

Decision 84 03 110

MAR 21 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

BLUE AND GOLD FLEET,

Complainant,

vs

HARBOR CARRIERS, INC.,

Defendant.

**ORIGINAL**

Case 83-03-02  
(Filed March 7, 1983)

Spolter, McDonald & Mannion, by Jerry Spolter,  
Attorney at Law, for Blue & Gold Fleet,  
complainant.  
Edward J. Hegarty, Attorney at Law, for Harbor  
Carriers, Inc., defendant.  
Richard Brozosky, for the Commission staff.

INTERIM OPINION

This is a complaint by Blue and Gold Fleet (Blue & Gold) against Harbor Carriers, Inc. (Harbor). Blue & Gold seeks an order requiring Harbor to cease and desist from alleged unlawful operations, an order to show cause why Harbor should not be held in contempt, and consideration of penalties against Harbor.

Because of alleged irreparable harm and request for a temporary restraining order an expedited hearing was calendared. The duly noticed hearing was held before Administrative Law Judge (ALJ) Donald B. Jarvis on April 4, 1983, in San Francisco. The issues raised at the hearing were submitted for consideration by the Commission subject to the filing of additional material which was received by April 22, 1983. The entire proceeding has not yet been submitted.

The complaint alleges that: (1) Harbor is unlawfully, and in violation of previous Commission cease and desist orders, providing service from San Francisco to points north and east of San

Pablo Bay - particularly Sacramento; (2) Harbor is conducting unauthorized service between Piers 41 and 43 $\frac{1}{2}$  in San Francisco; (3) Harbor has engaged in service discrimination in its Alcatraz operations.

Two related matters are pending before the Commission. On February 18, 1983, Harbor filed Application (A) 83-02-43, which seeks amendment, restatement, and extension of its passenger vessel operating rights. A.83-02-44, filed the same date, seeks passenger stage operating authority between San Francisco and the Counties of Napa, Solano, and Sonoma.

After the presentation of evidence the ALJ, without foreclosing the ultimate disposition on the issues, indicated that in his opinion there was a lack of probability that a cease and desist order would issue on the alleged unauthorized service between Piers 41 and 43 $\frac{1}{2}$  and the alleged service discrimination in the Alcatraz operations. Additional evidence must be taken on these issues and they will not be disposed of in this order.

The ALJ also indicated that in his opinion there was a probability that a cease and desist order would issue on the alleged unlawful Sacramento operations. He directed briefing and permitted the filing of affidavits on this point.

#### Material Issues

The material issues presented for determination at this time are: (1) Has Harbor violated any law or rule or order of the Commission? (2) If any violations occurred, what relief should be granted?

San Francisco-Sacramento Operations

For at least seven years Harbor has, on a regular basis, entered into charter agreements with Delta Travel Agency (Delta) for voyages between San Francisco and Sacramento. Delta operates sightseeing cruises between San Francisco and Sacramento. Harbor provides the vessel and crew. Delta markets the cruises and provides the narration. The cruises are on Saturday and Sunday, April through October. Delta offers a two-day cruise from San Francisco to Sacramento, which includes an overnight stop at a Sacramento hotel. The passengers go to and from Sacramento by vessel, which takes 7 to 8 hours each way. Delta also offers one day cruises from San Francisco and Sacramento. The passenger departs from San Francisco or Sacramento by vessel and goes to the destination city where a period of bus sightseeing and the opportunity for dining is provided. The passenger is returned to the point of origin by

bus.<sup>1</sup> Fifty-two one-way vessel trips were scheduled by Delta in 1983. Harbor receives approximately \$5,100 for the charter of its vessel for a one-way trip between San Francisco and Sacramento.

A. Contentions of the Parties

1. Blue & Gold's Contentions

Blue & Gold contends that the chartering of vessels to Delta for the San Francisco-Sacramento cruise constitutes a common carrier operation by Harbor. Blue & Gold asserts that Harbor has no authority to transport passengers by vessel between San Francisco and Sacramento. Blue & Gold argues that Harbor's operating authority is derived from the Commission's decision in Re Vessel Operative Rights (1937) 40 CRC 493 (hereafter referred to as the 1937 Decision). Blue and Gold contends that the 1937 decision does not authorize the complained of operations and specifically ordered Harbor to cease and desist from them. In support of this position, Blue & Gold points to an allegation in A.82-02-43 in which Harbor states that "its present authority to serve Suisun Bay and the navigable tributaries of the San Francisco, San Pablo and Suisun Bay may be in question." It also refers to a letter in lieu of a brief from Harbor's counsel in A.59193 which stated:

"The Commission decisions which I enumerated at the hearing set forth or restate all of the passenger vessel authority which is held by Harbor Carriers, Inc. No authority north or east of the San Pablo Bay is included in these decisions."

