

ORIGINAL

Decision No. 93214 JUN 16 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
United Charter Service, Inc., for a
Class "B" Certificate to operate as
a Charter-Party Carrier of Passengers,
Daly City.

(File No. 98-A)

Application No. 59806
(Filed July 11, 1980)

Eldon M. Johnson, Attorney at Law, for
United Charter Service, Inc., applicant.
Condie, Lee and Gee, by Richard J. Lee and
Stevens Condie, Attorneys at Law, for
J. Mark Lavelle, protestant.
James S. Clapp, Attorney at Law, for Lorrie's
Travel & Tours, Inc., protestant, and for
O'Connor Limousine Service, Inc.,
interested party.
Dennis Natali, Attorney at Law, for
A-1 Limousine Service, interested party.

O P I N I O N

On July 11, 1980 United Charter Service, Inc.
(United or applicant) filed an application for a Class B certificate
to operate as a charter-party carrier of passengers. Its home
terminal is 375 South Mayfair Street, Daly City, California. Applicant
is currently a permitted carrier of passengers, holding operating
authority under TCP 1114-P which is limited to 14 passengers or less.
By this application, applicant seeks to expand that capacity to carry
25 passengers or less. The application shows that applicant currently
owns seven Dodge maxi-vans, five of which have a seating capacity of
14 (excluding the driver) and two of which have a seating capacity of
15 (excluding the driver). The application shows total assets as of
April 30, 1980 of \$137,509 and total liabilities of \$86,030.

If granted the requested authority, applicant plans to order a 28-foot microbus CB, which with the back seat removed to provide a luggage area, will carry 25 passengers. Applicant believes that this size bus will fill the gap between 15-passenger vans and 36-45 passenger buses. Applicant's witness Itakura testified that the average size of the Japanese travel group he carries has declined from 25-30 people to 16 or 17 people. Under his current authority, he must run two vans for this number of people which consumes more fuel and requires two guides and two drivers, contributing to overall greater expense.

Three days of hearing were held before Administrative Law Judge Bernard Peeters in November 1980 and before Administrative Law Judge Mary Carlos in January 1981. The matter was submitted after oral arguments on January 14, 1981 subject to the receipt of transcript which was filed on February 10, 1981.

Two protests were filed, one by Lorrie's Travel & Tours, Inc. (Lorrie's) and one by J. Mark Lavelle, dba Dolphin Tours (Dolphin). Neither protest was timely filed under our Rules of Practice and Procedure, Rule 8.3. Motions were made that Rule 8.3 be waived and the protests received, and oral argument was heard on November 13, 1980. ALJ Peeters took the motions under submission. Both Lorrie's and Dolphin participated in the cross-examination of applicant and both presented witnesses in support of their position that the Commission should not grant the requested authority.

A further petition for acceptance of a late-filed protest and request for hearing was filed by Greyhound Lines, Inc. (Greyhound). Greyhound's petition contains an offer to withdraw its protest provided that, if a certificate is granted, it be restricted to buses of 25-passenger capacity pursuant to applicant's proposal. Since applicant's proposal contains such a restriction on its face and since Greyhound did not appear at the hearing, we surmise that Greyhound has withdrawn its protest. Further, since the purpose of the revised

rules on protests was to reduce the number of spurious protests and protests made only for the sake of delay, and since both Lorrie's and Dolphin participated fully in this matter, we will waive Rule 8.3 and accept the late-filed protests.

Lorrie's protest offers to develop the following specific facts:

1. The financial fitness of the applicant, as well as the present financial status of Lorrie's.
2. Diversion of traffic that would result from a grant of the requested authority.
3. Existing excess capacity in relation to currently certificated carriers.

At hearing, Lorrie's witness testified that Lorrie's holds Class B charter-party carrier authority limited to vehicles of 21 passengers or less. Lorrie's has nineteen vehicles of various sizes available for its charter work. Four of the vehicles were added in 1980 because of customer demand and to increase service power. Lorrie's testified that it has sufficient vehicles to meet its current customer demand and that it would add more vehicles as customer demand requires. It went on to point out that Lorrie's shows a negative stockholder equity of (\$66,924.89) and a net loss for the six months ended June 30, 1980 of (\$22,213.60). Lorrie's alleges that its financial condition will be further jeopardized by the addition of another charter-party carrier such as applicant. Lorrie's closed by stating that the Commission had never informed it that its service was not satisfactory.

