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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Jorge M. Gonzales, Complainant, vs. Associated Limousine Operators of San Francisco, Inc., a cooperative corporation, Defendant.	Case 89-06-059 (Filed June 21, 1989)

Jorge Gonzales, for himself, complainant.
Alfred J. Arnaud, Attorney at Law, for Associated Limousine Operators of San Francisco, Inc., defendant.

O P I N I O N

Statement of Facts

By Decision (D.) 86459 issued October 5, 1976, Associated Limousine Operators of San Francisco, Inc. (Associated) was granted a certificate of public convenience and necessity to operate as a passenger stage corporation between San Francisco International Airport and certain San Francisco hotels.[1] D.86-01-046 issued January 23, 1986 expanded the authorization to embrace certain additional counties, including as relevant here, Santa Clara

1 D.86868 (January 18, 1977) corrected vehicle descriptions, and D.83-04-022 (April 6, 1983) more particularly specified pick-up points.

County. In addition, on December 12, 1984, Associated was issued a charter-party permit. This permit expired in December 1985, but was renewed on March 10, 1986.

In 1987, it appearing that Associated might have violated sections of the Public Utilities (PU) Code as well as Part 12 of General Order (GO) 98-A, and that certain limousine owner-operators providing services for Associated might also have violated the PU Code, the Commission issued its Order Instituting Investigation (OII or I.) 87-10-014. Following public hearing April 20 and 21, 1988, the Commission issued D.89-01-054 in the OII on January 27, 1989.

D.89-01-054 concluded that during the period at issue between December 13, 1985 through March 9, 1986, when Associated's charter-party permit had not been renewed, it conducted charter-party operations through its San Francisco office in violation of PU Code § 5371, using owner-operators (some Associated members and some not) thereby violating Part 12 of GO 98-A. However, Santa Clara County operations, run out of Associated's San Jose office, were conducted through an arrangement between Associated and A Touch of Class Limousine Service, under passenger stage and charter-party authorities held by the latter.

Basic to the D.89-01-054 conclusions, and of critical relevance here, was the Commission's determination on strongly controverted evidence, that there was no employer-employee relationship between Associated and San Francisco owner-operators who were not Associated shareholder-members. The Commission found that while Associated compensated these drivers for driving and furnishing their vehicles, and supervised vehicle appearance and safety, and individual dress codes, these owner-operators were liable for all operating expenses in connection with their vehicles except possibly insurance coverage. Furthermore, Associated did not withhold Federal or State income taxes, FICA taxes, or pay the employer portion of FICA taxes. There was also evidence that these

owner-operators were issued 1099 tax forms with their compensation shown as "nonemployee."

With this necessary background we now turn to the present complaint. Until late October 1988, Jorge M. Gonzales was a San Jose limousine owner-operator driving for Associated out of the latter's San Jose office. Gonzales was not an Associated shareholder. Gonzales asserts that he and his similarly situated fellow owner-operators met with Associated management in late July 1988 with regard to their status as "employees," and to negotiate on their scheme of operations. (This was at a point in time when Associated's management and those other owner-operators who had been parties to I.87-10-014 were waiting for a Commission decision in which status would be a focal issue. D.89-01-054 was not issued until the following January.) Out of this July 1988 meeting, Gonzales asserts, came the requirement that Associated was to receive from each owner-operator not an Associated shareholder $1,500 a month in advance, as well as 40% of each vehicle bookings over $3,750 per month.[2] Assertedly, Associated also demanded that the credit to corporate clients be carried by the owner-operators until paid by the clients, usually between 60-90 days. Associated denies any such agreement was made but does concede that it subsequently informed the owner-operators that its computer system could not be programmed to accommodate the arrangement, and that effective September 1988 these owner-operators could either pay a fixed rate of $2,200 or the $1,500/40% over $3,750 system,

2 Earlier, in June 1988, Associated had informed the owner-operators that effective August 1, 1988, the 60-40% commission split previously in effect would be changed to a fixed fee to each owner-operators of $2,500 per vehicle to be paid monthly in advance for the privilege of operating under Associated's jurisdiction.

but that for October thereafter, all of these owner-operators would be on the fixed $2,200 rate arrangement.[3]

On October 15, 1988, at another management/owner-operators meeting, Associated informed the latter that the owner-operators would also have to pay the travel agency commissions, amending this to become a flat $150 monthly charge to be paid in advance monthly; this in addition to the $2,200 and credit to corporate client charges.