Blue and Gold contends that it has authority to provide passenger vessel service from San Francisco to Sacramento and that Harbor's operations have caused it financial harm.

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<sup>1</sup> The one day Saturday cruise from Sacramento provides for direct bus transportation from Sacramento to Fisherman's Wharf, San Francisco, where the passenger embarks on the vessel and returns by cruise to Sacramento.

Blue & Gold seeks an order: (1) requiring Harbor to cease and desist its San Francisco-Sacramento operations; (2) holding Harbor in contempt for violating the cease and desist order in the 1937 decision; (3) providing for action to seek the imposition of penalties under Public Utilities (PU) Code §§ 2107-2109.<sup>2</sup>

2. Harbor's Contentions

Harbor contends that its activities in chartering vessels to Delta do not constitute common carriage or public utility service. Harbor asserts that if operating authority is required for the San Francisco-Sacramento operations it holds such authority. Harbor also takes the position that it and the Commission have evidenced substantial confusion and uncertainty for 50 years over the scope of its operating authority and the Commission should share some of the blame for the confusion and uncertainty.

In addition, Harbor contends that if the San Francisco-Sacramento operations are subject to Commission jurisdiction it should be as a for-hire vessel operator under §§ 4660 et seq. Harbor asserts that there is no valid basis to consider contempt sanctions. Finally, Harbor argues that issuance of a cease and desist order is not warranted.

3. Contentions of the Commission Staff (Staff)

The Staff intervened and appeared in the proceeding. Staff takes the position that Harbor does not have the requisite operating authority for the operations between San Francisco and Sacramento. It took no position on the type of order to be entered.

B. Discussion

1. What Operating Authority is Necessary for the Sacramento Operations?

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<sup>2</sup> Unless otherwise stated, reference to code sections refer to the Public Utilities Code.

As indicated, all the cruises conducted by Delta for which Harbor furnishes the vessel go from San Francisco or Sacramento to the other city. The passengers debark at the destination. Many of the cruises are preceded or followed by bus transportation from or to the city of origin. The vessels go from point to point and do not fall under the loop exemption from the requirement of a certificate of public convenience and necessity. (Golden Gate Scenic Steamship Lines v Public Utilities Commission (1957) 57 C 2d 373.)

Harbor contends that the operations are not common carriage or subject to public utility regulation because they only involve one customer and there has been no dedication of service to the public. There is no merit in this contention.

Sections 238, 211, 216, 207, and 1007 provide as follows:

"238. (a) 'Vessel' includes every species of watercraft, by whatsoever power operated, which is owned, controlled, operated, or managed for public use in the transportation of persons or property, except rowboats, sailing boats, barges under 20 tons dead weight carrying capacity and vessels under the burden of five tons net register. . . ."

"211. 'Common carrier' means every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part.

"'Common carrier' includes:"

\* \* \*

"(b) Every corporation or person, owning controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this state or upon the high seas between points within

this state, except as provided in Section 212. 'Inland waters' as used in this section includes all navigable waters within this state other than the high seas. . . ."

"216. (a) 'Public utility' includes every common carrier, ...where the service is performed for or the commodity delivered to the public or any portion thereof.

"(b) Whenever any common carrier, performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, ...is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

"(c) When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

"207. 'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered."

"1007. No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this state, without first having obtained from the commission a certificate declaring that public convenience and necessity require

such operation, but no such certificate shall be required as to termini between which any such corporation or person is lawfully operating vessels in good faith under this part as it existed prior to August 17, 1923, under tariffs and schedules of such corporations or persons, lawfully on file with the commission...."

It is undisputed that the vessels used in the Sacramento operations fall within the definition of § 238. Under the facts presented a certificate of public convenience and necessity or valid prescriptive right is required for the Sacramento operations.

Sections 216(a) and (b) subject common carriers defined in § 211 to the jurisdiction of the Commission. If one is subject to Commission jurisdiction, § 1007 requires a certificate or valid prescriptive right.

Harbor argues that its Sacramento operations do not constitute common carriage because it only serves one customer and the requisite dedication is not present.

Sections 207 and 216 "make clear that a utility which has dedicated its property to public use is a public utility even though it may serve only one or a few customers...." (Richfield Oil Corp. v Public Util. Com. (1960) 54 C 2d 419, 431; Camp Rincon Resort Co. v Eshleman (1916) 172 C 561, 563.)

We next consider the question of dedication.

"It has been held 'the statutory definitions of utilities as applying only to utilities that have dedicated their property to public use.' Richfield Oil Corp. v Public Util. Com. (1960 54 C 2d 419, 429.) 'The test to determine whether facilities or service have been dedicated to public utility use is whether there has been a holding out of the facility or service to the public or portion thereof. (Yucaipa Water Co. No. 1 v Public Util. Comm., 54 Cal. 2d 823, 827; Coml. Communications v Public Util. Comm. 50 Cal. 2d 512, 523; California Water & Telephone Co. v Public Util. Comm., 51 Cal. 2d 478, 494; S. Edwards Associates v. Railroad Comm. 196 Cal. 62, 70; Camp Rincon Resort Co. v Eshleman, 172 Cal. 561, 563.) Dedication may be found to exist



by implication. (Yucaipa Water Co. No. 1 v Public Util. Comm. supra; S. Edwards Associates v Railroad Comm., supra.)" (City of Mountain View et al. v Southern Pacific Co. (1967) 67 CPUC 291, 310.) We also note that in this day of extensive regulation of the transportation industry one may not become an express corporation or other type of common carrier by dedication of facilities alone. It is necessary to secure from this Commission a certificate declaring that public convenience and necessity require the proposed service. In addition, operating as an express corporation or other type of common carrier without first securing a certificate of public convenience and necessity is a misdemeanor. (Public Util. Code §§ 2110, 2112.) It would be a most foolhardy person indeed who, without having obtained a certificate of public convenience and necessity, would publicly declare that he was operating as an express corporation or other type of common carrier. As a practical matter, where it is alleged that someone has been illegally operating as a common carrier, the usual way in which this ultimate fact is established is to examine the conduct of the alleged violator and from this conduct determine whether or not there has been a 'dedication' or a 'holding out.' Thus in determining whether respondent has been operating as an express corporation we must look to its conduct and from this we determine 'intent', 'dedication', or 'holding out.'" (Investigation of Brinks, Decision (D.) 90984 in Case (C.) 9606, entered November 6, 1979.)

With the foregoing in mind, we examine the facts of this case.

Bonnie Boyd, the person in charge of charter sales for Harbor, testified as follows:

"Q I understand. We are using Derbyshire and Delta Travel interchangeably here. I understand that Delta Travel has a particular service whereby they charter one of your vessels. Along the way there is a tour explaining the various bays going through the various bridges that they are going under and things of that nature.

"Q And I think your response to my last question was that when there is an inquiry as to that service, you refer it to Mr. Derbyshire; is that correct?

"A That is correct.

"Q Now, have you ever been asked in the last eight years as to a group that wasn't interested in Mr. Derbyshire's type of service, but just as we would like to take a group to Sacramento or we would like to go from Sacramento to San Francisco or we would like to stop off at the Rio Vista Bridge?"

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"THE WITNESS: Yes.

"MR. SPOLTER: Q And with regard to those inquiries, could you be more specific, the types of inquiries that you have had?

"A I don't quite understand what you mean by more specific.

"Q When those people have made the inquiries that you just mentioned are made, how do you handle them?

"A I explain to them what the rates are.

"Q If you could, to the extent that you can recall now or refer to the records that you brought with you, could you state what types of services those people have inquired about.

"A Similar to the service that Delta Travel provides. They have a group of X number of people and they want to charter a vessel to or from Sacramento.

"Q And then you quote them rates?

"A That is correct, sir.

"Q Are these rates essentially the same that you quote to Delta Travel?

"A No, sir.

"Q No?

"A No, sir.

"A We have a volume rate with Delta Travel. We have a regular rate for individuals.

"Q With regard to those individuals in the last eight years that have inquired and you have given them the rates, have you entered into any agreements with any of them?

"A Once, yes.

"Q And with what group was that, if you can recall?

"A Sacramento Mental Health Association.

"Q And approximately when was that?

"A I believe about four or five years ago.

"Q And what were the points served in that charter?

"A Sacramento to San Francisco.

"Q And then back again or not?

"A No." (RT 22-25.)

Boyd also testified that except for existing customers, she did not have the final authority to enter into charter agreements with someone wishing to charter a vessel for a group for service east of the Carquinez Bridge. The primary reason for needing such approval was the availability of vessels and crews.

Jerry Koenig, Harbor's sales manager, testified that:

"Q Were your employees such as Bonnie or your subordinates under orders to decline to discuss charters to Sacramento or to Stockton with anybody other than Delta Travel?

"A No. They were under no specific orders not to talk to anybody else.

"But the fact is that Delta Travel is the one that we chartered our boats out to.