Dolphin's protest states that it will offer evidence demonstrating that:

1. Applicant is violating its present authority showing a total disregard of the Commission's regulations and is unfit to be entrusted with additional authority.
2. Applicant is presently unlawfully operating in violation of §§ 1031, 1032, and 5401 of the Public Utilities (PU) Code ^{1/}

1/ All references are to the California PU Code.

3. Applicant operates over a regular route between fixed termini charging (either directly or through an agent) individual fares.
4. Applicant presently owns and operates at least four passenger vehicles, seating more than fourteen passengers plus a driver, weighing more than 7,000 lbs. in violation of § 5384(b).

At hearing in support of the allegation that applicant operates over regular routes between fixed termini, Dolphin testified that its tour escorts and charter bus drivers reported seeing applicant's vehicles at least three times a week loaded with passengers from various Japanese Tour Operators Association agencies along the routes to Yosemite and to the Mystery Spot, near Santa Cruz.

In support of the allegation that applicant is charging individual fares, Mark Lavelle testified for Dolphin that he personally had run into four Japanese tourists who had been charged \$95 directly by applicant for a tour to Yosemite. Dolphin's price at that time was \$50. Lavelle testified of one other instance reported to him of applicant's charging more money for a tour to Mystery Spot than Dolphin did and that applicant had some sort of brochure. A copy was not produced and it is unclear from the testimony whether the brochure showed individual fares in this instance.

Dolphin presently has a passenger stage certificate but owns no vehicles of its own, conducting its operation by chartering vehicles of other authorized carriers according to its need. The certificate is limited to tours in the Japanese language.

Discussion

The allegation that applicant is financially unfit is overcome by the income statement and balance sheet submitted by applicant. As of July 31, 1980, applicant shows assets of \$140,875 and liabilities of \$80,359 with a total stockholders' equity of \$60,516. For the nine-month period ended July 31, 1980 applicant shows a net profit of

\$21,966. The assertion of Dolphin that applicant's business will fall off as much as 40 percent to 50 percent as a result of our decision in the Pacifico matter (J. Mark Lavelle (Dolphin Tours) v Pacifico Creative Service, Inc. and Japan Air Lines Company, Ltd. Case (C.) 10732, Decision (D.) 92455 dated December 2, 1980) is speculative and no facts were adduced in support of this opinion.

The allegation that applicant is operating in violation of law by carrying more than 14 passengers in vehicles weighing in excess of 7,000 lbs. gross weight is also unproven. Applicant submitted a weighmaster's certificate for its heaviest vehicle (a 15-passenger Dodge Maxi Van, License No. 1S94349) showing a tare weight of 6,280 lbs. It was not shown what the weight of the vehicle would have been with passengers and their baggage. Applicant's witness also testified that 14 was the maximum number of revenue passengers carried, although occasionally the tour agency provides a guide which brings the total people in the vehicle, exclusive of the driver, to 15. He testified that the tour guide was not counted as a passenger. When applicant uses larger vehicles it does so on a sub-charter basis from other carriers authorized to use the larger vehicles and thereby operates under their authority rather than its own restricted authority. While § 5384 provides that permits shall be issued to carriers using only vehicles under 15-passenger seating capacity vehicles, we note that the Commission staff approved 15-passenger vans for United's use under its existing permit, and this fact together with applicant's statement that it does not carry more than 14 revenue passengers is sufficient to convince us that no intentional violation of § 5384 has occurred. If a violation exists, it is at most a technical one.

Dolphin's claim that applicant is operating as a passenger stage carrier by charging individual fares and following regular routes is insufficiently documented to support the claim and is denied by applicant. Applicant's witness indicated that he had on occasion collected moneys from individual passengers at the direction of the travel agency which had chartered his company but that he did not do so when charging for his own operation. Dolphin's evidence in this regard consists ✓

largely of Lavelle's recounting incidents that others have recounted to him but only one incident in which he was directly involved. Testimony about that incident involving four Japanese businessmen who had taken applicant's charter to Yosemite, was devoid of documentation or precise detail. We cannot find on the basis of such remote testimony that applicant was charging individual fares in violation of the terms of its permit authority. Applicant has also denied that it follows regular routes, testifying that the routes depend on the guides or drivers or upon customer request. Usually the driver determines what route is to be followed, based on safety considerations. The record contains no testimony which convinces us to the contrary.

