C.5271 IB *

ORIGINAL

Decision No. 45624

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation into the fares, rules, regulations, charges, services, operations and practices of Arrow Airways, Inc.: California Central Airlines; Kenneth G. Friedkin, doing business as Pacific Southwest Airlines; Robin Airways, Inc.; Southwest Airways Company; Transcontinental & Western Air, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc. | ) | Case No. 5271 |

Appearances

Ray E. Costello, for Southwest Airways Company, respondent,
Donald Keith Hall and D. P. Renda, for Western Air Lines, Inc., respondent,
Kenneth G. Friedkin, for Pacific Southwest Airlines, respondent,
John W. Preston, Jr., for California Central Airlines, respondent,
Charles Stearns, for United Air Lines, Inc., respondent,
David G. Shearer, for Trans World Airlines, Inc., respondent,
Norman D. Kessler, for Robin Airways, Inc., respondent,
Wilson E. Cline, C. H. Jacobsen and Thomas A. Hopkins, for the staff of the Public Utilities Commission of the State of California.

O P I N I O N

This proceeding is an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the transportation of passengers between the San Francisco Bay area and the Los Angeles area.

Public hearings were held before Commissioner Craemer and Examiner Bryant at Los Angeles on March 14 and 27, 1951. Briefs have been filed. The matter is ready for decision.

This investigation was instituted by the Commission upon receipt of information that fares were being assessed for so-called "coach" transportation in excess of those named for such service in the tariffs on file with the Commission. The eight air carriers maintaining published fares between the San Francisco and Los Angeles areas were made respondents.

Factual evidence was offered by representatives of various of the carriers and by members of the Commission's staff. The record shows that certain of the respondents are not offering the coach services with which this investigation is primarily concerned. Arrow Airways, Inc., is no longer operating common carrier service of any nature, and has requested that the tariff which it heretofore filed for California operations be canceled.[1] Similarly, a member of the Commission's staff testified that the operations of Robin Airways have been suspended or discontinued. Southwest Airways Company and Trans World Airlines, Inc., (formerly Transcontinental & Western Air, Inc.) have no coach operations between California points, and there is no evidence in this proceeding that either of these companies has made any unauthorized increase in fares or otherwise operated unlawfully or improperly. Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, operates a coach service between the San Francisco and Los Angeles areas. The record shows that his fare for this service was maintained at $9.95 until March 28, 1951, on which date he increased it to $11.70, under authorization from this Commission.[2] The evidence is clear that Friedkin properly continued to assess and collect the lower fare until his tariff was lawfully amended. As to these three carriers the investigation may be discontinued upon cancellation of the inoperative tariffs.

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[1] Exhibit No. 6.

[2] Authority No. 20-12-121 of March 20, 1951.

The remaining respondents are California Central Airlines, United Air Lines, Inc. and Western Air Lines, Inc. As to these three carriers the essential facts are similar and undisputed. Each of them operates coach flights between the San Francisco and Los Angeles areas. For some time prior to March 1, 1951, California Central Airlines maintained for this service a one-way fare of $9.99 and the other two companies maintained a fare of $9.95. Effective with that date each of the companies started to collect and thereafter continued to collect a fare of $11.70. Each of the companies had filed with the Commission, prior to March 1, an application seeking authority to make the fare increase. None of the applications had been granted prior to March 1, nor have they yet been granted.[3]

At the conclusion of the taking of evidence the Commission's staff moved that the Commission promptly issue a preliminary order requiring the three respondents (1) to cease and desist charging passenger fares for air line coach travel in excess of the authorized fares set forth in their tariffs on file with the Commission, (2) to prepare and maintain a record of the names and addresses of all persons from whom more than the authorized fares have been or may be collected subsequent to February 28, 1951, and (3) to make reparation of the excess of the unauthorized fares over the authorized fares to all passengers whose names and addresses are reasonably ascertainable. Replies to the motion were, by agreement, incorporated in the briefs filed by the three respondents.

At the hearing and in their briefs the three carriers urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and

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[3] It was these circumstances which impelled the institution of this proceeding.

offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the companies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion.

The jurisdictional question may be considered first. The respondents argue on various grounds that the provisions of Article XII of the California Constitution are not applicable to air carriers, that the constitutional sections are not self-executing, and that the California legislature has not made a specific grant of power to the Commission to regulate air carriers. United Air Lines, Inc., and Western Air Lines, Inc., assert further that the regulation of air commerce is a field which has been completely occupied by the Federal government under the Civil Aeronautics Act of 1938. United Air Lines, Inc., advance the additional argument that its operations in question are interstate in nature.