"Q But they were permitted to discuss potential charters with people to Sacramento, to Stockton, and enter into preliminary negotiations with regard to those except perhaps any actual charter agreement would have to be approved by you or Mr. Pence; is that correct?

"A Any charter agreement like that would probably have to be approved by myself or Mr. Pence. But I think that you have to realize we get in any one day approximately 50 to 60 phone calls from people requesting information on charters.

"When I worked in the charter department, I had requested charter boats to practically any place on the coast of California.

"We always very patiently listened to them and evaluated whether we could do it or whether we couldn't do it.

"Q What was your evaluation based upon?

"A Our evaluation, I think almost any of the things we do are based on whether we can physically operate the charter, whether we have boats available.

"Q Let's assume for a moment in February, 1981, since you have been charter sales manager, if you had a boat available, if you had a crew available, if you could agree on a price and if somebody wanted to charter your service to Sacramento or to Stockton, operationally and financially all things being acceptable, would you have chartered a vessel?

"A To which point? From San Francisco to --

"Q To Stockton.

"A I would imagine we probably would have chartered a boat to somebody." (RT 77-78.)

The cited testimony and other evidence clearly establishes that, subject to the availability of personnel and equipment, Harbor will provide service to anyone wishing to take a group, for compensation, between San Francisco and Sacramento. We find dedication under the authorities previously set forth.

The previous discussion established that Harbor is a public utility subject to regulation under §§ 216(a) and (b). It is also a public utility subject to regulation under § 216(c).

The record clearly establishes that Delta advertises and sells its sightseeing cruises to the general public. Harbor has been chartering vessels to Delta for at least seven years. In 1983, 52 individual trips were scheduled between San Francisco and Sacramento. This clearly constitutes the furnishing of a service to a corporation which in turn "directly or indirectly, mediately or

immediately, performs such service...for the public or some portion thereof" within the meaning of § 216(c). If dedication is a requisite for a holding of public utility status under § 216(c), the evidence above cited indicates that dedication occurred. Harbor is a public utility subject to regulation under § 216(c).

Since the San Francisco-Sacramento operations are subject to public utility regulation a certificate of public convenience and necessity or valid prescriptive right is required under § 1007.

2. Does Harbor Possess the Requisite Operating Authority for its Sacramento Operations?

Harbor contends that it has prescriptive rights which authorize the Sacramento operations. In support of its contention Harbor points to the 1926 Commission decision authorizing its formation and sale of stock. (Harbor Tug & Barge Co. (1926) 27 CRC 609.) That decision limited Harbor's operating authority to the filed tariffs of its predecessors in interest. Although these tariffs are no longer in existence, Harbor contends they reflected the prescriptive rights contended for here.

It is not necessary to dwell at length over the operating rights set forth in the 1926 decision. Assuming, arguendo, that the tariffs on file in 1926 contained prescriptive rights, they were extinguished by the 1937 decision previously cited.

In the middle 1930's the Commission instituted an investigation on its own motion into the operating rights of common carriers by vessel on San Francisco, San Pablo and Suisun Bays and on the San Joaquin, Sacramento, and Napa Rivers, and Petaluma Creek and their tributaries. An interim decision was entered on October 14, 1935. (Re Vessel Carriers (1935) 39 CRC 429 - hereafter referred to as the 1935 decision.)

The 1935 decision stated the genesis of the proceeding:

"Approximately sixty carriers have had on file with the Commission for some time tariffs naming rates, rules and regulations governing the transportation of property, and in certain instances passengers, between various points on the inland water of San Francisco, San Pablo and

Suisun Bays and the San Joaquin, Sacramento and Napa Rivers and Petaluma Creek and their tributaries. From the records in several formal proceedings and from information brought before the Commission informally it became apparent however that in many instances these tariffs provided for operations greatly in excess of the carriers' lawful operative rights. The Commission therefore instituted this investigation into the operative rights of these carriers for the purpose of determining the extent thereof." (39 CRC at p. 430.)

The determination of a carrier's prescriptive rights was encompassed in the proceeding. (39 CRC at pp. 431-35.) The 1935 decision made a determination of Harbor's operating authority. (39 CRC at p. 451.) The order in the 1935 decision provided that:

"IT IS HEREBY FURTHER ORDERED that submission is hereby set aside as to respondents other than those named in the preceding paragraph, and this proceeding is reopened for further hearing before Commissioner Harris in the Court Room of the Railroad Commission, Fifth Floor, State Building, San Francisco, California, at 10 o'clock A.M., on Tuesday the 12th day of November, 1935, at which time and place such respondents are directed to appear and make any showing desired by them as to why an order should not be entered defining the scope and extent of their operative rights in accordance with the findings and conclusions set forth in the above opinion." (39 CRC at pp. 469-70.)

