

ALJ/jn

ORIGINAL

Decision No. 92480 DEC 2-1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

J. Mark Lavelle, dba
DOLPHIN TOURS,
Complainant,
vs.
JAPAN TRAVEL BUREAU,
INTERNATIONAL, and JAPANESE
TOUR OPERATORS ASSOCIATION,
and DOES I through XX, and
HIROSHI SAGAWA,
Defendants.

Case No. 10870
(Filed June 3, 1980)

ORDER OF DISMISSAL

Complainant J. Mark Lavelle, dba Dolphin Tours (Dolphin), is a passenger stage corporation with a certificate from this Commission to conduct certain sightseeing routes from San Francisco narrated in Japanese.

The complaint alleges on information and belief that defendant Japan Travel Bureau International (JTBI) is a "business entity" with offices in San Francisco, and that defendant Hiroshi Sagawa (Sagawa) is its president.

Regarding defendant Japanese Tour Operators Association (JTOA), the complaint alleges on information and belief that it is an "organization" with an office in San Francisco, whose chairman is defendant Sagawa. Twenty "Doe" defendants are alleged to be the members of JTOA.

The complaint alleges upon information and belief that:

"5. Defendants, in concert and individually, have held out to provide, are providing, are arranging to provide services which constitute passenger stage corporation services over the public highways of this State, regularly or with some degree of frequency, between fixed termini or over a regular route, partly within and partly without a municipality for compensation computed on an individual fare basis. Such operation requires prior certification by this Commission before Defendants may legally operate. Accordingly, Defendants have been and are providing, rendering, soliciting and/or otherwise arranging such service in violation of Sections 1031, 1032, and 5401 of the Public Utilities Code of the State of California by operating as a passenger stage corporation without the appropriate certificates of Public Convenience and Necessity, and such service is, therefore, unlawful."

The following paragraphs of the complaint add that the motor transportation furnished to the public consists of bus tours originating in San Francisco, and narrated in Japanese. No routes are described, however.

Paragraphs 9 and 10 read:

"9. The operation of uncertified passenger stage corporation services by Defendants, individually and in concert with one another, has resulted in what is, essentially, a monopolization of the Japanese tourist market in California, denying the opportunity of competition to Complainant and other American operators. This total monopolization is further described in Exhibit C.

"10. Immediate and irreparable harm will result to DOLPHIN TOURS, and to the public, if Defendants are permitted to continue to conduct their unlawful passenger stage corporation operations.

The prayer requests various preliminary and final orders against the uncertified bus operations, and is directed both

against "optional" tours (sold to Japanese tourists individually after they arrive in the U.S.) and "prepackaged" tours sold as part of a tour in Japan.

"Exhibit C", mentioned in paragraph 9 of the complaint, consists of a photocopy of pages 48 and 49 of the February 1980 edition of "Asia Travel Trade", apparently a trade magazine for the tour industry, which generally describes the growth in tour business for JTBI (said to be the largest Japanese tour wholesaler) and some of its competitors. The article mentions bus tours, although no routes are described and there is no information in the article as to who actually runs the bus transportation.

JTBI filed an answer averring that it is a New York corporation with principal offices in New York City and a local business office in San Francisco. The answer admits that JTBI holds no passenger stage authority from this Commission and that Sagawa is its San Francisco general manager. Otherwise, the answer denies the allegations of the complaint. A number of affirmative defenses are set forth, including that the complaint fails to state a cause of action, and that JTBI is in the business of being a receptive agent or ground handler for Japan Travel Bureau, not named as a defendant, a Japanese corporation selling package tours, in Japan, to the Japanese public wishing to travel to the U.S. or other countries. In other words, the affirmative defenses state that JTBI hires buses for tours but does not conduct a passenger stage business. The prepackaged tours sold in Japan are alleged to be beyond this Commission's intrastate jurisdiction.

Defendant Sagawa filed a motion to dismiss as to himself pointing out that there are no allegations in the complaint which

claim Sagawa, in an individual capacity, is acting as a passenger stage carrier, or in any other capacity besides general manager of JTBI or chairman of JTOA. A supporting declaration states that he maintains no independent business and that he personally owns no controlling interest in either JTBI or JTOA.

JTOA also filed a motion to dismiss on jurisdictional grounds, and on the ground that the complaint is "so vague, uncertain, and ambiguous that [JTOA] is unable to defend itself properly". JTOA also includes in its pleading a motion to abate the proceeding until we issue our decision in J. Mark Lavelle, dba Dolphin Tours v Japan Air Lines, et al., Case No. 10732 because the issue of the Commission's jurisdiction over "tour promoters" is pending there.

