

NOV 2 - 1983

Decision 83 11 041

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of NATIONAL FREIGHT LINES, INC.,)
an Indiana corporation, for a)
certificate of public convenience)
and necessity to operate as a)
highway common carrier for the)
transportation of property.)

Application 82-11-59
(Petition for Modification
filed June 9, 1983)

ORDER OF MODIFICATION

Applicant is an Indiana corporation qualified to do business in California, with its principal place of business in San Fernando.

It has petitioned to amend Decision (D.) 83-05-074 dated May 18, 1983 in Application (A.) 82-11-59 by removing Exception 10 from page 2 of Appendix A attached to the decision. The exceptions list the commodities applicant will not transport. Exception 10 reads as follows:

"Commodities requiring the use of special refrigeration or temperature control in specially designed and constructed refrigerator equipment."

It is alleged that the inclusion of Exception 10 was inadvertent and an oversight since Foremost McKesson, Inc. and its subsidiaries all use applicant's service and ship goods which require protection from both heat and cold.

Applicant also requests the removal of the following paragraph on page 2 of D.83-05-074:

"It is noted that the List of Equipment filed as Exhibit E of the application includes a number of units licensed in states other than California. In view of this circumstance, applicant is placed on notice that only owner-operators holding valid certificated or permitted authority may be employed as subhaulers in any California intrastate operation engaged in by applicant."

Applicant alleges that the application was presented to reduce deadheading within California between deliveries of interstate shipments and pickups of other interstate shipments at other points, and that such a requirement is self-defeating to its operational objectives. Applicant states it has no desire to obtain authority from this Commission for each of the 52 owner-operators who are under long-term contract with applicant, but who would only be able to utilize such authority in rare instances.

Applicant alleges that the requirement obstructs coordination of interstate and intrastate shipments, and ultimately becomes a burden on interstate commerce. It also alleges that the requirement is contrary to D.92541 in Order Instituting Rulemaking (OIR) 1 concerning energy efficiency.

The question whether subhaulers need operating authority from this Commission has been well examined and long settled. In D.91247 in Case 10279, it was concluded after extensive open hearings on the matter that subhaulers are "highway carriers" within the meaning of Public Utilities Code § 3511.

Addressing similar proposals to that petitioned for here (Morgan Drive Away, Inc., et al. (1971) 71 CPUC and Bridgford Distributing Company, D.87152 in A.55847) the Commission dismissed the former and denied the latter application to deviate from General Order 130 stating:

"The General Order was promulgated to make the statute and case law more cohesive, not to impose regulations materially different from those set forth in court and Commission cases and the statutes. This Commission has no authority to grant exemptions from the permit requirements of the Highway Carriers' Act. Such exemptions are set forth in the Act itself and if further exemptions are in the public interest, it is for the Legislature, not this Commission, to make them. We do not construe the Code sections governing leasing to grant us authority to make exceptions to the Highway Carriers' Act under the guise of modifying leases.

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

The Commission further stated:

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

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

As in those applications, the owner-operator lessors in this application admittedly are not employees of the applicant, and thus they are highway carriers in need of operating authority when hauling intrastate traffic.

On the issue of fuel conservation and energy efficiency, the policy set forth by D.92541 in OIR 1 cannot be used to circumscribe the statutes. Moreover, under the proposal petitioned for here, any possible fuel conservation or energy efficiency gained by the interstate carriers involved could well be offset by the negative impact on existing intrastate carriers.

Findings of Fact

1. Exception 10 in Appendix A of D.83-05-074 should be removed from applicant's certificate.

2. The petition for relief from the requirement that owner-operators employed in intrastate operations must hold valid certificated or permitted authority from this Commission should be denied.

Conclusion of Law

1. To the extent that applicant requests authority to use unlicensed carriers (owner-operator lessors), the petition for modification should be denied.

2. The petition for modification should be granted in part to the extent set forth in the ensuing order.

IT IS ORDERED that:

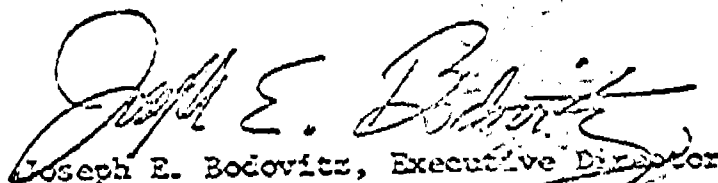
1. Appendix A of D.83-05-074 is amended by replacing Original Page 2 with First Revised Page 2 (attached).
 2. To the extent not granted herein, the application is denied.
- This order is effective today.

Dated NOV 2 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
FRISCILLA C. GREW
WILLIAM T. BAGLEY
Commissioners

Commissioner Donald Tiel, being necessarily absent, did not participate.

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


Joseph E. Bodovitz, Executive Director

Appendix A

NATIONAL FREIGHT LINES, INC.
(an Indiana corporation)

First Revised Page 2
Cancels
Original Page 2

8. Articles of extraordinary value.
9. Trailer coaches and campers, including integral parts and contents when contents are within the trailer coach or camper.
- *10. Explosives subject to U.S. Department of Transportation regulations governing the transportation of hazardous materials.
- *11. Fresh fruits, nuts, vegetables, logs, and unprocessed agricultural commodities.
- *12. Any commodity, the transportation or handling of which, because of width, length, height, weight, shape, or size, requires special authority from a governmental agency regulating the use of highways, roads, or streets.
- *13. Transportation of liquid or semisolid waste, or any other bulk liquid commodity in any vacuum-type tank truck or trailer.

In performing the service authorized, carrier may make use of any and all public streets, roads, highways, and bridges necessary or convenient for the performance of this service.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

*Amended by Decision 83 11 047, Application 82-11-59.

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