Further hearings were held. The result of these hearings was the 1937 decision. Harbor's operating rights were defined in Appendix A of the 1937 decision as follows:

"THE HARBOR TUG AND BARGE COMPANY (a corporation)

"A general launch, barge, tug and towboat business in "on call" service for the transportation of passengers between points on San Francisco and San Pablo Bays and for the transportation of property between points on San Francisco, San Pablo and Suisun bays and for the transportation of property in lots of not less than 100 tons between all other points involved in these proceedings." (40 CRC at p. 515.)

No additional operating authority has been granted to Harbor. The operating authority granted in the 1937 decision does not authorize passenger service between San Francisco and Sacramento.

Harbor contends that the 1937 decision is invalid insofar as it adjudicated passenger operating rights and Harbor may presently claim operating rights which it alleges existed in 1923. The basis of Harbor's argument is that the caption of the proceeding (C.3824) which resulted in the 1935 and 1937 decisions refers only to "common carriers engaged in transporting property by vessel." There is no merit in this contention.

Harbor appeared and was represented in the proceedings leading to the 1935 and 1937 decisions. (39 CRC 430; 40 CRC 494.) It cannot claim lack of knowledge of what transpired in the proceedings.

The California Supreme Court has held that:

"While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms. (Rogers v. Duhart, 97 Cal. 500 [32 P. 570]; Menefee v. Oxnam, 42 Cal. App. 81 [183 P. 379]; Masero v. Bessolo, 87 Cal. App. 262 [262 P. 61].) Since the enactment of section 452 of the Code of Civil Procedure in 1872, it has been generally recognized that in the construction of a pleading for the purpose of determining its effect, 'its allegations must be liberally construed, with a view to substantial justice between the parties.' (Estate of Wickersham, 153 Cal. 603 [96 P. 311]; Mix v. Yoakum 20 Cal. 681 [254 P. 557]; Terry Trading Corp. v. Barsky, 210 Cal. 428 [292 P. 474]; Von Schrader v. Milton, 96 Cal. App. 192 [273 P. 1074].) No error or defect in a pleading is to be regarded unless it affects substantial rights. (Code Civ. Proc., sec. 475.) . . . Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the

unsuccessful litigant to his injury. (Stein v. United Railroads of San Francisco, 159 Cal. 368 [113 P. 663]; Tietke v. Forrest 64 Cal App. 364 [221 P. 681].) (Buxbom v Smith (1944) 23 C 2d 535, 542-43.)

We examine the facts in the light of this authority and others later cited.

As indicated, Harbor appeared and was represented in the 1935 proceeding. The description of the proceeding indicated it was dealing with "tariffs naming rates, rules and regulations governing the transportation of property, and in certain instances passengers...." (39 CRC at p. 430.) The 1935 decision adjudicated passenger operating authority for eight operators of common carrier vessels, including Harbor. (39 CRC at pp. 442-43, 444, 445-46, 450, 451, 457, 459, 460, 464.)

The order in the 1935 decision vacated the submission and provided for further hearings and directed the respondents, including Harbor, "to appear and make any showing desired by them as to why an order should not be entered defining the scope and extent of their operative rights in accordance with the findings and conclusions set forth in the above opinion." (39 CRC at p. 470.) Harbor appeared and was represented in the proceeding which resulted in the 1937 decision which defined Harbor's operating rights. (40 CRC 494.) It is abundantly clear that the question of Harbor's operating authority was fully litigated in the 1935 and 1937 proceedings. While the orders in the 1935 and 1937 decisions deal with passenger operating authority, which is not mentioned in the caption, "The virtually unanimous rule in California is that variance between pleading and proof does not constitute error where no prejudice is shown and no objection to evidence or motion for nonsuit has been made in the trial court. (See 3 Witkin, Cal. Procedure (2d ed.) Pleading § 1061, p. 2637; and cases collected therein; Code Civ. Proc., § 469; Witkin, supra, § 1057, pp. 2632-2633; Dougherty v. California Kettleman, etc. (1937) 9 Cal. 2d



58, 85 [69 P. 2d 155]...." (Quezada v Hart (1977) 63 CA 3d 754, 761.)

Harbor's operating authority is delineated in the 1937 decision. It is bound by that decision and cannot attack it in this proceeding. (PU Code § 1709; People v Western Air Lines, Inc. (1954) 42 C 2d 621, 630.)

Since the San Francisco-Sacramento operations are common carriage subject to public utility regulation, it is unnecessary to consider §§ 4660 et seq. relating to for-hire vessels.