That same afternoon Gonzales was reminded that his October dues advance had not been paid, and he was told that unless he paid up and thereby met his obligation (as a nonshareholder member of the "cooperative") he would be put off the road. Gonzales asserts that because of his inability to fulfill the financial requirements of Associated he was put off the road.

3 Gonzales further asserts that the driver-operators were asked to shoulder the costs until paid, of credit to corporate clients.

Thereafter, on June 21, 1989, Gonzales filed the present complaint with the Commission.[4] By this complaint Gonzales asks that the Commission find that he and his fellow San Jose owner-operators (who were nonshareholders in Associated) were "employees" of Associated beginning September 5, 1986, and that therefore, as employees, by requiring them to pay $2,200 monthly advance fees, $150 monthly advance travel agency commission expenses, and carry the credit for corporate clients, Associated violated the Commission's holding in In Re Plaza Stages, Inc. (1919) 16 CRC 766, and Labor Code §§ 403 and 204, respectively, thereby failing to conform to the requirements of PU Code § 702 (that every public

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4 Associated, in legal form a corporation, essentially and legally since 1979, is a cooperative of owner-operators of 9-passenger limousines who retain all their revenues, paying only a portion thereof to the corporation. Limited to 50 members, each member owner-operator must own at least one share of stock. In the initial 1976 certification proceeding, Associated's president testified that upon advice of counsel, a separate corporation called "Associated San Francisco Limousine Operators' Cooperative" was formed to provide services to Associated, and each limousine owner-operator to be used by Associated was to be a co-op member. Back in 1976, in return for withdrawal of protests to its application, Associated agreed to certain conditions to be included in its certificate. Its amended application accepted that service was to be provided only in vehicles owned by members of Associated's separate co-op, or vehicles owned or leased by Associated, and operated by drivers employed by Associated. Today, Associated admits that no separate "Associated San Francisco Limousine Operators' Cooperative" was ever formed. In the 1988 I.87-10-104 hearing, Associated provided testimony that all owner-operators providing services in the December 12, 1985 to March 10, 1986 timeframe were considered to be members of the "cooperative" (meaning Associated), and that some (nonshareholders in Associated and therefore not legally members) were treated no differently than Associated members except that Associated provided its shareholder members with workmen's compensation coverage. In the I.87-10-014 hearing in 1988, Associated contended that these nonmembers of Associated were "employees" of Associated, a contention rejected by the Commission in D.89-01-054.

utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission).[5]

Gonzales further contends that since Associated's scheme of operations failed to conform to PU Code § 702, he was deprived of unemployment insurance benefits when his association with Associated ended; that providing him with 1099-MISC nonemployee compensation for years 1987-1988 may have violated Internal Revenue Code § 3301; that requiring him to pay for workmen's compensation insurance may have violated Labor Code § 3751; and that requiring him to pay for airport signs and desks may have violated Penal Code § 518; that deduction of the merchant's cost for mandated credit card sales from his share may have violated Labor Code §§ 224 and 351, and Penal Code § 518; that Associated's deduction of part of

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5 Plaza Stages held:

"The decision of this commission in Case No. 1212 (Decision No. 5318 decided April 17, 1918) ordered all transportation companies, as defined in chapter 213, laws of 1917, to either own their equipment (proprietary control being deemed ownership) or to lease such equipment for a specified amount on a trip or term basis and that the leasing of equipment should not include the services of a driver or operator. The practice of leasing equipment or employing drivers or operators on the basis of compensation on a percentage basis and dependent on the gross receipts per trip or for any period of time was also prohibited in such case. Applicant not only does not propose to own any cars or to lease same under the provisions of the commission's decision heretofore referred to, but the proposed scheme of operation, as defined by the by-laws of applicant as herein above quoted, indicates that applicant intends to charge each operator or member of the association an amount each day for the privilege of operating under the jurisdiction of the applicant.

"We are of the opinion that this is not in the interest of public policy nor a form of operation which should receive the approval of the commission."

Commission regulatory fees may have violated Labor Code § 224; that increasing his insurance premiums and failing to provide him with a true copy of Associated's master insurance policy may have violated Insurance Code § 383.5; that by requiring 12-hour/day, 7-day/week use of his vehicle may have violated Labor Code §§ 510 and 552, and as to a relief driver may have violated Internal Revenue Code §§ 3111 and 3301 as well as the spirit of Labor Code § 432.5.

Gonzales also contends that as to the asserted violations alleged in the preceding paragraph, Associated, with advance knowledge, conscious disregard, authorization, ratification, or as acts of oppression, fraud, or malice on the part of management, deprived him of his rights in violation of PU Code § 702.

In redress, Gonzales seeks to have the paragraph on page 9 of D.89-01-054 which reads:

> "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."

amended to read:

> "For the above reasons, we conclude that there was no employer-employee relationship between the ALO and the respondent operators and that the respondent operators under the arrangement with ALO were independent contractors; the San Jose operators, however, became employees of and their vehicles leased by ALO as of September 5, 1986 in compliance with ALO's PUC authorities."

Gonzales further asks that Associated be ordered to cease and desist from the alleged practices if determined to be unlawful, and that the Commission order Associated not to dispose of any assets pending to be initiated court proceedings for damages. The complaint included 22 numbered exhibits.

Associated filed a timely answer addressed to the specific points raised by the complaint, and as affirmative defenses pointed out that complainant essentially seeks redress for alleged violations of various California codes other than the PU Code, as well as federal rules and regulations under the Internal Revenue Code, acts not cognate or germane to public utility service, rates, or charges, and thus inferably outside the Commission's jurisdiction. Associated also points out that these aspects of the complaint are premised upon the Commission reversing itself and ascribing an "employee" relationship to the owner-operators in San Jose who are not Associated shareholders, a relationship determined last year by D.89-01-054 not to have existed under identical circumstances as to the respondent San Francisco nonshareholder owner-operators during the period of the investigation. Accordingly, Associated asserts that the complaint fails to state a cause of action against Associated.

After due notice and following a continuance occasioned by a conflict in the trial schedule of Associated's attorney, the matter come to hearing on February 9, 1990 in San Francisco before Administrative Law Judge (ALJ) John B. Weiss. At the outset of the hearing, the ALJ observed that the thrust of Gonzales' complaint was to have the Commission's basic conclusion in D.89-01-054 amended, indeed, reversed so as to find the San Jose owner-operators after the investigation not to be independent contractors, but to be "employees," despite apparent identical circumstances under which all provided service. The ALJ went on to point out that there were no provisions in the Commission's Rules of Practice and Procedure for a complaint to be the vehicle to be used for the purpose of reversing a final decision of the Commission; that Rule 43 (Petitions for Modifications of a Commission Decision) provides that a new application is the

appropriate vehicle.[6] The ALJ pointed out to Gonzales that given the facts presented by him at length in his filed complaint and his exhibits with regard to the service relationship between him and Associated - the same facts present in I.87-10-014, what complainant was attempting to present was essentially a collateral attack on the Commission's now final determination in D.89-01-054. Gonzales then essentially conceded that point by stating:

> "I was hoping to present evidence today, sir, that D.89-01-054 and Investigation 87-10-014 was decided based on some contradictory statements made by the defendant's witnesses."

And in response to the ALJ's statement:

> "...basically what you're seeking is to be determined that you were an employee, because that's the key to your being able to get into any other jurisdiction at all.
>
> "Mr. Gonzales: 'Uh-huh.'"

Observing that the period of Gonzales' association with defendant was after the period involved in I.89-01-054, with the possibility of a different relationship, the ALJ offered Gonzales opportunity to state what if any different facts bore upon his

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6 However, the ALJ misspoke himself in referring to such a "new" application as one for "rehearing." Rehearing applications (in this class of matter) must be filed within 30 days of the date of issuance of the decision sought to be changed (Rule 85). Under Rule 43, petitions for major modification of a decision after 30 days of its issuance are made by filing a "new" application, and are, as the ALJ pointed out to Gonzales, discretionary with the Commission, usually requiring a showing of evidence not previously available that would have materially changed the decision if then available (PU Code § 1708).

relationship than those relied upon by the Commission in I.87-10-014 in reaching D.89-01-054. Gonzales offered none, but merely attempted to reargue the import of those in I.87-10-014. This led to the following exchange:

> ALJ: "This is a complaint proceeding, and your complaint, if you will, rakes over what happened in another proceeding."
>
> Gonzales: "Because it's the same situation."
>
> ALJ: "That's exactly the point. It's the same situation. That's what I am telling you. Unless you can show that it's not the same situation, which gives me a complaint that you have which is independent of this and all, I can't proceed on it."

Thereafter, observing that Associated's defense in the present proceeding was to the point that Gonzales was failing to state a cause of action against Associated, the ALJ stated that from the pleadings and offers of proof to that point in the proceeding, the defense appeared to have some merit. Accordingly, the ALJ stated that while he would entertain an Associated motion to dismiss, he would also defer a ruling, and allow both parties opportunity to brief such motion. Associated thereupon made the motion.

Post-hearing briefs were received from both parties to the proceeding, and the matter was submitted for decision on March 30, 1990. In a 61-page brief Gonzales complained that he was not granted a just and speedy determination of his complaint because the ALJ had denied him his right to introduce his evidence. Throughout the brief Gonzales extensively sought to reargue the thrust of the evidence in I.87-01-014, contending there were misrepresentations in that earlier proceeding, and that different owner-operators were involved than him. Gonzales argued that since the Commission has held that reasonable employment protection is an inseparable part of public interest, the Commission should now hear

his complaint regarding "the alleged illegitimate scheme of operations" by the defendant, which assertedly in violation of various state and federal law (such as the Labor Code, the Penal Code, and the Rules and Regulations of the Internal Revenue Code) had deprived him of employment protection and unemployment benefits. Asserting that D.89-01-054 is subject to collateral attack for the period after September 5, 1986 (the day before I.87-01-014 was submitted), Gonzales claims the right in the regular complaint procedure to seek amendment of D.89-01-054, and to have Associated's liability determined for alleged violations of the Labor Code, Penal Code, and the Rules and Regulations of the Internal Revenue Code.

For its part Associated contends that the Commission is without jurisdiction to formulate the labor policies of utilities, to fix wages or to arbitrate labor disputes, and therefore cannot determine issues which seek redress for labor policies and labor disputes. And finally, that as complainant offered no new or different evidence from that in I.87-01-014, and the complainant does not allege that Associated has violated D.89-01-054, the complaint is a collateral attack on D.89-01-054, and should be dismissed as not actionable against Associated by use of the complaint procedure.

Discussion

This case comes to the Commission as an outgrowth of a labor relations dispute between Gonzales and Associated resulting in severance of their relationship on October 21, 1988. Since the Commission concluded on controverted evidence in D.89-01-054 that the relationship between nonshareholder owner-operators and Associated was one between independent contractors and Associated, and not an employee-employer relationship, terminated owner-operators including Gonzales assertedly are not eligible for unemployment benefits.

By the present complaint Gonzales seeks to have the Commission amend D.89-01-054 to change that consequence. The period of the I.87-01-014 investigation was between December 12, 1985 and March 10, 1986. The matter was submitted on September 6, 1988, and D.89-01-054 was issued on January 27, 1989. The decision ordered Associated to cease and desist from employing operators not either employees or charter-party permit carriers, and the named respondent nonshareholder operators were ordered to cease and desist operating for Associated until they either became bona fide employees or obtained charter-party permits. While he was a San Jose owner-operator driving for Associated, Gonzales was not one of the named nonshareholder respondent operators. He was also not a shareholder.

In his complaint Gonzales seeks to have the Commission amend D.89-01-054 so that it would provide that as of September 5, 1988, the day before submission in I.87-10-014, the San Jose owner-operators became "employees" and ceased being independent contractors. Employee status was a requirement under Associated's earlier granted operating authorities - a requirement D.89-01-054 concluded Associated was violating. In addition, and assuming we conclude employee status prevailed after September 5, 1988, Gonzales seeks conclusions that Associated's scheme of operations and its labor relations practices vis-a-vis the San Jose owner-operator "employees" violated PU Code § 702, Labor Code §§ 405, 3751, 224, 351, 510, 552, and the spirit of § 432.5, as well as Internal Revenue Code §§ 3301 and 3111, Penal Code § 518, and possibly Insurance Code § 383.5.

The initial problem we face is with the nature of the proceeding Gonzales seeks to initiate. First, he seeks to amend D.89-01-054 to change the relationship concluded by that decision to be one of independent contractor to that of employee-employer, and then, second, assuming that changed relationship, he seeks to accuse Associated of acts or omissions in violation, or claimed

violation, of provisions of law or orders or rules of this Commission - acts against him as an employee.

But D.89-01-054 issued January 27, 1989 has long since become final, and Rule 85 of the Commission's Rules of Practice and Procedure requires that applications to rehear a decision must be filed within 30 days of issuance of the decision. And unless D.89-01-054 is amended, Gonzales lacks the standing to bring a complaint alleging acts or omissions done by Associated against him as an employee in violation of any laws or orders or rules of the Commission.

As the ALJ attempted to point out to Gonzales at the February 9, 1990 hearing, Gonzales was using the wrong vehicle and also could not thereby state a cause of action against Associated. Gonzales first would have to get a determination that he had been an "employee" between September 5, 1988 and October 21, 1988, and that such a modification of D.89-01-054 would have to be made through an application to modify under Rule 43 of our Rules.[7] While under PU Code § 1708 the Commission has jurisdiction to amend

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7 43. (Rule 43) Petitions for Modification or for Extension of Time or Effective Date.

> Petitions for modification of a Commission decision, or for an extension of time to comply with a Commission order or for an extension of an effective date of a Commission order shall indicate the reasons justifying relief and shall contain a certificate of service on all parties. Petitions for modification, other than in highway carrier tariff matters, shall only be filed to make minor changes in a Commission decision or order. Other desired changes shall be by application for rehearing or by a new application. Requests for extension of time to comply with decisions or orders may also be made by letter to the Executive Director. The letter shall indicate that a copy has been sent to all parties.

at any time any order or decision made by it previously,[8] the ALJ also pointed out that it would be a "heavy uphill battle" to get it to do so under the facts presented by Gonzales. While Gonzales was not one of the named respondents in I.87-10-014, he readily concedes that the facts of his relationship to Associated between September 5, 1988 and his termination constituted "the same situation" as that of the named respondent operators in I.87-10-014.[9] The ALJ pointed out that the Commission rarely applies PU Code § 1708 and then only where there is a showing of evidence not available at the prior proceeding, evidence that would materially have changed that decision in the earlier proceeding had the evidence been available at that time.

Certainly until a Commission decision would be issued in I.87-10-014 - and none issued until January 27, 1989, after Gonzales' termination - Associated had no reason or compulsion to change its mode of operation. Throughout the I.87-10-014 proceeding and on brief, Associated's position had been that the nonshareholder owner-operators were employees, and while the

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8 1708. The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

9 Indeed, the exhibits submitted as part of the complainant's pleadings: the Form 1099 Miscellaneous Income reporting forms for both 1987 and 1988, copies of Associated invoices to Gonzales, copies of memos and other communications, insurance statements and checks, and statements of account all support the conclusion of independent contractor relationship. These and Gonzales' statements during the February hearing all confirm that in 1987 and 1988 Associated continued to operate in the same manner as during the three-month investigation period in 1985-1986 that was covered in I.87-01-014.

