

Decision 00-11-040 November 21, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Red & White Ferries, Inc. to
Temporarily Suspend Scheduled Weekday Vessel
Common Carrier Service Between Richmond and
San Francisco.

Application 00-07-034
(Filed July 18, 2000)

John Clark, Attorney at Law, for Red & White Ferries
Inc., applicant.

William Flenniken, Jr., Attorney at Law, for Friends
of the Richmond Ferry, and Terry Mollica, Attorney at Law,
for himself, protestants.

O P I N I O N

A. Summary

The authority of Red & White Ferries, Inc. (Red & White) to operate commute vessel service between the Cities of Richmond and San Francisco is revoked.

B. Background

Red & White is a public utility vessel common carrier of passengers on the San Francisco Bay. It operates a commute service between the Cities of Richmond (Richmond) and San Francisco (San Francisco), providing morning departures from Richmond at 6:55 a.m. and 7:40 a.m. and evening departures from San Francisco at 5:15 p.m. and 6:00 p.m. (Tr. 48.) It filed this application on July 18, 2000 seeking suspension of this commute service. Red & White alleges that there is insufficient ridership to justify continued service, and that it has

been losing money since the inception of service. A timely protest was filed by Friends of the Richmond Ferry (Friends) seeking an evidentiary hearing. Should Red & White be relieved of service, Friends asks that the certificate be revoked, not suspended, so that there would be no inhibition on competition from another provider. (Protest, p. 2.) We scheduled a prehearing conference (PHC) for September 5, 2000. On September 1, 2000, Red & White filed a motion for immediate suspension of service pending a Commission decision on its application. Administrative Law Judge (ALJ) Sheldon Rosenthal denied the motion at the PHC. Assigned Commissioner Richard A. Bilas concurred in that ruling. (Tr. 26.) He reaffirmed the denial in a written Scoping Memo dated September 7, 2000. At the PHC, Terry Mollica entered an appearance as a Protestant. (Rule 54.)

On September 14, 2000, Red & White filed a tariff reducing the round trip service between Richmond and San Francisco to one trip per day. (Exh. 2.) Friends protested this tariff filing. On Monday, September 25, 2000, Red & White posted a notice on its ferries stating that service would be suspended following the last trip on Thursday, September 28, 2000. (Exh. 5.) It also published a press release making this announcement. (Exh. 6.) On Thursday afternoon, September 28, 2000, the Commission held an emergency PHC. That same day, following the conference, Commissioner Bilas issued an emergency order requiring Red & White to continue service until further order of the Commission and consolidating the tariff filing of September 14, 2000, with the evidentiary hearing in this matter. Evidentiary hearings were held on October 25-27, 2000, at which time the matter was submitted subject to briefs to be filed on November 3, 2000.

This matter was preliminarily determined to be a ratesetting application for which a hearing was not necessary. (Resolution ALJ 176-3044) As a result of the protest filed by Friends and the appearance of Protestant Mollica, the preliminary designation will be changed to that of hearing required. (Tr. 2-3.) The ALJ was designated as the principal hearing officer (Tr. 1). At the conclusion of the evidentiary portion of the hearing the parties waived comments (Rule 8.1) on the ALJ's proposed decision. (Tr. 380.) Therefore this matter is ready for decision by the Commission.

Red & White filed another motion for immediate suspension of service on Friday, October 27, 2000. That motion is basically a renewal of its previous motions on this subject and will be denied. Since Red & White offered no evidence in support of the reduction of service to one round trip per day during the evidentiary hearing, the tariff filing is denied.