Article XII of the California Constitution contains many provisions which are pertinent to the jurisdictional question. Section 17 of said Article provides that, "All railroad, canal, and other transportation companies are declared to be common carriers, . . ." Section 23 of said Article, in part, states "every common carrier, is hereby declared to be a public utility . . ."

The staff on cross-examination of witnesses for the airlines developed the fact and we now find that the three air carriers, California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., which have increased their coach fares without Commission authorization offer their services to the public in general. Counsel for United Air Lines, Inc., in their brief admit that United is a common carrier.

In the recent case of State ex Rel State Railway Commission v. Ramsey (1949), 151 Nebr. 333, 27 N. W. (2d) 502, the Supreme Court of Nebraska in considering whether air carriers are common carriers as that term is used in the Nebraska Constitution laid down the following principles:

> ". . . A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply to all things to which they are in their nature applicable. . . . These principles have been held to be applicable to transportation by air. . . . Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier." (p. 338 Nebr. Reports)

The California Supreme Court had under consideration in Western Association of Short Line Railroads v. Railroad Commission (1916), 173 Cal. 802, 162 Pac. 391, the question whether companies engaged in the then new businesses of transporting freight in motor trucks and passengers in automobile stages were "other transportation companies" referred to in Article XII of the California Constitution. The Court unequivocally held that they were public transportation companies, common carriers, and public utilities.

In light of the foregoing cited constitutional provisions and judicial decisions, we find and hold that the herein air carriers operating under coach fares between the Los Angeles area and the San Francisco Bay area are transportation companies, common carriers and public utilities.

We now turn to the question whether the Public Utilities Commission has jurisdiction over the air carriers with respect to increases in fares charged for transportation between points within the State of California.

Section 20 of Article XII of the California Constitution, in part, provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission provided for in this Constitution, that such increase is justified, . . ."

Section 22 of Article XII of the California Constitution, in part, provides:

> "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission than the rates, fares and charges which are specified in such tariff. . . ."

In the Short Line Railroads case, supra, the Supreme Court ordered that a peremptory writ of mandate issue requiring the Commission to assume the jurisdiction conferred by the above-quoted portion of Section 22. With reference to the absence of enabling legislation, the Court stated at page 804:

> "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant."

That decision is a clear statement that the provisions of said Section 22 of the constitution are self-executing, and that the Commission must exercise the authority therein conferred regardless of any absence of legislative enactments. While the Court did not refer to Section 20, there is no reason why the same construction would not be given that section.

Various of the respondents have referred to In Re Martinez (1943), 22 Cal. (2d) 259, 138 P. (2d) 10, as being contrary to the principles above set forth. It is true that the Martinez case contains dictum to the effect that the Commission may exercise jurisdiction only where such jurisdiction is given by the legislature. However, in the Martinez case the Court had under consideration Section 23 of Article XII which reads, in part, as follows:

> ". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The grant of jurisdiction to the Commission over intrastate rates of air carriers is found in Sections 20 and 22 of Article XII of the constitution. The provision quoted from Section 23 of said Article can claim no priority over Sections 20 and 22 of said Article unless the former provision is more specific than the latter. As a matter of fact the latter are more specific than the former with respect to the regulation of rates of "other transportation companies." Should there be any possible ground for doubt on this point the provisions of Section 23 are conclusive against the contentions of respondents. Said Section 23 further provides, in part, as follows:

> ". . . Nothing in this section (Section 23 of Article XII) shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

In the face of these plain and unambiguous provisions of the constitution and in view of the holding in the Short Line Railroads case, supra, the dictum in the Martinez case cannot be considered as establishing a rule of law contrary thereto.

The Civil Aeronautics Act does not purport to extend economic regulation to intrastate transportation of persons or property other than mail. The states are therefore free to regulate intrastate rates and fares of air carriers to the same extent as they regulate intrastate rates and fares of railroads, trucking and bus companies, and telephone and telegraph utilities. (Cooley v. Board of Port Wardens (1851), 12 How. (U.S.) 299; 13 L. ed. 996; Minnesota Rates Cases (1913), 230 U. S. 352, 57 L. ed. 1511; Eicholz v. Public Service Commission (1939), 306 U.S. 268, 83 L. ed. 641; Smith v. Illinois Bell Telephone Co. (1930), 282 U. S. 133, 75 L. ed. 255; Lindheimer v. Illinois Bell Telephone Co. (1934), 292 U. S. 150, 78 L. ed. 1182.)

Based upon the law and the facts we hold that the jurisdiction of the Commission in the premises is clear and that such jurisdiction should be exercised. The contention of respondents to the contrary we hold to be without merit.

