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Decision 89 01 054 JAN 27 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of Associated
Limousine Operators of San Francisco,
Inc., individuals listed as
Respondent Operators in Attachment A,
and individuals listed as Respondent
Shareholders in Attachment B.

I.87-10-014
(Filed October 16, 1987)

Alfred J. Arnaud, Attorney at Law, for Associated
Limousine Operators of San Francisco, and
Robert Oziel and Dieter Schien, for themselves,
respondents.

Catherine A. Johnson, Attorney at Law, and Paul
Wuerstle, for the Transportation Division.

O P I N I O N

This investigation was instituted into the operations,
rates, charges, and practices of Associated Limousine Operators of
San Francisco, Inc. (ALO), the various respondent operators, and
the various respondent shareholders for the purpose of determining:

1. Whether respondent ALO violated Public
Utilities (PU) Code § 5371 by operating as
a charter-party carrier from December 12,
1985 to March 10, 1986 without a permit.
2. Whether respondent ALO has violated PU Code
§ 493 by serving additional authorized
points as a passenger stage corporation
before filing a tariff covering the
services.
3. Whether respondent ALO violated PU Code
§ 1031 by operating as a passenger stage
corporation to points not authorized by its
certificate.
4. Whether respondent ALO violated PU Code
§ 702 by violating a restriction contained
in its passenger stage certificate which

prohibits the subcontracting of services to other carriers. (Appendix A of Decision (D.) 86459 and Appendix PSC-1005 of D.86-01-046, General Authorizations, Restrictions, Limitations, and Specification, Section 1(e).)

5. Whether each respondent operator violated PU Code § 5371 by failing to obtain a charter-party carrier permit.
6. Whether respondent ALO has violated the Commission's General Order (GO) 98-A, Part 2(c), by engaging 24 respondent operators who do not hold charter-party permits nor are they employees of respondent ALO.
7. Whether respondent ALO violated PU Code § 702 by violating a restriction contained in its passenger stage certificate by allowing 22 shareholders of ALO to operate as carriers although they are not employees nor did they form a cooperative, referred to as Associated San Francisco Limousine Operators' Cooperative, as required in Appendix A to D.86459 and Appendix PSC-1005 to D.86-01-046, General Authorizations, Restrictions, Limitations, and Specification, Section 1(e).
8. Whether any or all of respondent's operating authority should be canceled, revoked, or suspended, or in the alternative, a fine imposed, pursuant to PU Code §§ 1033.5 and 5378.
9. Whether respondent ALO should be ordered to cease and desist from any unlawful operations or practices.
10. Whether each respondent operator should be ordered to cease and desist from any unlawful operations or practices.
11. Whether each respondent shareholder should be ordered to cease and desist from any unlawful operations or practices.

12. Whether any other orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction.

Public hearing was held before Administrative Law Judge O'Leary at San Francisco on April 20 and 21, 1988. The matter was submitted subject to the filing of concurrent briefs which were due 45 days after the filing of the transcript. At the request of ALO and the Commission's Transportation Division staff (staff) the time for filing of briefs was extended to September 6, 1988. The matter was submitted with the filing of briefs by ALO and the staff on September 6, 1988.

Staff Evidence

The evidence presented by the staff discloses that ALO holds a certificate of public convenience and necessity authorizing operations as a passenger stage corporation and a permit authorizing operations as a charter-party carrier of passengers.

The passenger stage corporation certificate was granted by D.86459 as amended by D.86868 and D.83-04-022. It authorized operations between San Francisco International Airport (SFO), on the one hand, and various hotels in the City and County of San Francisco, on the other hand. By D.86-01-046 the certificate was amended to authorize operations between SFO on the one hand, and all points within the Counties of Alameda, Contra Costa, Marin, Santa Clara, San Francisco, and San Mateo, on the other hand.

The certificate is subject to several provisions of which one is the following:

- "(e) The service shall be provided only in vehicles owned by members of Associated San Francisco Limousine Operators' Cooperative or vehicles owned or leased by Associated Limousine Operators of San Francisco, Inc., and operated by cooperative members or employees of Associated Limousine Operators of San Francisco, Inc. The certificate holder shall not subcontract to other carriers to provide the authorized service. Nothing

herein, however, shall be construed to prevent members of Associated San Francisco Limousine Operators' Cooperative from entering into lease-purchase agreements for the vehicles in which they provide the service."