Harbor does not possess the requisite operating authority for the San Francisco-Sacramento operations.

3. What Type of Order Should be Entered?

a. Contempt

Blue & Gold contends that as part of the relief granted the Commission should hold Harbor in contempt for violating the cease and desist provisions of the order in the 1937 decision. Harbor argues that there is no evidentiary basis for contempt sanctions and the request is defective in form and substance.

Harbor argues that a question of contempt for violating the 1937 decision can only be considered in a proceeding involving C.3824, the matter in which that decision was issued. We need not tarry on this point because the Commission is of the opinion that contempt is not appropriate on this record.

The general rules dealing with contempt were set forth in United Transportation Union v Southern Pacific Co., D.93206 entered June 16, 1981:

"The Nature of Contempt

"The Commission has the same power of contempt as courts of record. [Cal. Const., Art. XII, § 6; PU Code § 312; Van Hoosear v Railroad Commission (1922) 189 Cal 228.] Failure to obey a Commission

general order or decision is punishable by contempt. (PU Code § 2113; Code of Civil Proc. § 1209.) Each act of contempt is punishable by a fine of not more than \$500 or imprisonment not exceeding five days, or both. (Code of Civil Proc. § 1218.)

"[A] proceeding in contempt is regarded as a case that is criminal or quasi-criminal in nature, in which the state is the real plaintiff or prosecutor. Even where the conduct constituting the contempt arises in a civil action, or the proceeding for contempt is merely ancillary to a civil action, the proceeding may be regarded as of a criminal nature. Thus, contempt is not regarded as a civil action either at law or in equity," (14 Cal Jur 3d § 50, pp. 96-97.)

"Since contempt is criminal in nature the procedural and evidentiary requirements are the most rigorous and exacting of all matters handled by the Commission.

"Since contempt proceedings are criminal in nature, the prescribed procedural safeguards must be accorded the alleged contemnor. The accusation must be supported the same as any other criminal charge and is subject to the same presumptions. The judgment of conviction must be governed by the rules applicable to criminal cases, and no intendments or presumptions in favor of the regularity of the proceedings may be indulged as against the alleged contemnor to

sustain the sufficiency of the accusation, the affidavit, the evidence, the findings, or the order adjudging contempt, all of which must be construed in his favor." (14 Cal Jur 3d § 51, p. 98.)

"The burden of proof in a contempt proceeding is higher than in any other type of proceeding before the Commission.

"Since a contempt proceeding is criminal or quasi-criminal in nature, the contempt must be proved beyond reasonable doubt. A mere preponderance of the evidence is not sufficient." (14 Cal Jur 3d § 71 p. 124.)" (Stip. Dec. at pp. 3-4.)

If Blue & Gold wanted to involve contempt sanctions, it was necessary to comply with the requisite statutory requirements.

"If, however, the contempt did not occur in the immediate view and presence of the court, it becomes indirect contempt and a more elaborate procedure must be followed in order to notify the person so charged and to allow him an opportunity to be heard.

"[4] In such cases an affidavit must be presented to the court stating the facts constituting the contempt, an order to show cause must be issued, and a hearing on the facts must be held by the judge. (Code Div. Proc., §§ 1212-1217.)" (Arthur v Superior Court (1965) 62 C2d 404, 407-08; Rosenstock v Municipal Court (1976) 61 CA 3d 1, 6.)

In this case the affidavit required by CCP § 1211 was not filed and no order to show cause was issued. Contempt is not an appropriate remedy.

b. Cease and Desist

The record clearly indicates that Harbor is conducting the San Francisco-Sacramento operations without proper operating authority. Blue & Gold sought temporary and permanent cease and desist orders as part of the relief requested.

Harbor argues that a cease and desist order should not issue for the following reasons:

1. Harbor filed A.83-02-43 and volunteered the information which led to this complaint. The candor of the application to resolve the doubt about Harbor's San Francisco-Sacramento operating authority should not be the basis for Harbor's suffering economic harm.
2. While not binding on the Commission, the San Francisco-Sacramento operations have been conducted under color-of-right with the knowledge of the staff for at least five years.
3. The evidence does not establish any willful violation.
4. It would be against the public interest.
5. Applying a hardship test, the hardship to Harbor would be greatly disproportionate to that of Blue & Gold if no cease and desist order were entered.
6. Blue & Gold is attempting to protect a technical and unsubstantial right because it does not hold appropriate operating authority to serve from San Francisco to Sacramento and its vessels are unsuitable for the Delta operations.

The Commission did not enter a temporary cease and desist order for the reasons which follow.

Blue & Gold claims that it has operating rights to conduct operations between San Francisco and Sacramento. Harbor contends Blue & Gold does not have such authority and seeks such a holding here. This proceeding is not the appropriate one to determine Blue & Gold's operating authority. However, in considering whether to issue a temporary cease and desist order, the Commission is of the opinion that it has not been established with certainty that Blue & Gold has such authority. From the record, it appears no other vessel common carrier possesses such authority. The issuance of a temporary cease and desist order might have resulted in the cessation of all service. This would not have been in the public interest.

Delta filed a declaration which indicated that at the time of hearing it had already booked more than 7,000 cruises, which have received national publicity. The declaration set forth facts which indicate that Blue & Gold's vessels are not as suited as Harbor's for the service, and may not be suitable at all. The cruises are from 6-8 hours. During the period from April-August, 1982, the average number of passengers per cruise was 338. The declaration contends that: Blue & Gold vessels cannot accommodate more than 150 passengers on a 6 to 8-hour cruise. Blue & Gold vessels do not have sufficient inside cabin space to protect the number of passengers carried from fog and chilling wind or temperatures over 100° in blazing sun, which are frequently encountered. Blue & Gold vessels have fixed benches on all outside deck areas, which limit movement. Blue & Gold vessels would not be able to safely embark or disembark passengers in Sacramento. The cruises use Port of Sacramento facilities for embarking or

debarking. The declaration states that access to Blue & Gold vessels is a doorway above the water level. This permits boarding from a float with a gangway. The Port of Sacramento is built for ocean-going vessels and the ground level is 10-20 feet above the water line. A water line door is useless in these circumstances.

Assuming, arguendo, that Blue & Gold has the authority to conduct San Francisco-Sacramento operations, it appears that their vessels cannot adequately provide the service for the number of customers generally booked by Delta, if at all. In the light of the 7,000 passengers already booked for 1983 cruises and the apparent lack of adequate vessels of Blue & Gold to provide such service (assuming proper operating authority) a temporary cease and desist order was not appropriate.

We turn to the question of whether a permanent cease and desist order should be issued.

Preliminarily, we note Harbor's contention that a cease and desist order should not issue because "While not binding on the Commission, the Sacramento charters have been provided with Commission staff acquiescence and under color-of-right for at least the past five years." (Opposition Brief, p. 8.) This position is devoid of legal merit.

The record indicates that in 1978 the Commission's Director of Transportation wrote to the then president of Harbor indicating it did not have the requisite authority for the San Francisco-Sacramento operations. On March 28, 1978, the then counsel for Harbor responded that an application for appropriate authority "should be filed shortly." None was until the filing of A.83-02-43 in 1982.

The fact that the Commission did not institute a proceeding on its own motion against Harbor does not legitimize its unauthorized operations.

We declined to issue an interim cease and desist order so that members of the public holding reservations for 1983 cruises would not be inconvenienced. While the Commission has a duty to restrain the operations until appropriate authority is obtained we will in this case stay the effective date of the cease and desist order until we consider the evidence in Harbor's application for operating authority in A.83-02-43. We take this unusual action only because an immediate cease and desist order would halt existing passenger vessel service between San Francisco and Sacramento at the beginning of the cruise season. Harbor has the required evidence of insurance on file with the Commission.

#### Further Proceedings

This proceeding was only submitted on the question of Harbor's San Francisco-Sacramento operations. A further hearing will be held to afford the parties opportunity to present evidence on the issues dealing with the Alcatraz operations and those involving Piers 41 and 43½.

Consideration of A.83-02-43 and A.83-02-44 have been deferred pending the disposition of this matter. There are protests to A.83-02-43 and it will be expeditiously calendared. On March 14, 1984, Harbor filed a motion to withdraw A.83-02-44 because of changed circumstances. That request will be disposed of by separate order.

No other points require discussion. The Commission makes the following findings and conclusions.

#### Findings of Fact

1. For at least seven years Harbor has, on a regular basis, entered into charter agreements for voyages between San Francisco and Sacramento.

2. Delta operates sightseeing cruises between San Francisco and Sacramento. Under the charters, Harbor provides vessels over five tons net register and crews. Delta markets the cruises and provides the narration. The cruises operate on Saturdays and

Sundays, April through October. Delta offers a two-day cruise from San Francisco to Sacramento; which includes an overnight stop at a Sacramento hotel. The passengers go to and from Sacramento by vessel, which takes 7-8 hours each way. Delta also operates one-day cruises from San Francisco and Sacramento. The passenger departs from San Francisco or Sacramento by vessel and goes to the destination city where a period of bus sightseeing and opportunity for dining is provided. The passenger is returned to the point of origin by bus. Delta also operates a one-day Saturday cruise from Sacramento which provides for direct bus transportation to Fisherman's Wharf, San Francisco, where the passenger embarks on the vessel and returns by cruise to Sacramento.

3. In 1983, Delta scheduled 52 one-way vessel trips between San Francisco and Sacramento using Harbor vessels.

4. Harbor receives approximately \$5,100 for the charter of its vessel for a one-way trip between San Francisco and Sacramento.

5. Subject to the availability of vessels and payment of requested rates, Harbor will charter a vessel for service between San Francisco and Sacramento to anyone desiring to promote a cruise for compensation for a group comprised of members of the public. Harbor has dedicated this service to public utility use.

6. For at least the past seven years Harbor has chartered vessels on a regular basis to Delta. Delta in turn operated sightseeing cruises, for compensation, for the general public on these vessels between San Francisco and Sacramento. Harbor has dedicated this service to public utility use.

7. Harbor's operating rights, including any prescriptive rights, were defined in the 1937 decision. Harbor has no operating rights other than those set forth in the 1937 decision. Any claimed prescriptive rights beyond the authority granted were extinguished by the 1937 decision.

8. Harbor's operating authority is as follows: A general launch barge, tug and towboat business in "on call" service for the transportation of passengers between points on San Francisco and San Pablo Bays and for the transportation of property between points on



San Francisco, San Pablo and Suisun Bays and for the transportation of property in lots of not less than 100 tons between all other points involved in these proceedings.

9. Harbor does not have a prescriptive right or a certificate of public convenience and necessity, as required by §1007, to conduct the San Francisco-Sacramento vessel operations heretofore described.

10. No affidavit as required by CCP § 1211 seeking an order to show cause re contempt was filed in this proceeding and no order to show cause was issued.

11. Harbor presently provides the only passenger vessel service between San Francisco and Sacramento, either directly or by charter of vessels to Delta.

12. The heaviest portion of the cruise season between San Francisco and Sacramento occurs April through August.

13. Harbor has the required evidence of insurance on file with the Commission's Transportation Division.

#### Conclusions of Law

1. The vessels provided by Harbor for the San Francisco-Sacramento operations are vessels within the definition of § 238.

2. Harbor's San Francisco-Sacramento operations are point to point and do not fall under the loop exemption set forth in Golden Gate Scenic Steamship Lines v Public Utilities Commission (1957) 57 C 2d 373.

3. Harbor is a common carrier as defined in §211(b).

4. Harbor is a public utility subject to regulation under §§ 216(a) and (b) with respect to its San Francisco-Sacramento operations.

5. Harbor is a public utility subject to regulation under § 216(c) with respect to its San Francisco-Sacramento operations.

6. Harbor is bound by the description of its operating rights in the 1937 decision and cannot attack that description in this proceeding.

7. Harbor is conducting San Francisco-Sacramento common carrier vessel operations without the operating authority required by law.

8. Sanctions for contempt are not appropriate on this record.
9. Harbor should be ordered to cease and desist from conducting common carrier vessel operations between San Francisco and Sacramento without appropriate operating authority.
10. To preserve existing cruise service between San Francisco and Sacramento the effective date of the cease and desist order should be stayed until we issue a decision in A.83-02-43.

INTERIM ORDER:

IT IS ORDERED that:

1. Harbor Carriers, Inc. shall cease and desist from conducting common carrier vessel operations between San Francisco and Sacramento without appropriate operating authority.
2. The cease and desist order is stayed pending our decision in A.83-02-43.

3. A further hearing will be calendared in this matter to afford the parties the opportunity to present additional evidence on Harbor's Alcatraz operations and those between Piers 41 and 43+.

This order is effective today.

Dated MAR 21 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President

VICTOR CALVO

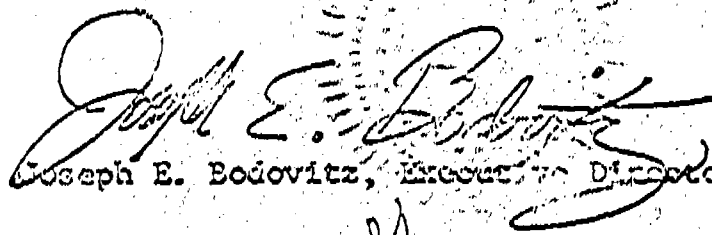
PRISCILLA C. GREW

DONALD VIAL

WILLIAM T. BAGLEY

Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

  
Joseph E. Bodovitz, Executive Director