Pacifico Creative Service, Inc. (Pacifico), a Hawaii corporation and a defendant in Lavelle v JAL, supra, filed a petition to intervene and to abate proceedings for reasons similar to these of JTOA. Complainant filed a pleading opposing the intervention of Pacifico and the motions to abate. This pleading points out that Lavelle v JAL deals only with issues related to optional tours, while this case includes prepackaged bus transportation sold in Japan as part of an overall tour.

Discussion

In our opinion, this complaint must be dismissed on the ground that it is unintelligible as to all defendants. We also agree that Sagawa is not a proper party-defendant.

We have this date issued Decision No. 92455 in Pacifico Creative Service, Inc. (Application No. 58739) and Lavelle v JAL (Case No. 10732). In that decision we determined

that we have no jurisdiction to try issues relating to the alleged monopoly of a segment of the tour industry by companies not themselves in the passenger stage business but who are allegedly engaged in certain practices violative of the antitrust laws.

We stated:

"The issue of whether a foreign airline attempts unlawfully to monopolize the tour market by way of a corporate connection with a tour company which competes against "independents" is not a question within our regulatory framework but one to be decided by the appropriate court under the applicable statutes. (Cf. Foremost International Tours v Qantas Airways (1975) 575 F. 2d 381, cert. den. 429 US 816.)

"Finally, as to the specific passenger stage routes complained of, it is not necessary for the protection of the public for our regulatory purposes to enjoin anyone but the actual operator or operators of illegal operations. With such an injunction, either the movements cease or we may initiate contempt proceedings and seek other methods of enforcement, including criminal prosecution." (Administrative Law Judge's proposed report adopted as the Commission's decision, page 34, emphasis by the author.)

The allegations of paragraph 9 of the complaint in the present case (quoted previously) relate to the very issues over which we have held we lack jurisdiction. Could we strike this paragraph and proceed on the remainder of the complaint?

The answer is no. When this paragraph is omitted, the complaint states that the defendants, some of whom are unknown, are running unspecified bus routes. A minimally acceptable complaint concerning alleged illegal bus operations should state with much greater particularity who is actually operating which route. The routes themselves should be set forth with reasonable

certainty. This is no onerous burden if such movements are actually taking place; it is impossible to conduct regular bus transportation over the public highways secretly.

We will order this complaint dismissed. Since we have issued our decision in Lavelle v JAL, the motions to abate are moot. This dismissal renders intervention on the part of Pacifico unnecessary. We are aware that we leave unresolved the issues relating to our jurisdiction over prepackaged tours sold in foreign countries which include California intrastate bus transportation as part of the package. This complaint, however, is an unsuitable vehicle for us to resolve such a matter.

Conclusions of Law

1. The complaint's "monopoly" allegations in paragraph 9 are beyond this Commission's jurisdiction.
2. The complaint is unintelligible.
3. The complaint fails to state a cause of action against defendant Sagawa for the reasons set forth in Sagawa's motion to dismiss and its supporting declaration.
4. There is no longer a reason for intervention by Pacifico, and it should be denied.

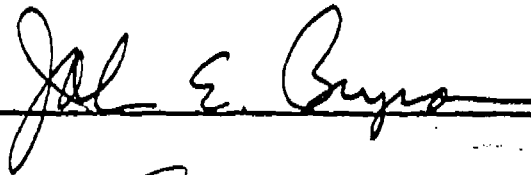
5. Issues concerning abatement of proceedings are moot.
IT IS ORDERED that:

1. Intervention by Pacifico Creative Service, Inc. is denied.

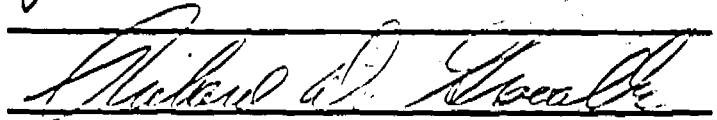
2. The complaint is dismissed.

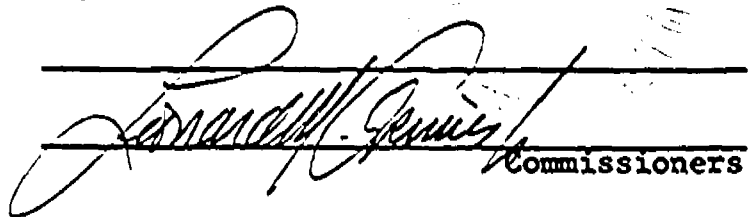
The effective date of this order shall be thirty days after the date hereof.

Dated DEC 2 - 1999, at San Francisco, California.



President





Commissioners

Commissioner Vernon E. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.