The permit to operate as a charter-party carrier of passengers (permit) was issued on December 12, 1984 with an expiration date of December 12, 1985. The permit expired on December 12, 1985 and was renewed effective March 10, 1986.

The respondent operators and respondent shareholders listed in Appendixes A and B of the Order Instituting Investigation (OII), respectively, do not hold any operating authority.

The staff evidence (Exhibits 2-A and 2-B) also shows that on numerous occasions the respondent operators conducted charter-party operations allegedly on behalf of ALO between December 13, 1985 and March 12, 1986. It also shows that on numerous occasions the respondent operators conducted passenger stage operations allegedly on behalf of ALO between points for which ALO had authority but did not have a tariff on file and also between points for which ALO did not have authority.

The respondent operators worked through either ALO's San Francisco office or ALO's San Jose office.

Those working through the San Francisco office paid a monthly fee of \$2,000 and retained 100% of all revenues earned. In the case of payments by credit card, ALO would tender a check to the shareholder or operator after receipt of the monies from the credit card company. Those working through the San Jose office did not pay a monthly fee. They retained 60% of the revenue earned and ALO was given 40%. In the case of payments by credit card, ALO would give credit to the respondent operator upon receipt of monies from the credit card company. ALO did not issue any checks in the event of credit card transactions. The respondent operators were

allowed to keep 100% of the cash payments until they made up what ALO owed them.

ALO Evidence

ALO does not dispute the evidence that the transportation was performed. It contends that the transportation by the respondent operators was performed on behalf of Touch of Class Limousine Service (Touch of Class) rather than ALO.

Stan McColley, an owner of Touch of Class, testified that the respondent operators who worked through the San Jose facility worked for Touch of Class during the period in question. He further testified that none of the respondent operators working through the San Francisco facility worked for Touch of Class.

Sanford A. and Kathy J. McColley, doing business as A Touch of Class Limousine Service, hold a certificate of public convenience and necessity authorizing operations as a passenger stage corporation between points within the Counties of San Mateo and Santa Clara, on the one hand, and SFO, Oakland International Airport, San Jose International Airport, and the maritime piers in San Francisco, on the other hand. Commission records disclose that during the period in question Touch of Class also held authority as a charter-party carrier of passengers. ✓

McColley also testified that in December of 1985 ALO was being pressured to start its service at SFO. Since it had not yet received its operating authority from the Commission, ALO approached him and asked if ALO referred business to Touch of Class would Touch of Class give them a referral fee. McColley committed Touch of Class to such an arrangement. There is no evidence concerning the financial details of the arrangement between ALO and Touch of Class.

Robert Oziel of ALO testified that the respondent operators were covered under ALO's insurance policy and that claims submitted by them in the past had been honored. Oziel also sponsored Exhibit 5 which is a copy of ALO's Articles of

Incorporation, which show an amendment of the articles which change the name from Associated Limousine Operators of San Francisco, Inc. to Associated Limousine Operators of San Francisco, Inc., Cooperative.

Andy Feynes, the vice president and general manager of ALO, testified that he and Oziel cooperatively manage the operations of ALO. Feynes testified that he considers the respondent operators and respondent shareholders to be employees of ALO and that he exercises supervisory responsibilities with respect to the vehicles and the employees. He checks vehicles for safety and cosmetic appearance. In the event a vehicle does not meet the standards of ALO respecting appearance and safety Feynes would pull it off the road. Feynes testified that all employees must complete a training program consisting of one day of classroom training and two days in a vehicle accompanied by an experienced driver. They are also required to attend a taxi safety school for approximately three hours. ALO's drivers are not allowed to perform services for any other company or on their own behalf. The employees are also required to conform to a specific dress code. The respondent operators are provided with worker's compensation coverage by ALO. Shareholders are not provided with worker's compensation coverage. Job assignments to the drivers are made from a rotational list. When your name reaches the top of the list you are dispatched to a job by the management of ALO. There is no distinction made between operators and shareholders with the exception of the unavailability of worker's compensation coverage for the shareholders.

On cross-examination Feynes testified that the employees do not earn sick leave or vacation credits nor are they paid for holidays. The operators who own the vehicles are responsible for payment of all repairs, maintenance, and fuel.

