

SEP 20 1996

Decision 96-09-083 September 20, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Vinodrai Rawal, dba the Wharf Airporter, Complainant,

ORIGINAL

SFO Airporter (PSC - 37), Defendant. Case 93-04-019 Filed April 16, 1993

Cooper, White & Cooper, by Barbara L. Snider, Attorney at Law, and Vinodrai Rawal, for Vinodrai Rawal, complainant; Ray Greene, Attorney at Law, and Jeffrey Lehouidakis, for SFO Airporter, Inc., defendant.

1. Summary

In this decision we find that on two occasions defendant SFO Airporter, Inc. (SFO Airporter) violated Rule 11 of the Commission's Rules of Practice and Procedure (Rules) by making false misstatements of fact to the Commission. For each violation we will impose a fine of \$1,000, a total of \$2,000. Upon payment of the fines pursuant to our order, SFO Airporter may reinstate its tariff for scheduled service between San Francisco International Airport (SFIA) and the Fisherman's Wharf area of San Francisco.

2. Background

This Complainant Vinodrai Rawal, doing business as the Wharf Airporter (Wharf Airporter), operates a scheduled bus service between the SFIA and the Fisherman's Wharf area of San Francisco, pursuant to authority granted by this Commission in June 1993.

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Defendant is a passenger stage corporation which presently operates two scheduled services between SFIA and downtown San Francisco, but not Fisherman's Wharf. Defendant aspires to operate a third scheduled service between Fisherman's Wharf and SFIA, but the tariff it filed for that service on March 17, 1993, was protested by complainant and subsequently suspended pending further order of the Commission.

This proceeding is the product of rivalry between these parties surrounding the commencement of scheduled Fisherman's Wharf airport service. Historically that service was operated by SFO Airporter, but in 1987 it was discontinued after a strike by SFO Airporter employees. Wharf Airporter's 1992 application to provide that service drew a protest from SFO Airporter, which prompted Wharf Airporter to file the present complaint.

Wharf Airporter filed this complaint on April 6, 1993, while its application to initiate Fisherman's Wharf service was still pending before the Commission. The complaint alleged that SFO Airporter had engaged in a pattern of anti-competitive behavior in relation to the operation of such service. We may infer that this alleged conduct was calculated to preserve its de facto control of the franchise to provide scheduled Fisherman's Wharf service without having to resume operation at that time. Wharf Airporter alleges that SFO Airporter committed a violation of Rule 1 in so doing, asks us to restrain SFO Airporter from implementing the Fisherman's Wharf service pending investigation of these events, and seeks sanctions against SFO Airporter for its allegedly deceitful anti-competitive behavior.

In its answer SFO Airporter admits many of the factual allegations of the complaint but denies any wrongdoing. This

Wharf Airporter (Wharf Airporter) operates a scheduled bus service between the SFIA and the Fisherman's Wharf area of San Francisco pursuant to authority granted by this Commission in June 1992.

places in issue the question of whether SFO Airporter violated Rule 1 in its dealings with the Commission relating to these events.¹

3. Procedural History

Administrative law judge (ALJ) Frank O'Leary, to whom the case was initially assigned, held a prehearing conference (PHC), but retired from state service before holding a hearing. The case was reassigned to ALJ Orville Wright, who held a second PHC and scheduled the matter for hearing. However, Wharf Airporter moved to disqualify ALJ Wright after the PHC, and the case was reassigned to ALJ Victor Ryerson in order to preserve the hearing date.² A one-day evidentiary hearing was conducted by ALJ Ryerson, and the proceeding was submitted on June 15, 1995, following the exchange of concurrent closing briefs.

4. Stipulated Facts

At the hearing the parties stipulated on the record to most of the material facts. Their agreement is summarized here.³

Wharf Airporter filed Application (A) 92-01-044 on January 14, 1992, seeking authority to provide regularly scheduled bus service from SFO to the Fisherman's Wharf area of San Francisco. The application was granted.

1 Although Wharf Airporter alleges that SFO Airporter engaged in anti-competitive conduct, it has not cited any statute, rule, regulation or order that would make SFO Airporter's conduct unlawful, nor any jurisdictional basis for this Commission to penalize SFO Airporter for that conduct. Accordingly, we are limiting our consideration to purported violations of Rule 1.

2 The Chief ALJ's Ruling on reassignment did not reach the merits of the motion, but made the reassignment in the interest of expediting the proceeding.

3 The parties made certain corrections to the previously admitted facts as part of their stipulations at the hearing. The rendition of stipulated facts here has been edited for brevity and clarity, but includes all of the matters which were the subject of the parties' agreement. (See Trans. 10)

by Decision (DI) 93-06-053, issued June 23, 1993.

Defendant SFO Airporter is a passenger stage corporation operating under the regulatory authority of the Commission. Defendant provides regularly scheduled bus service between SFIA and points in the Union Square and financial districts of San Francisco. SFO Airporter does not presently provide scheduled bus service in the Fisherman's Wharf area and has not provided regularly scheduled bus service between SFIA and the Fisherman's Wharf area since 1987.

The Commission granted SFO Airporter's operating authority in D.77121 in 1970. SFO Airporter's authority is different from certificates granted to other passenger stage carriers providing airport shuttle service after 1970, in that SFO Airporter does not need to seek Commission approval before adding new routes from SFIA to points within San Francisco, while other carriers are required to seek such approval.

On January 31, 1992, SFO Airporter filed a protest to A.92-01-044, alleging that the application should be denied because there was no need for the regularly scheduled service proposed by complainant. Shortly after SFO Airporter filed its protest, it filed a request with San Francisco Airport Ground

Transportation seeking SFIA authority to provide a similar regularly scheduled service from SFIA to the Fisherman's Wharf area. Notwithstanding defendant's actions seeking SFIA authority to provide this service, defendant has consistently argued in A.92-01-044 that there is no need for scheduled service to the Fisherman's Wharf area.

Defendant's witness, Jeffrey Leonoudakis testified in the application proceeding on July 8, 1992, that defendant was seeking authority from SFIA to provide regularly scheduled service to the Wharf area. On February 10, 1993, Mr. Leonoudakis testified under oath that defendant had conducted its own market study of the need for regularly

scheduled bus service between SFIA and the Fisherman's Wharf area; had concluded that there was no need for such service, and had decided not to provide regularly scheduled bus service to the Fisherman's Wharf area at this time. Mr. Leonoudakis further testified that the SFO Airporter was no longer seeking a permit from SFIA to provide this service.

On March 19, 1993, defendant filed a concurrent closing brief in A.92-01-044 in which defendant continued to argue that there was no need for regularly scheduled service to the Wharf area and continued to state that defendant had decided not to provide scheduled service from SFIA to the Wharf area because defendant did not feel there was any need for this service.

On March 17, 1993, two days earlier, SFO Airporter had filed a revised tariff sheet with this Commission to implement the scheduled service to the Wharf area which SFO Airporter had testified it was not going to provide because there was no need. No notice of the tariff filing was given to any of the parties in A.92-01-044. The March 17 tariff states that it was to become effective April 19, 1993 but it has been, and remains, suspended.

Upon filing the tariff, defendant again actively sought a permit from the San Francisco Airport to provide scheduled service to the Fisherman's Wharf area, notwithstanding Mr. Leonoudakis' testimony on February 10, 1993, that they were not presently seeking such a permit. While the service outlined in defendant's tariff is not identical to the service proposed by complainant in A.92-01-044, defendant's proposed service will provide service to several of the same hotels to which

4 The parties stipulated here that SFO Airporter was the sole protestant in A.92-01-044 but that is not the case. A protest was also filed by BayPorter Express with respect to a proposed route from SFIA to Oakland Airport. Accordingly, that part of the stipulation has been deleted.

complainant has proposed service, thus directly competing with the service proposed by Wharf Airporter, for which defendant has testified as recently as February 10 there is no need for Wharf Airporter contends that SFO Airporter's

simultaneous assertion of inconsistent positions in different proceedings constitutes "sharp dealing," which the Commission declared to be a violation of Rule 1 in Re U.S. West Cellular of California, Inc. (1990) 38 CPUC 2d 411. Complainant also contends that SFO Airporter made specific factual misrepresentations to the Commission in the course of these dealings. Complainant argues that, taken together, this conduct amounts to a pattern of activity which was calculated to give SFO Airporter an unfair competitive advantage over his company, the aspiring new entrant in the Fisherman's Wharf scheduled airport service market, and that the Commission should penalize SFO Airporter for this anti-competitive behavior.

SFO Airporter responds that the evidence does not demonstrate any act or omission which violates Rule 1, and that its protest in Wharf Airporter's application proceeding, which is the principal source of the controversy, was filed in the legitimate exercise of its right to present its position in the proceeding to the Commission.

5. The Scope of Rule 1

Rule 1 states in pertinent part that they were the service outlined in "Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act, agrees never to mislead the Commission, or its staff by artifice or false statement of fact" [Emphasis added.]

There are consequently two routes to potential culpability under Rule 1: artifice (i.e. trickery) and deception (i.e. false statements). Accordingly, that part of the stipulation has been deleted.

misstatement of fact need not be intentional in order to violate Rule 1. Wharf Airporter cites D.93-11-018, Investigation on the Commission's Own Motion into All Facilities Based Cellular Carriers CPUC2d for the proposition that a violation of Rule 1 can result from a reckless or grossly negligent act. (Id., mimeo., pp. 55-56.) Moreover, an omission to provide correct information can constitute a Rule 1 violation if the consequence is to mislead the Commission about a matter which is material to a proceeding. D.92-07-084, Re Natural Gas Procurement and Reliability Issues (42) CPUC2d, 241, 242. We will examine SFO Airporter's conduct under each of these standards.

5.1 SFO Airporter's Representation to the Commission on May 6, 1993, that its tariff for scheduled airport service had been formally filed and accepted by the Commission was a violation of Rule 1.

On May 6, 1993, SFO Airporter filed A.93-05-003 to establish a zone of rate freedom for scheduled service as a passenger stage corporation between SFIA and points in San Francisco. Appended to the application were partial copies of SFO Airporter's tariffs, including the schedule for the Fisherman's Wharf service which it had filed on March 17 and contemplated starting on April 19. With respect to these appendices, the application contained the following statement: "These revisions have been formally filed and accepted by the Commission." (Id., p. 7.)

SFO Airporter had been told the following in a letter dated April 29, 1993, from Thomas E. Enderle, Senior Transportation Engineer, in the Commission's Transportation Division:

"The Commission has received a timely filed protest to the (SFIA - Fisherman's Wharf) Tariff filing under the rules outlined in the Commission's General Order 113-B.

"As of the date of this letter, the subject tariff filing is suspended until further order of the Commission." (Ex. 4.)

At the hearing, Mr. Leonoudakis testified several times that he was aware that SFO Airporter had received this letter, and that the March 17 tariff amendment was suspended (Tr. 51-52, 65, 63). This was not mentioned in its application. Thus, although it was correct that the revisions had been formally filed and accepted by the Commission, there was a serious material omission in SFO Airporter's statement. The evidence supports our finding that SFO Airporter violated Rule 1 by omitting a material fact from its application. A.93-05-003

5.2 SFO Airporter's statement in its application for rehearing of D.93-05-016 that it had "greatly expanded its existing scheduled service" violated Rule 1.

On June 16, 1993, a few weeks after the foregoing incident, SFO Airporter filed with the Commission an application for rehearing and/or reconsideration of D.93-05-016, which had granted an extension of the certificate of public convenience and necessity to another airport shuttle operator. In that document SFO Airporter stated that it had "greatly expanded its existing scheduled service between the airport and points in San Francisco," and argued that the additional operating rights should not have been granted to the competitor because of the intensity of the competition for the service under consideration. On cross-examination, Mr. Leonoudakis admitted that this reference to expanded scheduled service referred specifically to the startup of the Fisherman's Wharf service. Clearly, his admission proves that at the time it was made, the statement that SFO Airporter had greatly expanded its service was a false statement of fact, because its scheduled service had not changed at all. The statement violated Rule 1.

"As of the date of this letter, the subject tariff filing is suspended until further order of the Commission." (Ex. 4.)

5.3 SFO Airporter's protest of Wharf Airporter's application and its subsequent filing of a tariff to provide scheduled Fisherman's Wharf service do not constitute a violation of Rule 1

The stipulated facts indicate that on several occasions during the period when Wharf Airporter's application was being processed, SFO Airporter urged the Commission to find that there was no need for scheduled service between SFIA and Fisherman's Wharf, while at the same time seeking to exercise, or at least protect, its own option to provide the service as the sole certificated carrier. Complainant alleges that this is a violation of Rule 1. SFO Airporter explains the apparent inconsistency in its actions as resulting from a change in its analysis of the market for the service. On the facts before us we do not find that this conduct violated Rule 1.

According to the stipulated facts, Mr. Leonoudakis testified on February 10, 1993, that there was no need for regularly scheduled bus service between the SFIA and the Fisherman's Wharf area, but SFO Airporter nevertheless filed a tariff on March 17, 1993 to provide such service. However, SFO Airporter's objections to the need for the service were limited specifically to that which Wharf Airporter had proposed, and did not encompass scheduled Fisherman's Wharf service generally. Because Wharf Airporter's proposal differed in several ways from SFO Airporter's, the comparison is between the proverbial apples and oranges, and there is insufficient evidence of deception to constitute a Rule 1 violation.

We cannot penalize a party for stating its position, no matter how displeased a competitor may be about acts of that party which may appear to be inconsistent to the point of deception. It is the Commission's job to sift and weigh the merits in each proceeding. Although the assertion of inconsistent arguments may be taken into account in deciding the outcome, it should not result in culpability under Rule 1, as the objective truthfulness of facts

is quite a different matter from the logical credibility of an argument.

6. Conclusion

It is clear that in at least two instances SFO Airporter represented to the Commission that it was operating service which had, in fact, been suspended by the Commission. In each instance, defendant made a false or misleading statement to the Commission in violation of Rule 1.

Pursuant to Public Utilities Code Section 2107, we will impose a fine of \$1,000 for each infraction. When the fine has been paid, SFO Airporter will be permitted to reinstate its tariff to operate SFIA - Fisherman's Wharf service.

Findings of Fact

1. On January 14, 1992, complainant Wharf Airporter filed A.92-01-044, seeking authority to provide regularly scheduled bus service from SFIA to the Fisherman's Wharf area of San Francisco.

2. On January 31, 1992, defendant SFO Airporter filed a protest in A.92-01-044, arguing that the application should be denied because there was no need for the regularly scheduled service proposed in Wharf Airporter's application.

3. On February 10, 1993, Jeffrey Leonoudakis, witness for SFO Airporter, testified that SFO Airporter had conducted a market study and concluded that there was no need for the scheduled service between SFIA and Fisherman's Wharf proposed by Wharf Airporter. He also testified that SFO Airporter decided not to provide regularly scheduled bus service to the Fisherman's Wharf area from SFIA at that time.

4. On March 17, 1993, SFO Airporter filed a revised tariff sheet with the Commission to implement scheduled service from SFIA to the Fisherman's Wharf area of San Francisco. The March 17 tariff was to become effective April 19, 1993, but was subsequently amended, and thereafter suspended by this Commission on April 29, 1993, and it remains suspended pending an order of the Commission.

5. On March 19, 1993, SFO Airporter filed a concurrent brief with the Commission in A.92-01-044 which argued that there was no need for the proposed regularly scheduled service from SFIA to the Fisherman's Wharf area.

6. Following its March 17 tariff filing SFO Airporter pursued efforts to obtain a permit from SFIA which would allow it to operate scheduled service between SFIA and the Fisherman's Wharf area.

7. On May 6, 1993, SFO Airporter filed A.93-05-003 to establish a zone of rate freedom for scheduled service as a passenger stage corporation between SFIA and points in San Francisco. SFO Airporter appended its partial tariff (and schedule) for the Fisherman's Wharf service to that pleading, and stated, in writing, that "These revisions have been formally filed and accepted by the Commission."

8. On June 16, 1993, SFO Airporter filed with the Commission an application for rehearing and/or reconsideration of D.93-05-016 which stated that SFO Airporter had "greatly expanded its existing scheduled service between the airport and points in San Francisco," and argued that certain operating rights consequently should not have been granted for the applicant in that proceeding. At the hearing in this proceeding SFO Airporter's witness, Mr. Leonoudakis, testified that the foregoing statement referred to commencement of scheduled service between SFIA and the Fisherman's Wharf area.

Conclusions of Law

1. A misstatement of fact need not be intentional in order to violate Rule 1, if making that misstatement was a reckless act.

2. SFO Airporter's representation to the Commission on May 6, 1993, that its tariff for scheduled airport service had been formally filed and accepted by the Commission, and its omission to state that the tariff also was suspended, constitute a violation of Rule 1.

3. SFO Airporter's statement in its application for a rehearing of D:93-05-016 that it had "greatly expanded its existing scheduled service" violated Rule 1, based upon SFO Airporter's admission that this statement referred to the institution of a regularly scheduled Fisherman's Wharf service.

4. SFO Airporter's protest of Wharf Airporter's application and its subsequent filing of a tariff to provide scheduled service between SFIA and the Fisherman's Wharf area do not constitute a violation of Rule 1A.

5. No further investigation of the facts involved in this proceeding should be made at this time.

SFO Airporter appended its partial tariff (and schedule) for the Fisherman's Wharf service to the pleading, and stated, in writing, that "these revisions have been formally filed and accepted by the Commission."

IT IS ORDERED that:

1. SFO Airporter, Inc. (SFO Airporter), shall pay \$2,000 to the State of California General Fund not more than 30 days after the effective date of this order.

2. Upon payment of the full amount of the fine as specified in the preceding paragraph, the suspension of SFO Airporter's Revised Page 9 of CA PUC shall terminate.

In this proceeding SFO Airporter's witness, Mr. Leonchakis, testified that the foregoing statement referred to commencement of scheduled service between SFIA and the Fisherman's Wharf area.

Conclusions of Law

1. A misstatement of fact need not be intentional in order to violate Rule 1, if making that misstatement was a reckless act.

2. SFO Airporter's representation to the Commission on May 6, 1993, that its tariff for scheduled airport service had been formally filed and accepted by the Commission, and its omission to state that the tariff also was suspended, constitute a violation of Rule 1.

3. No further investigation of the events involved in the complaint shall be made at this time.

4. Case 93-04-019 is closed.

This order is effective today.

Dated September 20, 1996, at San Francisco, California.

P. GREGORY CONLON
President
DANIEL Wm. FESSLER
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners