SW/ds

Decision No. 78172

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Application of: MORGAN DRIVE AWAY, INC., NATIONAL TRAILER CONVOY, INC., AND TRANSIT HOMES, INC., for authority to deviate from, and waiver of provisions of General Order No. 130. | Application No. 52099 (Filed July 31, 1970) |

Russell & Schureman, by Carl H. Fritze, and Mitchell King, Jr., for applicants.
Don B. Shields, for Highway Carriers Association, protestant.
Arlo D. Poe, J. C. Kaspar and H. F. Kollmyer, for California Trucking Association, interested party.
T. H. Peceimer, for the Commission staff.

## O P I N I O N

General Order No. 130 provides rules and regulations governing the leasing of motor vehicles. Those rules contain, in part, provision that under certain circumstances persons leasing equipment to carriers and driving said equipment must be under an employer-employee relationship; and that such driver-lessors may not maintain such equipment while in the service of the lessee-carrier. Applicants, permitted carriers, seek exemption from those provisions relative to applicants' leases with driver-lessors. Public hearing was held before Examiner Robert Barnett on October 6, 1970, in Los Angeles, after which the matter was submitted subject to the filing of

briefs, which have been received. This case should be considered as a companion case to Re ABC Messenger Service, Inc., et al, Decision No. 78171 dated JAN 13 1971 in Application No. 52061.

The facts in this case are not in dispute. All applicants operate in essentially the same manner and, therefore, we will refer to "applicants" rather than the individual companies involved. Each applicant has permitted authority from this Commission and carries the required amount of public liability insurance. The property that applicants are engaged in transporting moves under Minimum Rate Tariff No. 18. None of applicants' driver-lessors have operating authority from this Commission. The Commission staff opposes the relief requested.

Applicants are common carriers by motor vehicle, holding operating authority issued by the Interstate Commerce Commission (ICC) authorizing the transportation of mobile homes (trailers designed to be drawn by passenger automobiles as that term is interpreted by the ICC), and related commodities. Each applicant holds nationwide authority authorizing the transportation of such commodities, in secondary movements, along with substantial authority for the transportation in initial movements. Morgan conducts its interstate operations pursuant to authority granted to it by the ICC in Docket No. MC-103993; National, Docket No. MC-106398; and Transit, Docket No. MC-94350. Each applicant obtains its motor vehicles by leasing them from persons who also operate the vehicle. These driver-lessors do not become employees of the lessee. The driver-lessors operate in both interstate and intrastate commerce. We are concerned only with the California intrastate operations.

Over the years applicants have developed a highly specialized and coordinated method of operations whereby both intrastate and interstate shipments utilize the same equipment in order to increase the efficiency of both types of operations. Each of the applicants operate a network of terminals throughout the United States. Applicants maintain a number of terminal facilities in California in order to provide intrastate and interstate service to shippers or consignees located in California. The various terminals are connected with central dispatch centers in order to efficiently control the movement of the equipment and to assure the shipping public of an adequate supply of equipment, when and where needed throughout the United States.

In the conduct of their carrier operations applicants make substantial use of leased equipment from lessors who then drive the leased equipment in applicants' service. This is the universal practice of interstate carriers conducting this specialized type of carrier operation. The equipment is leased pursuant to a long-term written lease, copies of which were submitted into evidence. No equipment is leased except pursuant to a written lease contract. Compensation under the lease contract is computed on a mileage basis. The driver-lessors are not employees of applicants.

In the conduct of their operations applicants utilize the same equipment and drivers to transport both interstate and intrastate California traffic. The rates applicable to intrastate shipments differ from those applicable to interstate shipments. Drivers may transport intrastate California shipments following delivery of an interstate shipment in California, while waiting for an interstate load out of California. Under this method of equipment utilization, a particular driver may transport a single intrastate load, or he may transport a number of intrastate loads, before departing the state with an interstate movement. There are a large number of different drivers utilized for intrastate California shipments. Many of the drivers are not residents of California and the date of return of a particular driver to the state in conjunction with the transportation of an interstate shipment could only be conjectural, being wholly dependent on the ebb and flow of the traffic. There is some turnover each year, particularly with respect to the newer operators because of the extensive periods away from home and the skill necessary to successfully handle this type of traffic.

Applicants operate the equipment in full accord with the written long-term equipment lease agreements. These leases fully conform to the rules and regulations of the ICC. The written lease contracts provide, among other things, as follows:

1. The lease is for a definite term with automatic renewal provisions, and provisions for cancellation after a thirty-day period;

2. The carrier Morgan, National or Transit shall have exclusive possession, control and use of the equipment;

3. The carrier assumes responsibility imposed on carriers for the protection of the public and for protection of cargo;

4. The owner of the equipment shall maintain the equipment so as to comply with the requirements of all state and federal regulatory authorities, or requirements of the carrier;

5. Provisions for inspection of the equipment;

6. The specific equipment leased identified either in the body of the exhibit, or by appropriate schedule to which reference is made in the exhibits;

7. The manner of compensation;

8. The equipment is to be identified as that of the operating carrier;

9. <u>The owner of the equipment shall employ the driver or operator of the equipment;</u> (emphasis added)