ALO presented no evidence to refute the staff's evidence with respect to operations by ALO through its San Francisco office.

Discussion

The briefs in this matter were limited to three issues, namely: (1) Is there an employer-employee relationship between ALO and its drivers? (2) What is the effect of the cooperative arrangement? (3) What effect did the arrangement between ALO and Touch of Class have on the issues of ALO's operations without authority and ALO's relationship with its drivers?

1. Is there an employer-employee relationship between ALO and its drivers?

GO 98-A sets forth rules and regulations governing the operations of passenger stage corporations and passenger charter-party carriers. Part 12 of GO 98-A provides:

"PART 12-DRIVERS OF EQUIPMENT"

"12.00. Drivers of Equipment.

"12.01. Driver Status. Passenger stage corporations and passenger charter-party carriers shall not operate any passenger stage unless the driver thereof is under the complete supervision, direction and control of the operating carrier, and is:

- "(a) An employee of the operating carrier, or
- "(b) An employee of a public transit agency or of another Commission-authorized carrier that owns or possesses the vehicle by virtue of a bona fide full-time lease arrangement of 30 days or longer. This agreement of the utilization of the second carrier's vehicle and driver by the operating carrier shall be evidenced by written contract between the two carriers, or
- "(c) An owner-driver who, himself, holds Commission authority as a specialized charter-party permit carrier, pursuant to Public Utilities Code Section 5384(a). Such owner-driver permit shall be limited to one vehicle."

ALO contends that the evidence establishes without reasonable controversy that during the period in question the respondent operators were working for Touch of Class and not ALO. This contention can only apply to the operations out of the San Jose office since the testimony establishes that Touch of Class did not have an arrangement with ALO for the San Francisco operation. In its brief ALO states: "Respondents herein, however, wish to settle the issue as to the relationship between Associated Limousine and its present drivers..."

ALO contends that the respondent drivers are employees of ALO because of the control ALO exercises over the drivers, the inclusion of the drivers in ALO's health insurance plan, worker's compensation benefits provided by ALO, and the power of ALO to hire and fire the respondent operators.

In its brief ALO cites numerous cases supporting its contention that the respondent drivers are employees of ALO. Even if the cases cited by ALO were controlling we do not believe an employer-employee relationship exists for several reasons as set forth in the testimony of Feynes as follows:

1. ALO does not withhold Federal or State income taxes.
2. ALO does not withhold FICA (social security) taxes.
3. ALO does not pay the employer's portion of FICA taxes.
4. The respondent operators are paid not only for driving but also for the use of their vehicles.
5. The respondent operators are liable for all expenses in connection with the operation of the vehicle with the possible exception of insurance coverage.
6. The San Jose respondent operators for the most part were issued 1099 forms with their compensation shown as nonemployee

compensation indicating that for income tax purposes ALO does not consider them to be employees.

7. In the event a respondent operator's vehicle is inoperable a vehicle owned by ALO is available to the respondent operators, however, they must pay a fee to use that vehicle.

For the above reasons we conclude that there is no employee-employer relationship between ALO and the respondent operators and that the respondent operators under the arrangement with ALO are independent contractors.

2. What is the effect of the cooperative arrangement?

The cooperative first surfaced in connection with ALO's application for a passenger stage corporation certificate (Application (A.) 56228). D.86459 in that application states that:

"Applicant's president testified that, on advice of counsel, a separate corporation called Associated San Francisco Limousine Operators' Cooperative was formed to provide services to applicant. Each limousine owner-operator to be used by applicant in performing service under the authority sought herein is a member of the cooperative. Each owner-operator, through membership in the cooperative, guarantees to applicant that the services of the vehicle and its operator are available to applicant upon demand and that certain appearance and safety standards will be maintained. The cooperative assertedly was formed to insure the continuous availability of services of the owner-drivers to applicant."

D.86459 discloses that in return for the withdrawal of protests to the application, ALO stipulated that certain conditions be attached to its certificate. One of the conditions was that service be provided only in vehicles owned by members of the cooperative or vehicles owned or leased by ALO and operated by members of the cooperative or employees of ALO.

The only effect of the cooperative is to limit the manner in which the transportation under the passenger stage certificate can be performed.

