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Decision No. 89807

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of MOTOR HOME TRANSPORT CO. for a certificate of public convenience and necessity authorizing operations as a highway common carrier, to engage in driveaway operations.	Application No. 58284 (Filed July 27, 1978)

Donald Murchison, Attorney at Law, for Motor Home Transport Co., applicant.
Russell, Schureman & Hancock, by R. Y. Schureman, Attorney at Law, for Auto Driveaway Company, protestant.
Don B. Shields, for Highway Carriers Association, interested party.
Peter Fairchild, Attorney at Law, for the Commission staff.

O P I N I O N

By this application Motor Home Transport Inc., a California corporation, seeks authority to operate statewide (except in Lassen and Modoc Counties) as a highway common carrier by driveaway. Applicant proposes to provide employee drivers to drive the shippers' motor vehicles. This operation does not require any carrier owned vehicles. A hearing was held in Los Angeles on October 10, 1978, before Administrative Law Judge Robert T. Baer limited to the issue of the Commission's jurisdiction to regulate driveaway operations as common carriage.

Driveaway Defined

By decision reported at 50 CPUC 816 (1951) the Commission held that "...the movement of motor vehicles, trailers and related vehicular equipment by the so-called driveaway method...is transportation, and when performed by a highway common carrier, is subject to the Public Utilities Act." (50 CPUC at 821.)

The Commission defined "driveaway" as "...any transportation of vehicles where the motive power is provided by means of a vehicle being transported" and stated that driveaway may be performed by:

> "(1) single delivery, whereby one car is driven under its own power;
>
> "(2) tow-bar delivery, whereby one vehicle is driven under its own power and another towed through the use of a tow-bar mechanism;
>
> "(3) saddle delivery, whereby one vehicle is driven under its own power and another is partially mounted thereon;
>
> "(4) full-mount delivery, whereby one vehicle is driven under its own power and one or more are fully mounted thereupon; and
>
> "(5) combination delivery, whereby one vehicle is driven and the remainder of the vehicles are attached to the vehicle driven by one or more of the foregoing methods. In all these instances, ...the motive power is being furnished by one of such vehicles being transported." (50 CPUC at 822.)

Statutory Scheme

As can be seen from a cursory reading of the relevant code sections quoted below, the subject of transportation by driveaway is not dealt with specifically in the statutory law governing highway common carriage. Section 213 of the Public Utilities Code[1/] provides in part:

> "'Highway common carrier' means every corporation or person owning, controlling, operating, or managing any autotruck, or other self-propelled vehicle not operated upon rails, used in the business of transportation of property as a common carrier for compensation over any public highway in this state, ..."

1/ Hereafter, all references to code sections are to the Public Utilities Code unless otherwise indicated.

Section 209 provides in part:

> "'Transportation of property' includes every service in connection with or incidental to the transportation of property, including in particular its receipt, delivery, elevation, transfer, switching, carriage, ventilation, refrigeration, icing, dunnage, storage, and handling, ..."

These sections have not been significantly amended since 1951, when the Commission at 50 CPUC 816, 818-821 interpreted them to include driveaway operations. The Commission at that time placed particular emphasis upon the language "every service in connection with or incidental to the transportation of property, including... receipt, delivery, ...transfer, ...and handling."

It is particularly noteworthy, however, that Section 209 does not define the phrase "transportation of property", but rather provides what incidental services other than the basic transportation of property will be included within that phrase for the purposes of the Public Utilities Act. Thus, the terms "transfer", "receipt", "delivery", and "handling" do not describe the basic transportation itself but rather describe the additional services associated with or incidental to the basic transportation.

Regulation of Driveaway Operators
By the Department of Motor Vehicles

In the Vehicle Code a driveaway company is referred to as a transporter. Section 645 of the Vehicle Code defines a transporter as "...a person engaged in the business of moving any owned or lawfully possessed vehicle by lawful methods over the highways for the purpose of delivery of such vehicles to dealers, sales agents of a manufacturer, purchasers, or to a new location as requested by the owner."

