing deadlines. The closing briefs were received late in May 1980.

Applicant's Presentation

According to the application and the testimony of Mr. Kinoshita, Sanae's activities are centered in promoting business tourism. Sanae attempts to identify and market products made in Japan that are salable in the U.S., and to arrange meetings between American purchasing agents and Japanese business persons. Japanese businessmen frequently bring their families with them to the U.S. and wish to combine sightseeing with a business trip, partly because of favorable expense account treatment under Japanese law for such combined trips. According to Mr. Kinoshita, Sanae presently charges by the hour (per person) for its service and does not separately break out its transportation costs on bills to its clients.

Sanae proposes single-day round trips. The San Francisco-Lake Tahoe tour is to terminate on the California side of the South Lake Tahoe area, although Sanae indicated it might seek Interstate Commerce Commission authority to go into Nevada. The Yosemite tour is also intended as a single-day round trip. Fare for both tours is proposed as \$52 per person.

Mr. Kinoshita stated that Sanae owns two Cadillac limousines and one van. All vehicles are air-conditioned. Sanae, he said, intends to run small groups exclusively. When using the van, the passenger limit would be ten. When the limousine is used, the driver would narrate; when the van is used there would be a separate guide.

In both direct and cross-examination, Mr. Kinoshita laid considerable stress on what he considers to be the specialized nature of Sanae's service, as compared to Dolphin's (in an effort to show public need for a second San Francisco-Yosemite single-day tour with Japanese narration). He stated that while Dolphin dealt with the general Japanese-speaking public, Sanae's business was so structured that it attracted "high-class" Japanese who demanded more formalities and courtesies and smaller, more private groups. In this connection the witness stated that Sanae was selected to chauffeur Emperor Hirohito when he visited San Francisco in 1976.

Sanae sells group tours for businessmen and their families both here and in Japan. Mr. Kinoshita stated that a passenger stage certificate would allow them to put small groups together. As mentioned, the present method of payment is by the hour (\$20 per hour per person with a minimum of \$150-200). The testimony of the witness did not clarify how Sanae would charge the \$52 for the passenger stage fare--separately or as part of the hourly payment. The hourly method is presently used because other services, such as business introductions, are part of the package.

Sanae apparently intends to restrict the carriage of passengers to the "high-class" type of business client that it solicits. The witness emphasized the advantages of limousine transportation, as compared to buses, for "high-class" persons.

Attached to the application are a statement of income and expenses for 1978 and a statement of assets and liabilities for that year. They are both titled "Dillons Bar - Sanae Travel." The income-expense statement reads as follows:

INCOME

Income from Dillons	138,041.39
Commission Earned	110,034.22
Total	<u>248,075.61</u>

EXPENSES

Travel Expense	46,593.38
Supplies - Liquor	17,907.00
Supplies - Foods	19,517.47
Salaries	42,014.24
Commission Paid	27,937.31
Payroll Taxes	4,782.41
Other Taxes	7,041.98
Insurance Expense	1,334.44
Rental Expense	22,709.86
Telephone & Telex	4,385.26
Utilities	2,880.76
Advertising Expense	1,261.64
Automobile Maintenance	8,294.94
Maintenance Exp. - Other	3,860.54
General Operating Expenses	15,318.18
Total	<u>225,839.41</u>

NET INCOME: Taxable Income	<u>22,236.20</u>
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As can be seen, the "Sanae Travel" portion of the expenses is not broken out from those associated with Dillons Bar. The same problem, except for accounts receivable, is present in the statement of assets and liabilities. The statement shows an excess of assets over liabilities of \$20,204.82.

Sanae did not furnish for the record any proof of vehicle insurance or insurability. Sanae holds no authority from this Commission although our records indicate it has also applied for a charter-party permit.

While this was not part of Sanae's case, Mrs. Sanae Tomoyasu was subpoenaed as a witness by Dolphin. She testified to being principally an investor and was not able to add anything to the record relative to the actual business operations of Sanae.

Dolphin's Protest

Dolphin first contends that Sanae fails to demonstrate fitness for a certificate because Sanae has conducted tours on an individual fare basis and using regular routes without a certificate from this Commission.

Dolphin's witnesses show that Sanae placed an advertisement in a Japanese-language magazine advertising tours of San Francisco, to Yosemite, and to the Santa Cruz "mystery spot". Sanae's witness Kinoshita denied selling tours on other than a group basis since March 1, 1979. Dolphin's witnesses demonstrated that on at least two occasions since that time (March 12 and 13) Sanae sold individual transportation from San Francisco to Yosemite.

Dolphin next points out that Sanae has failed to demonstrate financial fitness. The financial material submitted with the application, reviewed previously, contains no information relating to transportation functions alone.

Finally, Dolphin produced witnesses and exhibits to show that its own service is satisfactory and that Sanae has failed to demonstrate the need for its service.

Noriko Abe, Dolphin's general manager, testified that Dolphin's guides go through a formal training program. All of the guides speak Japanese with the necessary degree of fluency. Those who were not born and raised in Japan are trained in Japanese customs in order to treat the passengers properly (the witness was born and raised in Japan, is bilingual, and personally conducts the training program).

Lately, Dolphin has sometimes used guides in tandem, so that on some of the longer trips there is one native-born Japanese and one Japanese-speaking American. In this way, the passengers can have the benefit of the American's knowledge of U. S. history, geography, life style, etc., while the native Japanese can be more attentive to the special needs of Japanese passengers. According to Abe, this is particularly done when one of the guides is new and still in the training program.

Abe stated that between July and December, 1979, Dolphin carried between 2,000-2,500 passengers. All of them, except for those on a nightclub tour, were asked to complete a questionnaire (see Exhibit 7). Between 1,500 and 1,700 turned in the questionnaire. A tally of the results by Dolphin shows that on questions relating to overall service by Dolphin, 81.2 percent found it excellent, 16.3 percent found it good, 2.5 percent found it average, and only 0.08 percent found it poor.

Kazuko Nakashima, one of Dolphin's guides, stated that in her opinion a limousine arrangement in which the driver narrates as he drives, might not please Japanese passengers, since in Japan it is considered bad manners not to face a person while speaking. She said she had handled all "classes" of people, and they had been satisfied with the service. She also stated that many Japanese prefer a Japanese-speaking American as a guide to a native Japanese, because of such person's knowledge of the U.S. She said that the passengers did not expect a Japanese-speaking American to understand all the formalities of Japanese manners, or of language.

J. Mark Lavelle, president of Dolphin, testified to the considerable promotional effort and expense Dolphin had put forward over the last year to build up business.

Dolphin experiences considerable competition from certain charter-party carriers who are the customary bus transportation for large "ground" operators specializing in the handling of Japanese tourists. Exhibit 5 shows that for the 10-month period ending December 31, 1979 Dolphin experienced a net loss of \$185,336.

#### Discussion

We believe that Sanae has failed to establish that a public need exists for its service, for the reasons presented by Dolphin, and, additionally, for reasons which we will discuss.

First, we emphatically agree that there is a failure of proof regarding financial fitness and certain other aspects of fitness as well. The financial material submitted with the application, reviewed previously, contains no information relating

to transportation functions alone. Mr. Kinoshita's testimony did not enlighten us regarding this phase of the case. At one point he admitted that the proposed Lake Tahoe service would not be profitable because, at present at least, the Lake Tahoe area is not popular in Japan. No projections of passengers or future estimates of profitability were submitted.

Sanae also furnished no exhibit material or other documentation of insurability or that the vehicles to be used had any recent California Highway Patrol inspection.

It is elementary that fitness is not presumed but rather is a matter of affirmative proof. Further, we have recently stated that our policy in issuing passenger stage certificates does not include the demise of the requirement that an applicant must demonstrate fitness to perform the proposed service (San Francisco-Yosemite Tours, \_\_\_\_\_ CPUC \_\_\_\_\_, Decision No. 91927 dated June 17, 1980, Application No. 57152). Here, even without considering any of Dolphin's evidence, there is no proper proof of financial fitness and fitness regarding insurability or safety. In this particular instance, these deficiencies are glaring enough that they, in themselves, would warrant denial of the application without considering other aspects.