The critical question is: Who are the members of the cooperative? Exhibit 5 contains the Articles of Incorporation, as amended. Article Fifth provides the following:

- "Fifth" (a) That this corporation is authorized to issue only one class of shares of stock; that the total number of shares which the corporation is authorized to issue is fifty (50); that the aggregate par value of all shares is FIFTEEN THOUSAND DOLLARS (\$15,000); and that the par value of each share is THREE HUNDRED DOLLARS (\$300). Upon the effective date hereof, each set of three (3) outstanding shares owned by each member and each share having a par value of \$100.00 is hereby reclassified and reconstituted as one (1) share of the par value of \$300.
- "(b) The initial capital of this Association shall be Sixty-six Hundred Dollars (\$6,600).
- "(c) No person may be a member of the Association without owning at least one (1) share of stock and no stock may be owned by any person who is not a member of the Association, but the voting rights of each membership of the Association shall be equal and each membership shall be entitled to one vote.
- "(d) No person or entity of any legal description or designation shall be entitled to receive, own or claim the rights of more than one such membership.
- "(e) The membership shall be evidenced by a membership certificate and will

evidence ownership of one (1) share of stock.

- "(f) The Association is authorized to admit up to Fifty (50) members and is authorized to issue up to Fifty (50) of its membership certificates only.
- "(g) All other property, voting, and membership rights and privileges not specifically mentioned herein, and the liabilities of the membership to dues or assessments, and the method of collection thereof, shall be as set forth in the By-Laws of this Association."

To be a member of the association, under the Articles of Incorporation, a person must own at least one share of stock in the corporation. The association is limited to a total membership of 50.

It appears that the stock of the corporation, as presently issued, is not in accordance with the Articles of Incorporation as amended. Attachment A of Exhibit 2-A contains a list of 22 individuals each of whom own a 4.5% interest of ALO. That list coincides with Attachment B of the OII for the most part. Attachment B lists 21 names rather than 22 and contains a listing for a James Reid who is not listed in Exhibit 2-A. The list in Exhibit 2-A contains two names not included in Attachment B of the OII (Roger Abraham and John Thomas). A 4.5% interest would translate to ownership of 2.25 shares of the authorized stock issue.

The respondent operators are not listed as owning any interest in ALO; however, Feynes testified all respondent operators are considered to be members of the cooperative. He also testified that the respondent operators are treated no differently than the respondent shareholders with the exception of the worker's compensation coverage.

We are not charged with the duty of enforcing compliance of statutes other than those set out in the PU Code. However, it appears from the evidence that ALO is not conducting business in accordance with its Articles of Incorporation. In this regard we caution ALO that its stock issuance may not be in accord with the terms set forth in its Articles of Incorporation. In the future we expect that only members of the cooperative, which membership is evidenced by the ownership of at least one share of stock, will operate vehicles under ALO's passenger stage certificate. Further members of the cooperative must either become employees of ALO or in the alternative, obtain charter-party authority so as to comply with the provisions of Part 12 of GO 98-A.

It is also appropriate to point out that this record appears to be contrary to the record in A.56228. In that application, the president of ALO testified that a separate corporation called Associated San Francisco Limousine Operators' Cooperative was formed to provide services to ALO. Exhibit 5 in this record discloses that in 1979, ALO's Articles of Incorporation were amended to change the name of ALO. ALO is placed on notice that within 90 days after the effective date of this order, it is to advise the Commission of the correct corporate name of the holder of the passenger stage and charter-party authorities held by ALO and, if necessary, file pleadings to change the name of the holder of the authorities. ✓

3. What effect did the arrangement between ALO and Touch of Class have on the issues of ALO's operations without authority and ALO's relationship with its drivers?

At the time the staff conducted its investigation it was not aware of the arrangement between ALO and Touch of Class. The arrangement may be best described as being very informal. None of the parties to the proceeding could give specific details of the arrangement. Staff, in its brief, argues that the arrangement should not be recognized because of the following:

1. No mention of the arrangement was made during the course of staff's investigation.
2. McColley was unable to recall critical details of the arrangement.
3. Both ALO and Touch of Class maintained records for the same transportation. Staff contends that if ALO's involvement was confined to a mere 15% referral fee, there was no need for ALO to keep detailed records.

There is no question that the arrangement between ALO and Touch of Class was a very informal one. It appears there is some question as to whether the arrangement did in fact exist; however, based on the evidence that staff did submit, we are not in a position to conclude that it did not exist. ✓

The arrangement between Touch of Class and ALO eliminates any violations by ALO of unlawful operations as a passenger stage corporation and a charter-party carrier performed by respondent operators operating out of the San Jose office.

The operations out of ALO's San Francisco office were not a part of the arrangement.

Touch of Class is not a respondent to this proceeding and therefore not subject to any sanctions. We would be remiss if we did not point out that Touch of Class was not in compliance with GO 98-A Part 12 if the operators did not become employees of Touch of Class.

Comments Filed by ALO

The ALJ's proposed decision was filed and mailed to the parties on April 29, 1988. Late-filed comments on the proposed decision were filed by ALO as authorized by the ALJ's ruling dated January 5, 1989. The reply filed by the Transportation Division filed on January 17, 1989 contends that the comments are for the most part, a reargument of points developed in ALO's brief.

Rule 77.3 of the Rules of Practice and Procedure deals with the Scope of Comments. The rule provides in part that:

"Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed."

We concur with the Transportation Division that the comments filed by ALO contain argument that the drivers who performed services for ALO were employees of ALO. The comments also contain a request that ALO be allowed 90 days to comply with any order issued by the Commission.

Whether there was an employer-employee relationship between ALO and its drivers was one of the three issues the ALJ requested be covered in the briefs and is one of the primary issues to be decided by us in this proceeding. The argument with respect to the employer-employee relationship between ALO and its drivers is beyond the scope of comments set forth in Rule 77.3 and is rejected. We will amend Ordering Paragraph 2 of the ALJ's proposed decision to provide for a period of 90 days.

We do not believe it appropriate to provide ALO 90 days to comply with the remaining portions of the ALJ's proposed order which we are adopting.

Findings of Fact

1. By D.86459 as amended by D.86868 and D.83-04-022, ALO was granted a certificate of public convenience and necessity authorizing operations as a passenger stage corporation between SFO, on the one hand, and various hotels in the City and County of San Francisco, on the other hand.

2. By D.86-01-046 the certificate was expanded to authorize operations between SFO, on the one hand, and all points within the Counties of Alameda, Contra Costa, Marin, Santa Clara, San Francisco, and San Mateo, on the other hand.

3. ALO held a permit to operate as a charter-party carrier of passengers which expired on December 12, 1985. The permit was renewed effective March 10, 1986.

4. The respondent operators and respondent shareholders listed in Appendixes A and B of the OII, respectively, do not hold any operating authority from this Commission to transport passengers.

5. No evidence was presented concerning operations by the respondent shareholders.

6. ALO had an arrangement with Touch of Class whereby operations conducted through the San Jose Office were conducted under the authorities held by Touch of Class.

7. No evidence was presented with respect to passenger stage operations by ALO through the San Francisco office.

8. During the period December 13, 1985 to and including March 9, 1986 ALO conducted operations as a charter party through its San Francisco office.

9. The operations set forth in Finding 6 were conducted by various respondent operators.

10. The respondent operators were compensated for driving and the furnishing of their vehicles.

11. ALO supervises the respondent operators as to appearance and safety of the vehicles and the dress code of the individuals.

12. The respondent operators were liable for all expenses in connection with the operation of their vehicles with the possible exception of insurance coverage.

13. ALO did not withhold Federal or State income taxes from respondent operator's compensation.

14. ALO did not withhold FICA taxes from the respondent operators.

15. ALO did not pay the employer's portion of FICA taxes on behalf of the respondent operators.

Conclusions of Law

1. ALO violated PU Code § 5371 by operating as a charter-party carrier of passengers without authority during the period December 13, 1985 and March 9, 1986.

2. ALO has violated GO 98-A Part 12 by engaging respondent operators who do not hold operating authority from the Commission and who are not employees of ALO.

3. Each respondent operator has violated PU Code § 5371 by operating as a charter-party carrier of passengers without first having obtained authority from this Commission.

O R D E R

IT IS ORDERED that:

1. Associated Limousine Operators of San Francisco, Inc. (ALO) shall pay a fine of \$500 to this Commission under PU Code § 5413.5 on or before the 40th day after the effective date of this order.