10. Provisions for cancellation of the lease for violation of the provisions thereof.

Discussion

Applicants seek deviation from certain provisions of General Order No. 130. If those deviations are granted, in applicants' opinion the driver-lessors would then be exempt from the permit requirements of the Public Utilities Code. Applicants assert that such an exemption would permit them to develop and provide an efficient service for the shipping public through utilization of the same equipment both for intrastate and interstate shipments, thereby enhancing the efficiency and available pool of equipment for both services. They assert that no public or regulatory benefit would flow from depriving the citizens of California of the benefits of this service and at the same time deprive the interstate drivers of needed work. The ultimate effect would only be to make inefficient operations out of efficient operations, all without purpose. Applicants assert that "the requirement that literally hundreds of permits be obtained serves no valid regulatory purpose and would entail a prohibitive cost. The cost is further increased when annual turnover is considered. In fact, the cost of each permit could well exceed the revenues derived under the permit. Another consideration is the 90-day residency requirement of Section 3571(d) of the Public Utilities Code. Many drivers would not be residents for this period of time. The effect of General Order No. 130 can only be to deprive the public of California of needed service at a reasonable cost, or to escalate cost."1/

1/ We take official notice that this Commission has issued over 200 permits, which are in force, to perform movements under MRT 18 in California; and that there have been no complaints to this Commission concerning this service in California.

It is obvious from reading the above paragraph that applicants misconstrue not only General Order No. 130, but the authority of this Commission. As we said in the ABC Messenger Service case, "The General Order was promulgated to make the statute and case law more cohesive, not to impose regulations materially different from those set forth in court and Commission cases and the statutes. This Commission has no authority to grant exemptions from the permit requirements of the Highway Carriers' Act. Such exemptions are set forth in the Act itself and if further exemptions are in the public interest, it is for the Legislature, not this Commission, to make them. We do not construe the Code sections governing leasing to grant us authority to make exceptions to the Highway Carriers' Act under the guise of modifying leases.

"The General Order does contain criteria which, if followed, would show that a driver-lessor is not required to have a permit from this Commission. But those criteria merely express existing law. If we could change the criteria for determining highway carrier operations by merely changing the leasing regulations, we would, in effect, be granting exceptions to the Highway Carriers' Act. We do not construe our authority under the leasing regulations to be so broad. Therefore, to grant the deviation sought by applicants will not help applicants avoid the permit requirements of the Act. We must look to the actual operations of the driver-lessors to determine if they are highway carriers."

The evidence in this case shows that the driver-lessors are highway carriers as that term is used in the Highway Carriers' Act and as that term has been consistently interpreted by Commission decisions. One who provides a driver and a vehicle to transport property over the public highways for compensation is a highway carrier. For such a person to avoid regulation, this Commission has consistently held that he, at the very least, must enter into an employee-employer relationship with a carrier and lease his motor vehicle to the carrier under a lease that provides for the control of the motor vehicle in the carrier. Further, he cannot enter into this lease agreement if such an agreement is a device to evade regulation. (Re Payments Made to Underlying Carriers (1949) 48 CPUC 576, 581, 582; and Re Practices by Motor Freight Carriers of Leasing the Vehicles and Subhauling (1952) 52 CPUC 32.) These principles were reaffirmed in the opinion which set forth General Order No. 130. (Re Establishment of Rules Governing the Leasing of Motor Vehicles, Decision No. 77072, dated April 14, 1970, in Case No. 8481.)

In this case it is not disputed that the driver-lessors are not employees of the applicants. We need go no further. (Cf. United States v. Drum (1962) 368 US 370, 393, 7 L ed 2d 360, 374 (dissent).) Under the evidence presented in this case, the driver-lessors are highway carriers and are required to have operating authority from this Commission before they can transport intrastate shipments.

In the ABC Messenger Service case we discussed the need of looking at an operation from the "totality of the arrangement". We used the phrase as a method of approach to determine if in fact control was in the lessor, or if in fact a lease was a device to evade regulation. In this case, if there had been a dispute as to whether or not the driver-lessors were employees of applicants, we would look to the totality of the arrangement. But, there is no dispute. Applicants admit the driver-lessors are not their employees and the lease so provides.

Applicants assert that the result which we reach here will cause a reduction of service to Californians, will cause the rates for applicants' service to rise, and will cause conflicts with certain ICC regulations. If such actually are the results of this decision, applicants' remedy lies with the Legislature, not with this Commission.

The facts show that a deviation from General Order No. 130 is not warranted as the agreements entered into between the applicants and lessors are not leases within the meaning of the General Order but are subhaul agreements, not covered by the General Order. (General Order No. 130, General Provisions, B. "LEASE does not include a subhaul agreement ....".)

Findings of Fact

1. Applicants are common carriers by motor vehicle holding operating authority from the ICC and this Commission authorizing the transportation of mobile homes and related commodities. The property that applicants are engaged in transporting in California moves under Minimum Rate Tariff 18.

2. Each applicant obtains its motor vehicles by leasing them from persons who also operate the vehicle. These driver-lessors are not employees of the lessee. Compensation under the lease contract is computed on a mileage basis. The lease contract provides that the owner of the equipment shall maintain the equipment and that the owner of the equipment shall employ the driver or the operator of the equipment.

3. The driver-lessors who transport property in intrastate movements in California under agreement with applicants are engaged in transportation of property for compensation as a business over the public highways in this state by means of a motor vehicle and are highway carriers required to have operating authority from this Commission before they can transport intrastate shipments.

4. The agreements entered into between the driver-lessors and applicants are not leases within the meaning of General Order No. 130, but are subhaul agreements.

The Commission concludes that the application should be dismissed.

# O R D E R

IT IS ORDERED that the application is dismissed.

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

Dated at San Francisco, California, this 13th day of JANUARY, 1971.

Chairman

Commissioners

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