The licensing requirements for transporters are found in Section 11700 of the Vehicle Code, which provides in part:

> "It shall be unlawful for any person to act as a...transporter...without having first procured a license as required in Section 11701..."

in Section 11701 of the Vehicle Code, which provides in part:

> "Every...transporter of...vehicles of a type subject to registration...shall make application to the department for a license containing a general distinguishing number. The applicant shall submit proof of his status as a bona fide ...transporter...as may reasonably be required by the department."

and in Section 11704 of the Vehicle Code, which provides in part:

> "(a) Every applicant who applies for a license pursuant to Section 11701 shall submit an application to the department on the forms supplied by the department. Such applicant shall provide the department with information as to the applicant's character, honesty, integrity, and reputation, as the department may consider necessary. The department, by regulation, shall prescribe what information is required of such an applicant for the purposes of this subdivision.
>
> "(b) Upon receipt of an application for a license which is accompanied by the appropriate fee, the department shall, within 120 days, make a thorough investigation of the information contained in the application."

A violation of any of the foregoing licensing sections is a misdemeanor punishable by a fine of $500 or six months in the county jail or both. (Vehicle Code Sections 40000 and 42002.)

The Vehicle Code also contains insurance requirements for transporters. Section 16550 thereof states:

> "Every transporter of vehicles shall, except as to operations subject to regulation by the Public Utilities Commission, maintain ability to respond in damages resulting from the operation of his business and arising by reason of personal injury to, or death of, any one person, of at least fifteen thousand dollars ($15,000) and subject to the limit of fifteen thousand dollars ($15,000) for each person injured or killed, of at least thirty thousand dollars ($30,000) for such injury to, or the death of two or more persons in any one accident, and for damages to property of at least five thousand dollars ($5,000) resulting from any one accident.

"Ability to respond in damages may be maintained by either:

"(a) Being insured under a motor vehicle liability policy against such liability.

"(b) Obtaining a bond of the same kind, and containing the same provisions, as those bonds specified in Section 16434.

"(c) By depositing with the department [D.M.V.] thirty-five thousand dollars ($35,000), which amount shall be deposited in a special deposit account with the State Controller for the purpose of this section.

"(d) Qualifying every 12 months as a self-insurer under Section 16056. The department may permit qualification for periods in excess of 12 months if it determines that the protection of persons benefited by such ability to respond in damages is not impaired.

"The department shall return the deposit to the person entitled thereto when he is no longer required to maintain ability to respond in damages as required by this section or upon his death."

Vehicle Code Section 16552 states: "No person shall engage in the business of a transporter without maintaining ability to respond in damages as required by this chapter."

These insurance sections should be contrasted with the Commission's own insurance requirements for highway common carriers in General Order No. 100-I(1), which provides in part:

"Every highway carrier...shall provide and thereafter continue in effect, so long as they may be engaged in conducting such operations, adequate protection against liability imposed by law upon such carriers for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than two hundred fifty thousand dollars ($250,000) on account of bodily injuries to, or death of, one person; and protection against total liability of such carriers on account of bodily injuries to, or death of more than one person as a result of any one accident, but subject to the same limitation for each person, in the amount

> of not less than five hundred thousand dollars ($500,000) and protection in the amount of not less than one hundred thousand dollars ($100,000) for one accident resulting in damage to or destruction of property other than property being transported by such carrier for any shipper or consignee, whether the property of one or more than one claimant; or a combined single limit in the amount of not less than $600,000 on account of bodily injuries to, or death of, one or more persons and/or damage to or destruction of property other than property being transported by such carrier for any shipper or consignee whether the property of one or more than one claimant in any one accident."

The protection to the public afforded by compliance with General Order No. 100-I(1) exceeds that afforded by compliance with the Vehicle Code by more than 10 times. Were the Commission to conclude that driveaway operations do not constitute highway common carriage, then intrastate driveaway operators could reduce their insurance limits to the low levels required by the Vehicle Code.