2. Within 90 days after the effective date of this order, ALO shall file a report advising the Commission of the correct name of the corporate entity and, if necessary, apply to have the operating authorities transferred to the corporate entity currently set forth in its Articles of Incorporation.

3. ALO shall cease and desist from employing operators not in accordance with Part 12 of GO 98-A.

allowed to keep 100% of the cash payments until they made up what ALO owed them.

ALO Evidence

ALO does not dispute the evidence that the transportation was performed. It contends that the transportation by the respondent operators was performed on behalf of Touch of Class Limousine Service (Touch of Class) rather than ALO.

Stan McColley, an owner of Touch of Class, testified that the respondent operators who worked through the San Jose facility worked for Touch of Class during the period in question. He further testified that none of the respondent operators working through the San Francisco facility worked for Touch of Class.

Sanford A. and Kathy J. McColley, doing business as A Touch of Class Limousine Service, hold a certificate of public convenience and necessity authorizing operations as a passenger stage corporation between points within the Counties of San Mateo and Santa Clara, on the one hand, and SFO, Oakland International Airport, San Jose International Airport, and the maritime piers in San Francisco, on the other hand. Commission records disclose that during the period in question Touch of Class also helped authority as a charter-party carrier of passengers.

McColley also testified that in December of 1985 ALO was being pressured to start its service at SFO. Since it had not yet received its operating authority from the Commission, ALO approached him and asked if ALO referred business to Touch of Class would Touch of Class give them a referral fee. McColley committed Touch of Class to such an arrangement. There is no evidence concerning the financial details of the arrangement between ALO and Touch of Class.

Robert Oziel of ALO testified that the respondent operators were covered under ALO's insurance policy and that claims submitted by them in the past had been honored. Oziel also sponsored Exhibit 5 which is a copy of ALO's Articles of

However, SoCal Water is placed on notice by this decision that the Commission does not find that its construction program is necessary or reasonable for rate making purposes. These issues are normally tested in general rate or rate base offset proceedings.

Cash Requirements Forecasts

In the letter dated December 7, 1988 to the CACD, SoCal Water's revised estimated cash requirements forecast for the years 1989 and 1990 indicated that internally generated funds will provide about 10.3% or \$5,500,000 of cash expenditures for 1989 and about 18.4% or \$6,000,000 for 1990. SoCal Water will require additional funds from outside sources amounting to about \$47,799,000 in 1989 and also about \$26,581,000 in 1990. CACD concludes that SoCal Water's proposed issuance and sale of its Debt Securities is necessary to help meet forecasted cash requirements.

We are not charged with the duty of enforcing compliance of statutes other than those set out in the PU Code. However, it appears from the evidence that ALO is not conducting business in accordance with its Articles of Incorporation. In this regard we caution ALO that its stock issuance may not be in accord with the terms set forth in its Articles of Incorporation. In the future we expect that only members of the cooperative, which membership is evidenced by the ownership of at least one share of stock, will operate vehicles under ALO's passenger stage certificate. Further members of the cooperative must either become employees of ALO or in the alternative, obtain charter-party authority so as to comply with the provisions of Part 12 of GO 98-A.

It is also appropriate to point out that this record appears to be contrary to the record in A.56228. In that application, the president of ALO testified that a separate corporation called Associated San Francisco Limousine Operators' Cooperative was formed to provide services to ALO. Exhibit 5 in this record discloses that in 1979, ALO's Articles of Incorporation were amended to change the name of ALO. ALO is placed on notice that within 30 days after the effective date of this order, it is to advise the Commission of the correct corporate name of the holder of the passenger stage and charter-party authorities held by ALO and, if necessary, file pleadings to change the name of the holder of the authorities.

3. What effect did the arrangement between ALO and Touch of Class have on the issues of ALO's operations without authority and ALO's relationship with its drivers?

At the time the staff conducted its investigation it was not aware of the arrangement between ALO and Touch of Class. The arrangement may be best described as being very informal. None of the parties to the proceeding could give specific details of the arrangement. Staff, in its brief, argues that the arrangement should not be recognized because of the following:

1. No mention of the arrangement was made during the course of staff's investigation.
2. McColley was unable to recall critical details of the arrangement.
3. Both ALO and Touch of Class maintained records for the same transportation. Staff contends that if ALO's involvement was confined to a mere 15% referral fee, there was no need for ALO to keep detailed records.

There is no question that the arrangement between ALO and Touch of Class was a very informal one. It appears there is some question as to whether the arrangement did in fact exist; however, based on the evidence contained here, and since staff chose not to present rebuttal concerning the arrangement, we are not in a position to conclude that it did not exist.

The arrangement between Touch of Class and ALO eliminates any violations by ALO of unlawful operations as a passenger stage corporation and a charter-party carrier performed by respondent operators operating out of the San Jose office.

The operations out of ALO's San Francisco office were not a part of the arrangement.

Touch of Class is not a respondent to this proceeding and therefore not subject to any sanctions. We would be remiss if we did not point out that Touch of Class was not in compliance with GO 98-A Part 12 if the operators did not become employees of Touch of Class.

Findings of Fact

1. By D.86459 as amended by D.86868 and D.83-04-022, ALO was granted a certificate of public convenience and necessity authorizing operations as a passenger stage corporation between SFO, on the one hand, and various hotels in the City and County of San Francisco, on the other hand.

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Touch of Class is not a respondent to this proceeding and therefore not subject to any sanctions. We would be remiss if we did not point out that Touch of Class was not in compliance with GO 98-A Part 12 if the operators did not become employees of Touch of Class.

Comments Filed by ALO

The ALJ's proposed decision was filed and mailed to the parties on April 29, 1988. Comments on the proposed decision were filed by ALO on December 28, 1988. Rule 77.3 of the Rules of Practice and Procedure deals with the Scope of Comments. The rule provides in part that:

"Comments shall focus on factual, legal or technical errors in the proposed decision and

1. No mention of the arrangement was made during the course of staff's investigation.
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2. By D.86-01-046 the certificate was expanded to authorize operations between SFO, on the one hand, and all points within the Counties of Alameda, Contra Costa, Marin, Santa Clara, San Francisco, and San Mateo, on the other hand.

3. ALO held a permit to operate as a charter-party carrier of passengers which expired on December 12, 1985. The permit was renewed effective March 10, 1986.

4. The respondent operators and respondent shareholders listed in Appendixes A and B of the OII, respectively, do not hold any operating authority from this Commission to transport passengers.

5. No evidence was presented concerning operations by the respondent shareholders.

6. ALO had an arrangement with Touch of Class whereby operations conducted through the San Jose Office were conducted under the authorities held by Touch of Class.

7. No evidence was presented with respect to passenger stage operations by ALO through the San Francisco office.

8. During the period December 13, 1985 to and including March 9, 1986 ALO conducted operations as a charter party through its San Francisco office.

9. The operations set forth in Finding 6 were conducted by various respondent operators.

10. The respondent operators were compensated for driving and the furnishing of their vehicles.

11. ALO supervises the respondent operators as to appearance and safety of the vehicles and the dress code of the individuals.

12. The respondent operators were liable for all expenses in connection with the operation of their vehicles with the possible exception of insurance coverage.

13. ALO did not withhold Federal or State income taxes from respondent operator's compensation.

in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed."

The comments filed by ALO contain argument that the drivers who performed services for ALO were employees of ALO. The comments also contain a request that ALO be allowed 90 days to comply with any order issued by the Commission.

Whether there was an employer-employee relationship between ALO and its drivers was one of the three issues the ALJ requested be covered in the briefs and is one of the primary issues to be decided by us in this proceeding. The argument with respect to the employer-employee relationship between ALO and its drivers is beyond the scope of comments set forth in Rule 77.3 and is rejected. We will amend Ordering Paragraph 2 of the ALJ's proposed decision to provide for a period of 90 days.

We do not believe it appropriate to provide ALO 90 days to comply with the remaining portions of the ALJ's proposed order which we are adopting.

Findings of Fact

1. By D.86459 as amended by D.86868 and D.83-04-022, ALO was granted a certificate of public convenience and necessity authorizing operations as a passenger stage corporation between SFO, on the one hand, and various hotels in the City and County of San Francisco, on the other hand.

2. By D.86-01-046 the certificate was expanded to authorize operations between SFO, on the one hand, and all points within the Counties of Alameda, Contra Costa, Marin, Santa Clara, San Francisco, and San Mateo, on the other hand.

3. ALO held a permit to operate as a charter-party carrier of passengers which expired on December 12, 1985. The permit was renewed effective March 10, 1986.

4. The respondent operators and respondent shareholders listed in Appendixes A and B of the OII, respectively, do not hold

14. ALO did not withhold FICA taxes from the respondent operators.

15. ALO did not pay the employer's portion of FICA taxes on behalf of the respondent operators.

Conclusions of Law

1. ALO violated PU Code § 5371 by operating as a charter-party carrier of passengers without authority during the period December 13, 1985 and March 9, 1986.

2. ALO has violated GO 98-A Part 12 by engaging respondent operators who do not hold operating authority from the Commission and who are not employees of ALO.

3. Each respondent operator has violated PU Code § 5371 by operating as a charter-party carrier of passengers without first having obtained authority from this Commission.

O R D E R

IT IS ORDERED that:

1. Associated Limousine Operators of San Francisco, Inc. (ALO) shall pay a fine of \$500 to this Commission under PU Code § 5413.5 on or before the 40th day after the effective date of this order.

2. Within 60 days after the effective date of this order, ALO shall file a report advising the Commission of the correct name of the corporate entity and, if necessary, apply to have the operating authorities transferred to the corporate entity currently set forth in its Articles of Incorporation.

3. ALO shall cease and desist from employing operators not in accordance with Part 12 of GO 98-A.

any operating authority from this Commission to transport passengers.

5. No evidence was presented concerning operations by the respondent shareholders.

6. ALO had an arrangement with Touch of Class whereby operations conducted through the San Jose Office were conducted under the authorities held by Touch of Class.

7. No evidence was presented with respect to passenger stage operations by ALO through the San Francisco office.

8. During the period December 13, 1985 to and including March 9, 1986 ALO conducted operations as a charter party through its San Francisco office.

9. The operations set forth in Finding 6 were conducted by various respondent operators.

10. The respondent operators were compensated for driving and the furnishing of their vehicles.

11. ALO supervises the respondent operators as to appearance and safety of the vehicles and the dress code of the individuals.

12. The respondent operators were liable for all expenses in connection with the operation of their vehicles with the possible exception of insurance coverage.

13. ALO did not withhold Federal or State income taxes from respondent operator's compensation.

14. ALO did not withhold FICA taxes from the respondent operators.

15. ALO did not pay the employer's portion of FICA taxes on behalf of the respondent operators.

Conclusions of Law

1. ALO violated PU Code § 5371 by operating as a charter-party carrier of passengers without authority during the period December 13, 1985 and March 9, 1986.

4. Respondent operators shall cease and desist from operating for ALO until such time as they either obtain charter-party permits or become bona fide employees of ALO.

The Executive Director shall have this order personally served upon respondent ALO and served by mail upon all other respondents.

This order shall become effective for each respondent 30 days after order is served.

Dated _____, at San Francisco, California.

2. ALO has violated GO 98-A Part 12 by engaging respondent operators who do not hold operating authority from the Commission and who are not employees of ALO.

3. Each respondent operator has violated PU Code § 5371 by operating as a charter-party carrier of passengers without first having obtained authority from this Commission.

ORDER

IT IS ORDERED that:

1. Associated Limousine Operators of San Francisco, Inc. (ALO) shall pay a fine of \$500 to this Commission under PU Code § 5413.5 on or before the 40th day after the effective date of this order.

2. Within 90 days after the effective date of this order, ALO shall file a report advising the Commission of the correct name of the corporate entity and, if necessary, apply to have the operating authorities transferred to the corporate entity currently set forth in its Articles of Incorporation. ✓

3. ALO shall cease and desist from employing operators not in accordance with Part 12 of GO 98-A.

4. Respondent operators shall cease and desist from operating for ALO until such time as they either obtain charter-party permits or become bona fide employees of ALO.

The Executive Director shall have this order personally served upon respondent ALO and served by mail upon all other respondents.

This order shall become effective for each respondent 30 days after order is served.

Dated JAN 27 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ASO &
COMMISSIONERS TODAY

[Signature]
Victor A. ... Executive Director
FD