C. Discussion of the Legal Issues

Red & White contends that it is "cashless" and that it can not be required to continue providing service which will drain its unregulated parent Golden Gate Scenic Steamship Corporation (Golden Gate). Brooks-Scanlon Company v. Railroad Commission of Louisiana (1920) 251 U.S. 396; Gibbons v. U. S. (C.A.7 1981) 660 F.2d 1227. Protestants counter that Red & White represented to the Commission at the time it sought its certificate that it would borrow funds to operate the commute service from its affiliates or a commercial bank. (Exh. 23, D.98-02-008, p. 15.) Friends claims that we must look to the financial condition of all of the affiliates in determining the applicability of the "cashlessness" principal, and that the Gibbons case, supra, actually supports its position rather than Red & White's. Friends argues that a utility can be ordered to continue service at a loss even though the creditor's security and investor's capital will be

eroding while the regulatory agency acts on petitions for abandonment. (Matter of Chicago, M. St. P. and P. R. Co. (C.A.7 1979) 611 F.2d 662.) Because Red & White has obeyed the order of Commissioner Bilas to continue service until further order of the Commission, there is no need to determine whether there is an absolute right to cease service. We shall withhold judgment until a case arises where such a decision is necessary.

D. Protective Order

At the first PHC, counsel for Red & White sought a protective order for the financial information filed under seal or marked “confidential.” (Tr. 10-12.) Protestants did not object to a protective order, though the particular wording of the confidentiality agreement became a matter that was eventually resolved by the ALJ. No spectators were allowed in the hearing room during the evidentiary hearings other than those who had signed a confidentiality agreement or who were members of the Commission Staff. Since confidential information was inextricably mingled with non-confidential evidence we shall order that the evidentiary file be placed under seal for a period of two years.

E. Discussion of the Evidence

Red & White presented evidence showing that the average round trip passenger load was less than 45 per day on vessels with a capacity of 444 passengers. (Exh. 10.) A smaller vessel was available to Red & White, but the cost of running that vessel was approximately the same as the larger vessel and the smaller vessel was slower than the vessels used in the commute. (Tr. 49.) Speed of the trip is important in attracting riders. (Tr. 122.) Testimony presented by Red & White’s Chief Financial Officer indicated that the commute service has never reached the break-even point, and that with the current vessels there was little likelihood of ever achieving profitability. Red & White is being supported

by its parent, Golden Gate. The extent of this support cannot be readily determined from this record, since the accounting methods employed by the parent and various subsidiaries, including Red & White, do not permit easy discrimination of intra-family charges. (Exh. 20.) Since many of the exhibits and all of the testimony in this proceeding were covered by a protective order we shall not go into detail on the numbers in evidence. However, we are satisfied that there has been a showing that the commute service is being operated at a loss, though the extent of this loss is not clear.

Friends stipulated that Red & White could present testimony that it had made a sincere effort to increase patronage by various marketing strategies. Red & White stipulated that Friends could present testimony that marketing, if done differently could have increased patronage. (Tr. 316.)

We are distressed by the fact Red & White, knowing of this loss, informed its auditors in March 2000 (Tr. 268), that it intended to suspend the commuter ferry service but did not choose to share this information with us. In Exhibit 20, which is the consolidated financial statement of Golden Gate and its subsidiaries, the following note is found on page 11:

“During 2000, the Companies scaled back their commuter ferry services and now plan to suspend remaining services to stem the large operating losses from that segment of their business.”

At that very time Red & White had an application pending before this Commission seeking an expansion of its authority so that it might provide weekend service to Pacific Bell Park. (Exh 14.) Instead of submitting new financial statements, Red & White urged the Commission to rely on the financial findings in the decision in which it received its original authority (Exh. 23),

submitting that "...the Commission's prior findings that Applicant is financial [sic] fit applies equally to this requested Amendment." (Exh. 14, p. 6.)

Red & White has been less than forthright with this Commission and the commuting public. The losses which it claims in operating after September 28, 2000, could have been avoided if it had filed for cessation of service in March, at which time it had already determined to end the commute runs. Earlier notice would have given the commuters some opportunity to seek a replacement service. Red & White offered no reason why it chose to create an emergency.