Staff Evidence

Approximately 30 carriers are engaged in driveaway operations within the state. Intrastate revenues generated by these carriers for fiscal year ending March 31, 1978, approximated $1.5 million. The great majority of the shippers using driveaway operators are used car dealers, recreational vehicle dealers or manufacturers, automotive leasing companies, auto rental agencies, auctioneers, and enterprises maintaining fleets of vehicles for employees such as sales representatives. From its sampling of these carriers the staff concluded that an insignificant amount of intrastate business is derived from the nonbusiness consumer sector.

The rates of common carriers engaged in driveaway operations are exempt from the Commission's minimum rates. However, as a common carrier a driveaway operator files tariffs pursuant to Public Utilities Code Section 486 et seq. and rates and rate increases are subject to Section 451 et seq. Were the Commission to conclude that driveaway operations were beyond its jurisdiction, prices for the various services offered by common carrier driveaway companies would no longer be subject to regulation.

Industry Evidence

Evidence for the industry was presented by John F. Sohl, president of Auto Driveaway Company of Chicago, Illinois. The witness testified that he went into the driveaway business in 1952 and operated until 1965 without I.C.C. regulation. From 1965 until the present he has operated under I.C.C. authority. He has a radial highway common carrier permit for California intrastate operations.

The basic theme of the witness testimony was that if California deregulates the driveaway business, the abuses that originally led to regulation by the I.C.C. will occur with respect to California intrastate movements. He stated that Los Angeles was one of the worst cities in the United States for abuses, such as:

1. Renting a shipper's car as a daily rental car for two weeks before delivering it to its destination.
2. Selling seats in a shipper's car and not shipping it until at least four seats were sold.

Prior to regulation by the I.C.C., the witness testified, a driveaway company acted more as a temporary help agency than as a transportation company. The shipper would sign an order stating that the driveaway company was acting as his agent in obtaining a driver for the shipper's car. Once the driver had picked up the car the driveaway company had fulfilled its obligations to the shipper. If the car was destroyed, embezzled, or damaged it was the shipper's responsibility. His own insurance, if any, covered all losses.

Under regulation, although cargo insurance is not required, either by the Commission or by the Department of Motor Vehicles, a common carrier is liable for damage to the vehicle being transported. Accordingly, Auto Driveaway Company is insured for $60,000 for loss of cargo. However, if the Commission determined that it lacked jurisdiction to regulate the driveaway industry, the witness testified

that he would revert to pre-regulation practices and cancel his cargo and public liability[2/] insurance and by agreement with the shippers shift liability from himself to them. He stated that he could save $100,000 annually in insurance premiums in this way.

In effect, a driveaway operator would become nothing but an agent for the shipper with no responsibility other than the providing of a driver for a fee. While this situation might not prejudice large business entities dealing with a driveaway operator, an individual consumer could more easily be victimized, as was the case prior to regulation.

The witness also cited a practice existing prior to regulation of charging an individual twice or three times the rate charged a dealer for transportation between San Francisco and Los Angeles, for instance. It should be noted that a driveaway operator with a radial permit may do the very same thing since driveaway operations are exempt from the Commission's minimum rate tariffs.

Discussion

The central legal issue in this case is the meaning of the clause in Section 213 "used in the business of transportation of property as a common carrier". Interpreted broadly the phrase would include driveaway operations, since the vehicles transported are arguably used in the business of transporting themselves. Construed narrowly the phrase does not include driveaway operations since, arguably, the vehicles transported are the cargo and not the vehicles used to provide the transportation. As the staff argues, Section 213 does not contemplate a reflexive movement where an item of property is carrying itself, but rather the section implies the use of one vehicle that is providing the carriage and another vehicle, or other item of property, that is being carried.

2/ He could not, of course, completely cancel his public liability insurance because of the Vehicle Code provisions quoted above.

For this reason the staff would distinguish between single vehicle movements, of which, it argues, the Commission lacks jurisdiction, and multiple vehicle movements,[3/] of which, it argues, the Commission has jurisdiction.