Lastly, Dolphin contends that applicant is unfit because it has tried to evade the Commission's regulations by aiding, abetting, assisting, or acting as the agent of an operator that should have a passenger stage certificate but does not. Dolphin refers specifically to the conduct of "optional tours" as described in D.92455 in C.10732 (J. Mark Lavelle (Dolphin Tours) v Pacifico Creative Service, Inc. and Japan Air Lines Company, Ltd.). Dolphin bases this contention on three Commission staff letters to Japanese Tour Operators Association (JTOA) during April and May 1979. Applicant has testified that it is a member of JTOA; and Dolphin asserts that as a member, it knew, or should have known as a result of the staff advice in these three letters, that the operations conducted as optional tours by JTOA members required a passenger stage certificate. By accepting charters from JTOA members which did not possess a passenger stage certificate, Dolphin contends that applicant was in knowing violation of the law. Dolphin recommended in closing arguments not only that this application be denied but that applicant's existing permit authority be revoked.

The issue of who actually owned, operated, controlled, or managed a system for the transportation of people in the Pacifico matter was one which was hotly contested by several parties. It was not until December 2, 1980, in D.92455 we concluded that Pacifico, and not the various charter-party carriers, controlled and managed the passenger stage routes in question, and that as a tour promoter Pacifico must use the correct class of carrier to provide the transportation. Therefore, it is only transportation provided after D.92455 for which applicant may be charged with knowledge that a passenger stage certificate is required if the transportation involves a California intrastate passenger stage route. There is no evidence that applicant provided transportation services to optional tour customers after December 2, 1980, which would require a passenger stage certificate under the Pacifico rationale. We therefore have no basis for finding applicant unfit for the authority for which it applies. ✓
Further, there is no basis for considering revocation of United's existing authority. ✓

We do, however, have a problem with the issue of applicant's need for the certificate. Applicant's president was the only witness testifying on its behalf; no public witnesses were presented. The witness testified that he had contacted four Japanese tour operators to testify, but all four refused. The witness states that this is ✓
because two of the tour operators have been sued by Dolphin in federal court for alleged antitrust violations (C 80 3846; United States District Court, Northern District of California), and the other two do not want to become involved because of this antitrust suit. The witness declined to name any of the four tour operators contacted.

The following exchange took place between applicant and counsel on direct examination on the question of need:

"Q All right. Would you describe for the record and for the Judge why the applicant here needs and/or wants the Class B authority that has been applied for here?

"A We like to have Class B license because customers want, asked to fill the gap between 15-passenger van to between big bus and also--

"Q Now you use the term 'big bus,' what do you mean?

"A Big bus mean 36, 40, 45 passenger bus.

"Now also even wide van, wide one van cramped and uncomfortable for more than 12 passengers.

"Q Are there any other reasons?

"A If, if I get all, say, 14, 15 passengers tour, I have to provide two buses which spends more fuel and has to provide two guides and two drivers, it's going to be more expensive; and also, more Japanese travel group is reducing size from average of 25, 30 to 16, 17, that's average.

"MR. CLAPP: Excuse me.

I didn't--would you repeat that?

"THE WITNESS: Well, the group in the old days used to be we had big group in one tour, I say about 25, 30 people in a tour, but these days I think inflation affecting on this maybe tour, some people getting group, getting smaller and smaller which they charter us.

"Some group is maybe 16, 20 average passengers in one group.

"ALJ [sic] JOHNSON: Q You have used the term old days, in the old days would handle a group of 25 or 30 passengers, what kind of--

"A The bus company could handle those group, they using big buses for even 14, 15 small groups, because no adequate bus size in those groups.

"Q When we use the term 'big bus,' would you name some of the big bus companies, big buses that operate here in San Francisco?

"A Falcon, San Franciscan, East Shore, Charter Buses.

"Q Can you think of any others that handle Japanese traffic?

"A I believe there is more, but I am not too familiar with those."

* * *

"Q And if you could operate such a (25-passenger) bus, would this help your passengers and help your business in any way?

"A Yes.

"Q Would you explain why or how?

"A The passenger feel more comfortable with enough room, and the customer likes to save the money which spend two buses instead of one.

"Q In other words, if you get more than say 12 or 14?

"A 12, 14, yes."

* * *

"MR. JOHNSON: Q Can you afford to buy this bus?

"A Yes.

"Q Can you afford to get the extra insurance that the size of this vehicle might require under the Commission's rules?

"A Yes.

"Q Do you think this is the right thing for your business at this time?

"A Yes, I believe so." (RT 55-61.)

We have held that there is no requirement that the burden of showing public convenience and necessity must be met by public witness testimony, particularly in an application for a charter-party permit for a sightseeing operation. We are particularly sensitive to the problem of securing testimony of tour agents catering primarily to the Japanese tourist industry in view of the ongoing legal dispute between Dolphin and various Japanese tour operators.

In this proceeding, we have an applicant who is willing to invest in larger equipment, in a highly competitive market, to meet the need that he perceives. While this testimony is not supported by independent evidence, it appears to us a per se indication of need for service. It does not make economic sense to commit capital to purchase of larger equipment unless there is a reasonable expectation that this equipment will be necessary to carry additional revenue passengers, thereby recovering the investment.

Further, applicant makes a strong case for the efficiency of using a single, large vehicle in lieu of two smaller ones. The legislature has declared, with respect to the carriage of property, that it is the policy of this state to achieve increasingly efficient

use of energy in the performance of transportation services. (§ 3502.1). While not separately articulated in the Passenger Charter-Party Carriers' Act, we can find no compelling reason not to apply this same policy to our consideration of applications concerning carriage of passengers. Accordingly, we find that there is a need for the proposed service and will grant the authority requested in the application.

Findings of Fact

1. United presently holds a § 5384(b) charter-party permit, and seeks a Class B certificate by this application.

2. United's stated purpose in obtaining the Class B certificate is to offer charter-party service for groups of 25 passengers, maximum, in a 28-foot microbus which will be purchased for this purpose. Solicitation of business would be primarily from, although not limited to, Japanese tourists arriving from overseas.

3. The application was initially protested by Lorrie's, by J. Mark Lavelle, dba Dolphin Tours, and by Greyhound. Greyhound did not participate in the hearings and has apparently dropped its protest.

4. Financial fitness has been demonstrated and applicant has not been shown to be operationally unfit to possess the requested authority.

5. United is willing to purchase a larger vehicle if the requested authorization is granted.

6. A larger vehicle would preclude the need of two vehicles for groups of 12 or more thereby saving both energy and operating costs.

7. United has the ability, experience, and financial resources to perform the proposed service.

8. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

9. The following order should be effective the date of signature because there is a demonstrated public need for the proposed service.

Conclusions of Law

1. Public need for the proposed service has been demonstrated.
2. The application should be granted to the extent set forth below.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity to operate as a Class B charter-party carrier of passengers, as defined in Section 5358 of the Public Utilities Code, from a service area encompassing a radius of forty air miles from applicant's home terminal at 375 South Mayfair Street, Daly City, California, is authorized to be issued to applicant, United Charter Service, Inc. Service shall be limited to vehicles seating 25 passengers or less.


2. In providing service pursuant to the certificate when issued, applicant shall comply with and observe, among other things, the safety rules administered by the California Highway Patrol, the rules and other regulations of the Commission's General Order No. 98-Series, and the insurance requirements of the Commission's General Order No. 115-Series. Failure to do so may result in cancellation of the operating authority.


3. When the required California Highway Patrol clearances for the new larger sized vehicle(s) are received by the Commission's Passenger Operations Branch and the evidence of adequate protection

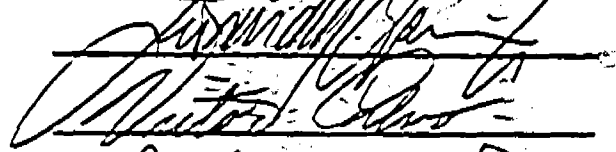
against liability imposed by law is filed in compliance with General Order No. 115-Series, the annual renewable certificate on Form PE 695 will be issued by the Passenger Operations Branch under the authorization of Resolution PE-303, approved July 29, 1975.


This order is effective today.

Dated JUN 16 1981, at San Francisco, California.



President






Commissioners