The parties agree that some form of subsidy is necessary to operate ferry service between Richmond and San Francisco. There is a dispute as to whether Red & White has been sufficiently active and/or resourceful in assisting Richmond to obtain a subsidy. Witness Escher, the President and General Manager of Red & White, and Witness Koenig, Vice President of Sales and Marketing, testified to the lobbying activities undertaken in Washington D.C., Sacramento, and the East Bay. (Tr. 322, 355-356.)

Witness Frank of Friends testified that she was informed by the staff of Metropolitan Transportation Commission (MTC) that MTC would only provide funding for ferry service that was already operating. (Tr. 369.) No regulation, rule, or policy statement of MTC was offered and no MTC witness was presented. During cross-examination Friends asked Red & White witnesses about any requirement of a two-year operating commitment before a subsidy would be considered. Both Witness Escher (Tr. 356) and Witness Koenig (Tr. 324-325) denied any such requirement, and no proof of its existence is in this record.

In its brief Friends puts forth a proposal that Red & White be permitted to reduce its service to one round trip per day, with the boat being berthed in

Richmond. It asserts that such an operation could be profitable, based on adjustments to the cost information supplied by Red & White, changes in the existing labor contract, and information supplied by unidentified experts admittedly not presented on this record. Had this proposal been made on the record it could now be considered. Since it was not, we shall give it no further consideration.

Issue 3 set forth in the Scoping Memo of September 7, 2000, related to the joint use of the dock in Richmond by Red & White to serve Pacific Bell Park, if offered next year, and a competitor ferry for commute service. Red & White Witness Koenig stated that Red & White owned only the float, the ramp, and the pilings, and that these facilities are moveable. (Tr. 339.) Richmond owns all other facilities, such as the parking lot, and the lighting. (Tr. 339.) Witness Koenig indicated that Red & White would be willing to negotiate with another carrier for use of the dock for commute service. (Tr. 326-327.) Thus there appears no problem for a competitor providing service for the commute run.

At the evidentiary hearing Red & White did not specifically address the issue of why its authority should be suspended rather than revoked. (Scoping Memo, Issue 2.) Friends argues in its protest and in its brief that revocation is proper. Red & White favors suspension, arguing in its brief that having a potential operator in a position to provide service might be helpful to Richmond in obtaining subsidies. It also calls our attention to the provisions in The Richmond-Red & White Interim Service Agreement. (Exh 15.) The license agreement expires on June 1, 2001, and permits immediate termination by Richmond if service ceases. We believe that if service is to cease, then the opportunity to provide new service should be equally open to all groups. Red & White should not be able to assert any competitive advantage by virtue of a

“suspended” certificate. Therefore we believe it in the public interest to revoke Red & White’s authority, rather than merely suspending it indefinitely.

We note that with the revocation of the Richmond-San Francisco commute service, all operations regulated by this Commission will terminate. Red & White was granted authority to serve between San Francisco and the USS Hornet by D.98-09-003, but this authority was suspended at the request of Red & White in D.00-04-056. The Pacific Bell Park service authorized by D.00-055-011 (Exh. 24) ceased at the end of the Giant’s baseball season. Red & White has not committed to renew this service next year, and if it wished to renew the service would have to renegotiate with Richmond for a new license. (Tr. 326.) As with the commute service, we believe that it is not in the public interest to continue suspended authority indefinitely, in that it might discourage others who wish to provide the service. Therefore we shall revoke all of the tariffed authority currently held by Red & White without prejudice to it competing with other carriers should it believe that any of these services are viable.

F. Waiver of Comment Period

Section 311(d) provides that the Commission shall issue its decision not sooner than 30 days following filing and service on this proposed decision. The parties have waived this 30-day waiting period and the filing of comments on the proposed decision.

Findings of Fact

1. Red & White has provided public utility common carrier of passenger vessel commute service on San Francisco Bay between Richmond and San Francisco since September 27, 1999.

2. Red & White holds authority to provide other services which are either under suspension or no longer operating.

3. The current service of Red & White is two morning trips from Richmond to San Francisco and two return trips in the late afternoon.

4. Red & White seeks suspension of its commute service claiming lack of passengers to warrant continuation at the present time.

5. The average passenger count per vessel since inauguration of service is less than 45 and shows no sign of increasing.

6. Red & White has made a sincere effort to increase patronage by various marketing strategies.

7. Protestants claim that a different marketing strategy would have increased patronage.

8. Red & White has been losing money since the inception of service and its parent, Golden Gate, no longer wishes to finance these continued losses.

9. Protestants do not dispute losses but do dispute the extent of the losses claimed by Red & White.

10. Because of the manner in which the inter-corporate books of account are maintained, it is not possible to determine the precise extent of any loss suffered by Red & White, though it is possible to find that the commute operation has never operated at the break-even point.

11. In the present application, filed July 18, 2000, Red & White first notified the Commission and its passengers that it intended to suspend commute service. The application does not contain a specific date that it wished the suspension to begin.

12. It was not until September 1, 2000 that Red & White announced that it wanted to suspend service after the last trip on September 28, 2000.

13. Red & White had actually determined to suspend the commute service in March 2000 or earlier, due to "large operating losses" from that service.

14. At the time of these large operating losses, Red & White sought permission to operate a weekend service from Richmond to Pacific Bell Park in San Francisco and urged the Commission to rely on financial information that did not show these losses.

15. There is little chance of profitable operation of the commute service without some form of government subsidy.

16. Protestants argue that without an existing carrier in operation and committed to operate for at least two years, there is little hope of obtaining a subsidy, but offered no rule or regulation or testimony from a governmental agency to support this contention.

17. Red & White owns the float, ramp, and pilings at the Richmond dock. Richmond owns all other facilities.

18. Red & White is willing to negotiate with another carrier for the use of these facilities. If negotiations are not successful, the facilities are moveable.

Conclusions of Law

1. Since Red & White has continued to operate the commute service during the pendency of this proceeding in accordance with the ruling of the Assigned Commissioner, there is no need to determine whether there is an absolute right to cease service if a state of "cashlessness" exists.

2. Red & White has made reasonable efforts to market its service and to obtain a subsidy.

3. Red & White has been incurring substantial, though not precisely proven, losses in the commute operation for one full year. We conclude that it need not continue to provide money-losing service.

4. There has been no proof in this proceeding that an existing operator with a two-year commitment is necessary to obtain a governmental subsidy.

5. Losses incurred by Red & White after its proposed suspension date of September 28, 2000 are due to its delay in filing this application from at least March 2000 to July 18, 2000.

6. In order to place all potential competitors for the Richmond-San Francisco commute service, the Pacific Bell Park service, and the USS Hornet service on equal footing, we shall revoke Red & White's certificate for these operations, rather than merely suspend them.

7. Red & White's motion for suspension prior to this decision should be denied.

O R D E R

IT IS ORDERED that:

1. Red & White Ferries, Inc.'s (Red & White) tariff filing to reduce service to one round trip per day is denied.

2. The authority granted to Red & White to operate common carrier vessel service between San Francisco and the USS Hornet by Decision (D.) 98-09-003, and suspended by D.00-04-056, is revoked.

3. The authority granted to Red & White to operate common carrier vessel service between Richmond and Pacific Bell Park by D.00-05-011 is revoked.

4. The authority granted to Red & White to operate common carrier vessel commute service between Richmond and San Francisco by D.98-02-008 is revoked.

5. Red & White shall cease service no earlier than the last trip from San Francisco on Wednesday, November 22, 2000.

6. Red & White's motion for immediate suspension of operations is denied.

7. The evidentiary file in this proceeding shall remain under seal for two years from the effective date of this order.

8. Application 00-07-034 is closed.

This order is effective today.

Dated November 21, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners