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Decision 98-01-050 January 21, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application CALIFORNIA WESTERN RAILROAD, INC. for authority to modify scheduled commuter passenger service and seek relief from regulated excursion passenger scheduling and fares.

Application 97-08-007
(Filed August 5, 1997)

ORIGINAL

Gary Milliman and Sean J. Hogan, Attorneys at Law,
for California Western Railroad, Inc., applicant.
Bruce Richard, for Mendocino Transit Authority, and
Johanna Burkhardt, Emile's Station, for herself,
interested parties.
James T. Quinn, Attorney at Law, and James R. Panella,
for the Rail Safety and Carriers Division.

INTERIM OPINION

The decision concludes that the excursion passenger service provided by California Western Railroad (CWRR) should not be subject to regulation by the Commission.

Background

CWRR transports passengers and freight between Fort Bragg and Willits, California. CWRR also serves a few communities between Fort Bragg and Willits in the Noyo River Valley.

CWRR currently provides one round trip daily except on Thanksgiving Day, Christmas Day and New Year's Day (362 days a year) from Fort Bragg to Willits and returning to Fort Bragg. CWRR charges commutation fares and special intermediate point round-trip-ticket fares for its service. Additionally, at various times of the year, CWRR operates trains between Fort Bragg and Northspur and less frequently between Willits and Northspur. Northspur is located approximately midway between Fort Bragg and Willits.

CWRR's route between Fort Bragg and Willits is very scenic and CWRR attracts several tourists to ride its train. CWRR provides excursion passenger service to tourists on its famous "Skunk Train." CWRR's excursion service is provided for the same fare as the fare for commuter service.

According to the information provided by CWRR, CWRR's excursion service constitutes over 90% of its operations.

CWRR filed this application to seek Commission approval to reduce its commuter service to three days a week during the winter months of October through March. CWRR also seeks relief from regulation by the Commission of its excursion service.

Hearings

Public participation hearings (PPHs) on the application were held in Willits (on October 22, 1997) and Fort Bragg (on October 23, 1997) before Administrative Law Judge (ALJ) Garde. In addition to the PPHs, a prehearing conference (PHC) was held on October 23, 1997 in Fort Bragg.

At the PHC, the ALJ bifurcated the proceeding into two phases. The first phase would address CWRR's request to deregulate its tourist or excursion passenger service. The second phase would address the issue of reduction in commuter passenger service.

It was agreed that the issue of deregulation being a legal issue could be addressed through the filing of briefs. Accordingly, concurrent opening and reply briefs were filed on November 17, 1997 and November 25, 1997, respectively.

An evidentiary hearing in the second phase was held in Fort Bragg on December 4, 1997.

This interim decision addresses the issue of deregulation of CWRR's tourist or excursion passenger service. A separate order will be issued regarding CWRR's request to reduce its commuter passenger service.

CWRR and the Commission's Rail Safety and Carriers Division (RSCD) filed opening briefs. RSCD and Mendocino Transit Authority filed reply briefs.

Commission Regulation of Railroads

Before considering CWRR's request for deregulation, it would be helpful to examine Commission's regulation of other railroads.

There are 15 railroad companies in California that provide excursion passenger service of which all but two are not regulated by the Commission. The two railroads regulated by the Commission are CWRR and the Napa Valley Wine Train (Wine Train).

In the case of Wine Train, the Commission regulation involves the monitoring and enforcement of a program to mitigate any adverse impact of the operation of Wine Train on the environment. The Mitigation Implementation Program adopted by the Commission, under Section 21081.6 of the California Environmental Quality Act (CEQA), was part of the assessment of environmental impact of the operation of trains. Under the Mitigation Implementation Program, the Commission specifies, among other things, the hours of the day during which Wine Train can operate. The Commission does not regulate Wine Train's schedule or rates.

In the case of CWRR, the Commission regulates both the commuter service and excursion service.

Discussion

All parties support deregulation of CWRR's excursion service. The following discussion is a distillation of opinions expressed in the briefs.

In considering CWRR's request for deregulation, we have determined whether CWRR's excursion service qualifies as "transportation" under Public Utilities (PU) Code § 1007 and whether in rendering such service CWRR functions as a public utility. We will examine CWRR's operations in that perspective.

Does CWRR's Excursion Service Constitute Transportation?

What does the term "transportation" mean and what services qualify as transportation addressed by the California Supreme Court in *Golden Gate Scenic Steamship Lines v. Public Utilities Commission*, 57 C.2d 373 (1962). The steamship company operated sightseeing vessels on San Francisco Bay. The passengers being served by the steamship company boarded vessels at a certain point in San Francisco

and after cruising the bay in a loop returned to the point of origin. Golden Gate Scenic Steam Ship Lines contended that its operations did not come under the Commission's regulatory authority because it did not transport people between points and thus was not providing transportation as provided in PU Code § 1007.