However, we also believe that the applicant has failed to demonstrate the need for the service. Mr. Kinoshita was the applicant's only witness. We recognize that it would be difficult to produce Japanese tourists as witnesses. Compare, however, Amador Stage Lines, Inc., \_\_\_\_\_ CPUC \_\_\_\_\_, Decision No. 91954 dated June 17, 1980, Application No. 59368, in which no passengers testified but the application was well supported by travel agency personnel and airline employees. This record contains only the



general opinions of Mr. Kinoshita that "high-class" Japanese persons would prefer a separate passenger stage service. He relies principally on what he believes to be the cultural differences between Japan and the United States, and the fact that Japanese society is more stratified than that of the U.S. He referred to alleged complaints about Dolphin's service but offered no specific evidence along this line. Mr. Kinoshita's opinion was that some of Dolphin's guides were unsatisfactory because they were only part-time or temporary and, therefore, inadequately trained to handle Japanese business persons and their families, who were used to more considerate and formal treatment.

We believe that Dolphin's evidence regarding its understanding of the needs of Japanese passengers, and its training program and management of personnel, more than adequately rebuts the contentions of Mr. Kinoshita in this connection. Sanae's evidence fails to demonstrate any deficiencies of Dolphin's service, or that Dolphin does not perform its certificated service to the satisfaction of the Commission, under Public Utilities Code Section 1032.

Dolphin, moreover, has no real monopoly as to Japanese tourists. It is a small carrier in this connection and experiences heavy competition from certain large charter-party carriers who are the customary bus transportation for most of the "ground operators" specializing in handling Japanese tourists, particularly those traveling to this country under prepackaged arrangements sold in Japan. Moreover, any regular passenger stage company whose operations are not particularly restricted as to language, may conduct a sightseeing tour on its route or routes in a foreign language, or bilingually.

Finally, we come to public policy considerations. It is alien to our own standards of fairness, as well as inimical to equal protection provisions of the federal and California Constitutions, to issue a certificate to a person or entity to engage in transportation only for a certain social "class" of people. Sanae recognizes this; it does not request such a restriction but plans to structure its business specifically to attract business clientele of the "high-class" variety. What happens, then, when under a certificate without a specific restriction, Sanae turns away persons as unsuitable? There is a violation of the terms of the certificate. We note in this regard that it would seem impossible for Sanae to hold itself out publicly as a passenger stage corporation without attracting at least some persons lesser in social status than it desires. Moreover, even if pretexts are used to refuse passengers so that unfortunate members of the Japanese traveling public are fooled, the public record in this proceeding would stand as a monument to what is really going on.<sup>1/</sup>

On the other hand, if Sanae does not turn away such persons, then what is special about its service, and in what way is it anything but duplicative of Dolphin's? Regarding the duplication of service, we note that Sanae does not propose limousine service exclusively. For larger groups it will use a van with a driver and a separate guide. Its position is thus inconsistent. It stresses the advantage of a limousine and claims that a driver guide plus a limousine is more suitable for "high-class" people than a larger vehicle with a driver and a separate guide, but plans to use the latter system interchangeably, depending on group size, and in order to put groups together.

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<sup>1/</sup> We have routinely approved tariff provisions which allow a transportation company to refuse passage to a disorderly passenger or one who is likely to disturb others. This is obviously a completely different matter.

It may be argued that the certificate should be granted only as to the Tahoe part of the application. However, the fitness problems discussed above mean that the entire application fails to meet our standards. Additionally, however, we believe it would be against the public policy of this State to issue a certificate for a passenger stage operation to an applicant who intends, very possibly, to turn away prospective customers because their social status appears to be unacceptable to it.