A number of exhibits were submitted in justification of the reasonableness of the $11.70 fare. Among these was a 17-page interdepartmental memorandum of the Civil Aeronautics Board consisting essentially of estimates of revenues generated and expenses incurred by United Air Lines, Inc., and Western Air Lines, Inc., for air coach operations on the Pacific Coast. According to this memorandum, United incurred a loss of $73,461 in the San Francisco-Los Angeles operations for the period May through August, 1950, and Western similarly incurred a loss of $27,478 for the period June through August, 1950.[4] It was pointed out that the fare of $11.70 represents an increase of approximately one-half cent per passenger mile over the $9.95 fare, and that it results in a per-mile fare of about 3½ cents. According to the Civil Aeronautics Board, this contrasts with recently increased fares of 4½ cents per passenger mile now generally prevailing throughout the rest of the country for air coach services. The record in this proceeding is clear that the $11.70 fare was developed, recommended, and in fact urged upon the carriers, by that Board.

[4] The estimated losses are on the basis of fully allocated costs.

United Air Lines, Inc., through its traffic manager, introduced additional evidence concerning the operation of its coach flights between the San Francisco and Los Angeles areas. For its revenue and expense allocations, however, this company offered only the aforesaid analysis made by the staff of the Civil Aeronautics Board. United did not submit comparable estimated results for the future. The following table shows actual operating experience at the $9.95 fare as developed by the Board's staff and submitted by the company. A second column shows, for comparative purposes, the results which would have obtained for the same period if the higher fare had applied and all other conditions were unchanged.

UNITED AIR LINES, INC.
(Four Months Ending with August, 1950)

| | Actual Experience at $9.95 Fare | Adjusted Experience at $11.70 Fare |
|---|---|---|
| Revenues | $ 549,629 | $ 549,629 |
| Additional Revenue from Increased Fare..... | - | 96,735 (1) |
| Total Operating Revenues | $ 549,629 | $ 646,364 |
| Operating Expenses | | |
| Flying Operations | $ 121,884 | |
| Direct Maintenance Flight Eqpt. | 36,549 | |
| Depreciation - Flight Eqpt. | 63,378 | |
| Ground & Direct Maintenance | 38,160 | |
| Ground Operations | 90,083 | |
| Stewardesses' Salaries & Expense | 8,054 | |
| Passenger Insurance & Supplies | 9,847 | |
| Traffic and Sales | 90,529 | |
| Advertising and Publicity | 11,703 | |
| General and Administrative | 47,881 | |
| Depreciation - Ground Eqpt. | 16,925 | |
| General Headquarters Expense | 88,097 | |
| Total Operating Expense | $ 623,090 | $ 623,090 (2) |
| Net Operating Profit (3) | $(73,461) | 23,274 |
| Operating Ratio (3) | 113.4% | 96.4% |

(_____) Denotes Loss

(1) Revenue resulting from a 17.6 per cent increase in fares.
(2) Carrier did not submit 1951 estimated expenses.
(3) Before federal income taxes.

The director of budgetary controls of Western Air Lines, Inc. introduced and explained an exhibit showing month-by-month results of coach operations between the San Francisco and Los Angeles areas for the nine months from June, 1950, through February, 1951. The increase in passenger revenues, assuming a fare of $11.70 instead of $9.95, was included, but this company, like United, did not submit estimated revenues or expenses for the future. The actual and adjusted figures for Western Air Lines, Inc. are shown in the table which follows:

WESTERN AIR LINES, INC.
(Nine Months Ending With February, 1951)

| | Actual (1) Experience at $9.95 Fare | Adjusted Experience at $11.70 Fare |
|---|---|---|
| Revenues | $ 1,063,527 | $ 1,063,527 |
| Additional revenue from increased fare..... | | 184,793 (2) |
| Total Operating Revenue | $ 1,063,527 | $ 1,248,320 |
| Operating Expenses: | | |
| Flight Operations | $ 263,881 | |
| Direct Maintenance | 94,114 | |
| Depreciation of Flight Eqpt. | 126,000 | |
| Indirect & Ground Expense | 683,770 | |
| Total Operating Expenses | $ 1,167,765 | $ 1,167,765 (3) |
| Net Operating Profit (4) | ( 104,238) | $ 80,555 |
| Operating Ratio (4) | 109.8% | 93.6% |

( ) Denotes Loss

(1) February costs based on January experience prorated for 28 days.
(2) Additional revenue resulting from the increased fare as estimated by the witness.
(3) Carrier did not submit 1951 estimated expenses.
(4) Before federal income tax.