Commission staff and the Commission did not accept this contention, Associated's position was not entirely devoid of legal support. Thus in view of the closeness of the call it was entirely reasonable for Associated to wait for a decision in the investigation proceeding before considering changes in its operations. On the evidence of the investigation the Commission determined the nonshareholder owner-operators were independent contractors. The same conditions and mode of operations concededly continued through the period of Gonzales' association with defendant, an association which ended before D.89-01-054 was issued.

Since the present complaint is an attack made in a proceeding that has an independent purpose other than impeaching or overturning the conclusion in D.89-01-054, although impeaching or overturning the D.89-01-054 conclusion is necessary to the success of Gonzales' present action, it in essence is a collateral attack on D.89-01-054, and as such will not be entertained by the Commission. Any filing which has as its express purpose the annulling, correcting, or modifying of a decision now final can only be made by a new application made pursuant to the provisions of Rule 43 and PU Code § 1708, but not by a complaint. But under situations where the factual matrix of each is the same, and only the time when the situations were incurred differs, any such filing of a new application can only be regarded as a frivolous waste of the Commission's limited resources, and unlikely of success. The present complaint must be dismissed, both because of an inappropriate filing vehicle, and because unless a collateral attack on D.89-01-054 could be successful, Gonzales cannot on the

grounds stated herein state a cause of action against Associated.[10]

Findings of Fact

1. Associated, as a passenger stage corporation, and holding a charter-party carrier of passengers permit, is subject to the jurisdiction of the Commission.

2. I.87-10-014 was a Commission instituted investigation into the operations, rates, charges, and practices of Associated and various named respondent owner-operators, and resulted in D.89-01-054.

3. D.89-01-054 concluded that the scheme of operations followed by Associated with regard to its nonshareholder owner-operators during the period of the investigation resulted in the later being independent contractors providing services for Associated.

4. Gonzales was a nonshareholder owner-operator providing services for Associated after the period of the investigation, particularly between September 5, 1988 and the termination of that service on October 27, 1988, with such services concededly being provided under the same general scheme of operation as applied to the nonshareholder owner-operators concluded to be independent contractors by D.89-01-054 for the period of the I.87-01-014 investigation.

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10 And virtually all of the relief Gonzales seeks under asserted violations of codes other than those of the Public Utilities Act could only be obtained in forums other than this Commission. However, all require a conclusion of "employee" status by this Commission for entry.

5. The Commission has jurisdiction under PU Code § 1708 to amend or modify any decision at any time, and petitions to amend or modify decisions which have become final must, under provisions of Rule 43 of the Commission's Rules of Practice and Procedure, be brought by filing a new application.

6. By his present complaint filed June 21, 1989, Gonzales seeks to have the Commission amend D.89-01-054 to conclude that beginning September 5, 1989 the nonshareholder owner-operators, including himself, operating for Associated out of its San Jose office, were "employees" rather than independent contractors.

7. Offered opportunity to distinguish conditions surrounding his provision of service from those applicable to nonshareholder owner-operators in I.87-10-014, Gonzales conceded that they were "the same situation."

Conclusions of Law

1. A proceeding to amend or modify a Commission decision now final cannot be initiated by filing a complaint.

2. Gonzales, conceding "the same situation" regarding his relationship in his provision of service for Associated as applied to other nonshareholder owner-operators found to be independent contractors in I.87-10-014 with regard to their provision of services, cannot bring a complaint action against Associated to assert labor relations treatment or conditions in asserted violation of various codes applicable only to those in employee status.

3. The complaint filed June 21, 1989 should be dismissed, both as an inappropriate vehicle under these facts, and for failure to state a cause of action against Associated.

O R D E R

IT IS ORDERED that Case 89-06-059 filed June 21, 1989 is dismissed with prejudice.

This order is effective today.

Dated AUG 8 1990, at San Francisco, California.

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

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

NEAL J. SHULMAN, Executive Director