Sanae's Illegal Operations

We note that at present, Sanae holds no authority from this Commission whatsoever. Yet it appears to be conducting some local tours and some tours to Yosemite. It claims that these tours are part of a package deal where, actually, a businessman and his family pay on an hourly basis and are furnished business contact services as well as transportation. However, no documentation of this was furnished. Neither Mrs. Tomoyasu nor Mr. Kinoshita furnished any exhibit material showing how particular tours are laid out or how business contacts are arranged. Even assuming that other ancillary services are performed along with the transportation, if a regular route is involved Sanae should have a passenger stage certificate before running it.

We note that Sanae has two limousines and one van which apparently are used interchangeably. While, depending on the seating capacity (and not on the amount of passengers carried), they may be exempt from charter-party requirements,<sup>2/</sup> this is not possibly the case with the van:

Sanae will be ordered to cease and desist from offering either passenger stage or charter-party transportation until it obtains the proper certificate or permit from this Commission.

Findings of Fact

1. Sanae is a partnership in which Sanae Tomoyasu is the principal investor and Tadaaki Kinoshita is the manager and active partner.
2. In this application, Sanae seeks passenger stage routes between San Francisco and Yosemite, and between San Francisco and South Lake Tahoe, for single-day round-trip service.
3. Sanae's equipment consists of two limousines and one van.
4. The only financial information furnished by Sanae was attached to the application, as described above.
5. Sanae furnished no safety inspection or insurance information for the record.
6. Sanae holds no authority from this Commission.

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<sup>2/</sup> Limousines usually have jump seats, which make the passenger capacity six or seven, depending on whether the front seat can hold one or two passengers. Public Utilities Code Section 5359 reads: "'Motor vehicle' [for purposes of the Passenger Charter Party Carriers Act] means every self-propelled vehicle with a seating capacity of more than five persons excluding driver." Ordinary sedans are thus exempt from charter-party requirements; limousines usually are not. The record does not establish with certainty the capacity of Sanae's limousines. This decision orders Sanae to cease illegal charter party operations. This means that the van cannot be used without proper authority, and if the seating capacity of the limousines exceeds that allowed by Public Utilities Code Section 5359, that capacity must be reduced before Sanae may continue to use them as exempted from charter-party requirements.

7. Sanae, if granted a certificate, intends to structure its business and promotional activities to solicit "high-class" business clientele from Japan. The evidence demonstrates that Sanae prefers this type of clientele exclusively and may refuse to carry or reserve space for persons it deems not to meet its social standards.

8. On two occasions in March, 1979, Sanae sold individual transportation from San Francisco to Yosemite. Sanae has, on a continuing basis, engaged in the unlawful charter-party carriage of persons.

9. Sanae's evidence does not demonstrate that Dolphin's San Francisco-Yosemite service for Japanese-speaking persons is not, or will not be performed to the satisfaction of the Commission.

Conclusions of Law

1. Sanae's showing regarding financial fitness, safety, and insurance is inadequate.

2. Regarding Sanae's proposed San Francisco-Yosemite service, it has failed to demonstrate that the existing carrier for Japanese-narrated tours over that route (Dolphin) is not performing or will not perform its service to the satisfaction of the Commission.

3. It is against the public policy of the State of California for this Commission to issue a passenger stage certificate to a person or company intending to solicit business from a certain social class of persons, to the possible exclusion of others.

4. Sanae should be ordered to cease and desist from providing passenger stage or charter-party transportation without first obtaining proper authority from this Commission. Because of the necessity to enjoin these violations, the effective date of this decision should be the date it is signed.

O R D E R

IT IS ORDERED that:

1. The application is denied.
2. Sanae Tomoyasu, a partnership doing business under its own name and under the name Sanae Travel International, shall cease and desist from furnishing passenger stage and/or charter-party transportation without first obtaining proper authority from this Commission.

The effective date of this order is the date hereof.

Dated JUL 29 1980, at San Francisco, California.

John E. Bryson  
President  
James L. Sturgeon  
Harold D. Gandy  
Edward W. Gandy  
Clair T. Heston  
Commissioners