California Central Airlines, which operates wholly within the State of California, derives approximately 90 per cent of its revenue from coach flights between the San Francisco and Los Angeles areas. The operations of this company were not included in the staff report of the Civil Aeronautics Board. Exhibits submitted by the company show revenues, expenses, and estimated costs, as well as various plane-mile and passenger-mile data. According to the evidence, the company earned in the year 1950 a net profit of $1,512; and, if the higher fare and certain increased expenses had been in effect during the year, would have received an estimated net profit of $20,104. The operating ratios would be 99.8 per cent and 98.0 per cent, respectively. The figures as submitted by this company are summarized in the following table:

CALIFORNIA CENTRAL AIRLINES
(Twelve-Month Period)

| | Year 1950 Actual Experience at $9.99 Fare | Year 1951 Estimated Experience at $11.70 Fare |
|---|---|---|
| Operating Revenues | $ 855,145 | $ 981,371 (1) |
| Operating Expenses: | | |
| Flying Operations | $ 605,290 | |
| Ground Operations | 31,508 | |
| Ground & Indirect Maintenance | 8,995 | |
| Passenger Service | 15,600 | |
| Traffic and Sales | 114,806 | |
| Advertising & Publicity | 31,537 | |
| General & Administrative | 44,564 | |
| Depreciation - Ground Property | 1,333 | |
| Total Operating Expenses | $ 853,633 | $ 961,267 (2) |
| Net Operating Revenues (3) | $ 1,512 | $ 20,104 |
| Operating Ratio (3) | 99.8% | 98.0% |

(1) Revenue resulting from the 17.1 per cent increase in fares and an estimated diminution of five per cent in the number of passengers carried.
(2) The estimated expenses for 1951 were not segregated by accounts.
(3) Before federal income tax.

None of the companies supplied all of the supporting or underlying data which would be desirable. Nevertheless, considering all of the circumstances of record, the evidence is convincing, and we find as a fact, that the higher fare is justified. Publication, filing and maintenance of the fare will be authorized.

It is entirely clear, however, and indeed it is not disputed, that California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., increased their fares without first receiving authorization from this Commission. Timely requests for authority to make the increase were filed, but the showings required by the state constitution were made belatedly, and were incomplete at the time the instant investigatory proceeding was instituted and notice thereof served upon the respondents. The order which follows will authorize publication and maintenance of the $11.70 fare for the future. These companies are hereby placed on notice that they are and will hereafter be deemed to be "transportation companies" within the meaning of the Constitution of the State of California, and that they are subject to the prohibitions and requirements of said constitution. We also call the attention of these companies to Section 76(a) of the Public Utilities Act, which provides:

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

In view of the fact that these air carriers since March 1, 1951, have been charging fares in excess of the fares reflected by their tariffs on file with this Commission as applied to coach operations between the San Francisco Bay area airports and the Los Angeles

area airports, we are of the opinion that amounts collected in excess of such tariff fares should be refunded, wherever possible, to passengers who have paid the same and such direction will be incorporated in the order following this opinion. Sections 20, 21 and 22 of Article XII of the State Constitution require that such reparation be made.

There is some evidence, not hereinbefore discussed, relative to possible failure of some of the respondents to comply stricly with their filed tariff rules governing refunds or exchanges of unused tickets. This subject was subordinate to the basic issues in this proceeding, and the evidence thereon was in any event inconclusive. On this subject we make no finding of fact.

## O R D E R

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

IT IS HEREBY ORDERED:

1. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby authorized to publish, file and maintain a one-way adult coach fare of $11.70 for transportation of passengers between San Francisco Bay area airports on the one hand and Los Angeles area airports on the other hand.

2. That California Central Air Lines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby ordered to make reparation, wherever possible, to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand and the Los Angeles area airports on the other hand, in

excess of the fares as reflected by the tariffs of these air carriers on file with this Commission.

3. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., and all other of the respondents operating as common carriers, be and they are hereby adjured and admonished that they may not, for the transportation of passengers and property in intrastate commerce between points within the State of California, raise any rate of charge under any circumstances whatsoever except upon a showing before the Commission that such increase is justified, make unreasonable charges, discriminate in charges or facilities, nor in any other manner violate any of the provisions of Article XII of the Constitution of the State of California applicable to transportation companies.

4. That tariffs heretofore filed with this Commission by Arrow Airways, Inc., and Robin Airways, Inc., naming fares, rules and regulations governing transportation of passengers between points in this state, be and they are hereby canceled.

5. That the several pending motions for dismissal of the proceeding as to particular respondents, and the pending motion for issuance of a "preliminary order", be and they are hereby denied.

6. That, upon the effective date of this order, this investigation be and it is hereby discontinued.

The Secretary is hereby directed to cause a certified copy of this decision forthwith to be served personally on Arrow Airways, Inc., California Central Airlines, Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, Robin Airways, Inc.,

Southwest Airways Company, Transworld Airlines, United Air Lines, Inc., and Western Air Lines, Inc.

The effective date of this decision shall be fifteen (15) days after the date hereof.

Dated at San Francisco, California, this 24th day of April, 1951.

Commissioners