The applicant and the other industry representative argued that it would not be sensible to regulate multiple vehicle movements and not single vehicle movements, since a given shipper would in many instances offer both kinds of shipments to a given carrier. Thus, bifurcation of the market would provide opportunities for regulated rates to be circumvented by the pricing of unregulated movements. The potential for discrimination would exist in such a situation.

The legislative history of Section 213 does not shed much light upon the meaning of the terms in question. Highway common carriers were not regulated entities under the original Public Utilities Act. (Stats. 1915, ch. 91.) However, in 1917 the legislature provided for the regulation of transportation companies, which it defined, in part, as follows:

> "The term 'transportation company' means every corporation or person...owning, controlling, operating or managing any...auto truck...used in the transportation of...property as a common carrier for compensation over any public highway in this state..." (Stats. 1917, ch. 213, p. 330, § 1(c).)

It may or may not be relevant that:

> "The driveaway type operation in which we are basically involved started in 1932 in Detroit, Michigan by a Catherine Rae delivering new automobiles from Detroit to California using travellers to transport the automobiles." (Testimony of John F. Sohl, Exhibit 2.)

3/ In tow-bar, partial-mount, and full-mount situations the lead vehicle is the tractor while one or more others are the trailers.

Nevertheless, in 1935 the legislature repealed the 1917 act, including Section 1(c), and enacted Section 2-3/4 of the Public Utilities Act, now Section 213 of the Public Utilities Code. Section 1(c) and Section 2-3/4 are, insofar as they apply to the transportation of property, identical, except that where Section 1(c) stated "used in the transportation of" Section 2-3/4 stated "used in the business of the transportation of". That slight change does not appear to be significant. It certainly cannot be concluded that it was made in light of the beginning of the driveaway industry in 1932.

There is no evidence in the record that suggests that in enacting Section 1(c) of the 1917 act or Section 2-3/4 of the 1935 act the legislature contemplated transportation by driveaway. Although that industry apparently came into interstate existence in 1932, there is no evidence that it existed as an intrastate business in California in 1935.

We concur with the staff's interpretation of Section 213. That section does not contemplate the movement of an item of property under its own power. However, the staff's interpretation is too narrow. The vehicles transported by driveaway, whether in single or in multiple units, are the property transported and are not the autotrucks, or other self-propelled vehicles, used in the business of transportation of property. The vehicles transported are not used in the business, but are the properties transported.

The language of the section is manifest that the property transported and the vehicles providing the transportation are intended to be separate items.

The interpretation adopted is not only the legally correct one, but it is the one that will avoid duplicate regulation. It makes little sense to require a driveaway company to obtain both a permit from the Department of Motor Vehicles and a certificate from the Commission. The screening of prospective driveaway operators by the Department of Motor Vehicles should be adequate to discourage unqualified and unscrupulous persons from entering the industry.

The effect of our conclusion with respect to Section 213 will be:

1. To make prices for driveaway services subject to the competitive forces of the market place.

2. To reduce the public liability insurance limits required of driveaway operators to the levels required by the legislature in Vehicle Code Section 16550.

Both of these effects are likely to reduce the price of driveaway services to the shipper.

Conclusions

1. The statutory language of Sections 209 and 213 of the Public Utilities Code does not authorize the Commission to regulate driveaway operations.

2. The public interest will be served by reducing the regulatory overhead of the driveaway industry, i.e., dual regulation by the Commission and by the Department of Motor Vehicles.

3. The Commission lacks jurisdiction to regulate driveaway operations, whether they are conducted by single or multiple vehicle movements.

4. The motion of the staff to dismiss the application for lack of jurisdiction should be granted.

O R D E R

IT IS ORDERED that the application is dismissed for lack of jurisdiction.

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

Dated at San Francisco, California, this 19th day of DECEMBER, 1978.

Robert Batinovich
President

Abstain
William Symons, Jr.

Vernon L. Sturgeon
Leonard M. Grimes, Jr.
Claire T. Dedrick
Commissioners