In that case, the court determined that "transportation" was a key word and that when applied to passenger vessels "plainly" meant transportation of persons between two different points. The court concluded that the steamship company's sightseeing cruises did not come under PU Code § 1007.

In a subsequent proceeding, (Application (A.) 59818 et al.), the Commission, based on the Supreme Court's determination, issued Decision (D.) 93726 (7 CPUC2d at 135-136), which concluded that sightseeing service is not passenger stage corporation service. The Commission stated that:

"Aside from the legal analysis of the statutory scheme, concluding tour or sightseeing service is not passenger stage corporation service, we note that sightseeing or tour service is essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service. In those cases members of the public may be in a situation where they have no other mode for essential travel. And, there it is in the public interest to regulate rates, schedules, and service for what may very well be captive patrons.

"We recognize that today's decision is a departure from past Commission precedent. We are sure those companies who are already in business and doing well under regulation will take vocal exception with this decision. However, we believe our analysis of the statutory scheme for bus regulation in California is sound. Aside from the legal analysis requiring us to find sightseeing-tour service is not common carriage, we believe this change in our regulation will allow us to engage in better entry and rate regulation over point-to-point common carriers, and ultimately enable us to provide better regulation for the user of regular route, point-to-point bus service." (7 CPUC2d at 135-136.)

CWRR's excursion service involves transporting passengers from Fort Bragg either all the way to Willits or to midpoint Northspur, and then returning them

to Fort Bragg. Also, at some times of the year, CWRR operates a train from Willits to Northspur and then returning to Willits.

The operations described above involve transporting people from one point to a destination and returning them to the point of origin. While the operation does not entail transporting people in a continuous loop as the people using excursion buses or boats, the operation is comparable to the operation of excursion buses or boats. The difference in the operations is of degree, not kind, and should not be determinative of whether or not CWRR's operations meet the judicial definition of transportation under PU Code § 1007.

We conclude that CWRR's excursion service does not constitute "transportation" under PU Code § 1007.

Next, we will consider whether CWRR, in providing its excursion service, functions as a public utility. The primary purpose of CWRR's excursion service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing. In D.82-09-087, the Commission stated the following about sightseeing:

"The basic question is whether sightseeing is a public utility function. In the absence of a clear declaration by the Legislature, we conclude that it is not." (9 CPUC2d at 687.)

Further, the Commission also opined that public utilities are ordinarily understood as providing essential services, the kind that other industries and the public generally require.

While the excursion service provided by CWRR may be beneficial to the economy of Mendocino County and may even be considered essential by the tourist industry, it is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility.

Based on the above, we conclude that CWRR's excursion service should not be regulated by the Commission.

We believe that discontinuance of Commission regulation of schedules and fares of CWRR's excursion service will have no adverse impact in the area of the

public interest. Moreover, it would conform the Commission's regulation over CWRR's excursion service with Commission regulation of other such rail services.

Consideration of Safety of CWRR's Operations

While we have concluded that CWRR's excursion services be free from regulation by the Commission as regards to scheduling and fares, we believe that CWRR's excursion services should be subject to regulation in certain other areas. Foremost among these would be regulation with regard to the safety of CWRR's operations, which the Commission conducts as an arm of the Federal Railroad Administration (FRA). It is essential that the Commission staff and FRA personnel continue to inspect CWRR's track, signal and safety practices of CWRR's passenger and freight operations. It is also essential for the Commission to continue to regulate the upkeep and reliability of grade crossings and crossing protection devices under PU Code §§ 1201 et seq.

While the Commission ceased to regulate the schedules and fares of sightseeing tours provided by bus, the safety of bus operators was subject to regulation by state agencies. Accordingly, we conclude that CWRR should remain under the Commission's regulation in all areas of safety of its passenger and freight operations, as it is now.

Findings of Fact

1. CWRR seeks relief from regulation by the Commission of its excursion passenger service.
2. CWRR's excursion service does not constitute "transportation" under the provisions of PU Code § 1007.
3. The primary purpose of CWRR's excursion service is to provide its passengers an opportunity for sightseeing.
4. The Commission has concluded that sightseeing is not a public utility function.
5. The Commission currently regulates the safety of the operation of all services provided by CWRR.

6. While the Commission ceased to regulate the schedules and fares of sightseeing service provided by bus operators, the safety of the operations remained subject to regulation by state agencies.

Conclusions of Law

1. In providing excursion passenger service, CWRR does not function as a public utility.

2. The Commission should not regulate the schedules and fares for the excursion passenger service provided by CWRR.

3. The Commission should continue to regulate the safety of the operation all services provided by CWRR.

4. This order should be made effective today to provide CWRR an opportunity to publish its schedules and fares for the expected tourist season in 1998.

INTERIM ORDER

IT IS ORDERED that:

1. The schedules and fares for the excursion passenger service provided by California Western Railroad (CWRR) shall not be subject to regulation by the Commission.

2. The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission.

3. This proceeding shall remain open to consider CWRR's request to reduce its commuter service.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners