

**ORIGINAL**

Decision No. 71648

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of: )

HENRY KENGLA (HOLIDAY AIRLINES) to )  
 operate passenger air carrier service )  
 between Oakland, San Jose, Fresno & )  
 Al Tahoe; to establish fares; to )  
 establish time of operation; to )  
 establish frequency of service. )

Application No. 47901  
 (Filed September 17, 1965)  
 Amended April 29, 1966)

PACIFIC AIR LINES, INC., a  
 corporation,

Complainant,

vs.

HENRY P. KENGLA (HOLIDAY AIRLINES)  
 and HOLIDAY AIRLINES, INC., a  
 corporation,

Defendants.

Case No. 8405  
 (Filed May 4, 1966)  
 Answer Filed May 26, 1966)

Robert S. Rutledge, Jarvler & Rutledge, for  
applicant and defendants.

R. Barry Churton of Cooper, White & Cooper,  
for Pacific Air Lines, Inc., protestant and  
complainant.

Milton J. De Barr and Charles F. Gerughty, for  
the Commission staff.

O P I N I O N

Subsequent to the filing of this application, Henry Kengla caused the formation of Holiday Airlines, Inc., (Holiday) and transferred to said corporation all the assets of his existing sole proprietorship airline passenger business. Mr. Kengla is President of Holiday and one of its directors. His business operation continued in the same manner before and after the formation of Holiday except for the change to the corporate form. The amendment to the application was made to reflect the change to the corporate form and to seek authorization to serve the route Lake Tahoe - Los Angeles.

visitors to the South Shore is the San Francisco Bay Area including San Jose. The South Shore is presently accessible from the Bay Area by way of U. S. Highway 50 in private automobiles or by Greyhound Bus, and by air service provided by Pacific by way of flights from Reno, Nevada to Sacramento and San Francisco as well as by Holiday. From June 15, 1965 to April 30, 1966 Holiday transported 5,390 passengers. In 1965 Pacific had 11,929 Lake Tahoe passengers and in 1964, 8,847.

Pacific at the time of hearing was providing service in Martin 404 or Fairchild F-27 aircraft. These are two engine aircraft carrying approximately 40 passengers. As noted above the Pacific service to Lake Tahoe makes the Tahoe Valley Airport an intermediate stop between Reno to the east and Sacramento, San Francisco to the west. Pacific is an interstate carrier under regulation of the Civil Aeronautics Board. There was testimony by several witnesses who were dissatisfied with the Pacific service due to such reasons as poor scheduling and failure to stop at Tahoe because of weather or because the aircraft was filled with Reno, Sacramento or San Francisco passengers. Pacific will not land its aircraft at Tahoe Valley Airport when crosswinds there exceed 15 knots or when a takeoff tailwind of 10 or more knots exists. It has also experienced difficulty with snow banks at the edge of the runway which is one hundred feet wide. Its F-27 aircraft has a wingspan of ninety-five feet two inches.

The service provided by applicant utilizes Tahoe Valley Airport as one terminal point and Oakland International Airport and San Jose Municipal as the other terminal points. Consequently the services are not directly duplicative as to terminal points. Neither

are they directly duplicative as to type of aircraft operated or fare charged. The De Havilland Dove presently utilized by Holiday is an aircraft under 12,500 pounds gross weight and capable of carrying 11 or 12 passengers. It is not restricted by the 15 knot crosswind or 10 knot tailwind as are Pacific's aircraft and while the Dove's dimensions are not of record herein we can safely assume that its wingspan is considerably shorter than that of the F-27. Applicant proposes a one-way fare of \$11.95 plus tax per person or a round-trip fare of \$21.90 plus tax per person between Oakland International Airport, San Jose Municipal Airport and Tahoe Valley Airport. The fares presently charged by Pacific or proposed in the future are in all cases higher than those of applicant. These distinctions in aircraft and terminal points show, and we find, that the service of Pacific and that of Holiday are not directly competitive.

Pacific claims that it has pioneered Lake Tahoe air service and that Holiday is attempting to skim the cream from its over-all operation, that it plans to inaugurate service in Boeing 727 jet equipment with many more available seats, that it will increase and improve its schedule, that it will offer non-stop flights to the Bay Area and will institute one plane service to San Jose and Oakland as well as San Francisco.

As to Pacific's claim to have "pioneered" air service to Lake Tahoe, the record shows that its Lake Tahoe service did not commence until October 27, 1963. Prior to that time service of one kind or another was provided by Trans World Airline in 1961, and Futura Airlines and Paradise Airlines in 1962. Paradise Airlines generated over 59,000 Lake Tahoe passengers in the year 1963. The other matters with regard to improved service are, of course, all prospective in nature, and in any event this Commission would be

without jurisdiction in the matter. Assuming, however, that all of Pacific's proposed improvements were put into effect, applicant would still not be directly competitive inasmuch as the type of service would still be distinguishable and Holiday could conceivably operate under circumstances in which Pacific could not.

Pacific challenges the business experience of Holiday as it relates to air operations. Henry Kengla has been engaged in one form of air operation or another since 1947 when he entered the United States Air Force. He was one of the original partners of Paradise Airlines and was its vice-president and director of operations until August 1963, when he terminated his employment with that company. Paradise Airlines continued operations until March 1964. He has inaugurated the instant service, secured the aircraft, acted as pilot, provided for maintenance on a contract basis, dealt with the Federal Aviation Agency, and made all necessary arrangements for passenger handling at the various terminals. The experience Henry Kengla brings to Holiday in the field of air operations is broad, extensive and entirely adequate for the operation contemplated.

Pacific next attacks the financial stability of Holiday. Exhibit No. 10 is a balance sheet and profit and loss statement covering the five-month period ending March 31, 1966. These documents indicate a net loss of \$10,179.52 for said period. The balance sheet shows a purported net worth of \$112,320.48. When Holiday became incorporated in October of 1965 the assets of Henry Kengla were transferred to the corporation. One De Havilland Dove aircraft was included in these assets. Said aircraft was paid for in December 1965 and was valued at \$42,000 on the balance sheet. "Licenses and goodwill" was also included at \$72,145.35. No reasonable explanation was given concerning the constituents of this latter item except that it included the Federal Aviation Authority air taxi certificate and

the agreements with the various airports at which Holiday lands. The balance sheet does not appear to set forth a clear and detailed picture of applicant's assets and liabilities, since generally accepted accounting principles were not followed; however, we must observe that to date this Commission has set forth no specific system of accounts for passenger air carriers to follow. The profit and loss statement and the net loss shown thereon appear reasonable.

Henry Kengla testified that Holiday was in the process of acquiring additional debt financing of \$90,000. This infusion of additional funds appears to us to be most essential. Exhibit No. 4 sets forth some historical operating data for the period June 15, 1965 through April 30, 1966. It shows that Holiday has averaged 7 revenue passengers per flight in that period. Exhibit No. 5 is a projected operating budget for the period January through June 1966. This exhibit indicates that Holiday would just about break even if it could average 8 revenue passengers per flight. Pacific attacked Exhibit No. 5 as unrealistic when compared to the recorded figures in Exhibit No. 10. It presented Exhibit No. 30, a combination of actual and projected figures and concluded that Holiday would require 9 revenue passengers per flight to break even.

It is evident that the financial stability of Holiday depends upon its ability to secure additional financing and its ability to attract sufficient revenue passengers. We cannot determine on this record the extent of public acceptance Holiday will generate. That must depend to a great extent upon its service. We do determine, however, that if public acceptance is sufficient Holiday can attain financial stability.

Pacific warns this Commission that it must be wary of authorizing operation by a financially unstable carrier who may

attempt to cut costs at the expense of safe operations. It further warns us that we may not avoid this burden because the Federal Aviation Agency, and not this Commission, is charged with the regulation of safety of these operations.

The operational safety aspects of commercial airlines are under the regulation of the Federal Aviation Agency, and it is that agency's responsibility to see that its safety rules are complied with. Pacific did not produce for the record any substantiation of its fears that airlines of modest financial means cut costs at the expense of safety, or that under these conditions not only are Federal Aviation Agency regulations being ignored but violations of regulations are going undetected. This Commission will not authorize operation by a passenger air carrier about which it is obvious there is no possibility of financial survival, irrespective of the need for the proposed service. Here there is not only a need for the service, but with prudent management, a probability of financial success.

Holiday is aware of General Order No. 120-A the Commission's rules for minimum insurance coverage by a commercial air carrier and it has fully complied with said general order.

We have already discussed Holiday's ability to provide economic service to the communities involved and its dependence upon public acceptance and use of the service. Pacific, however, raises another objection. It presented one of its own pilots, who is also engaged in a one-man airline consultant business under the firm name Locke & Associates, to testify with regard to operations by Holiday and the proposed operation of Pacific with Boeing 727 aircraft at Lake Tahoe. This witness through a series of exhibits attempted to prove that it would be unsafe for Holiday to take off at Lake Tahoe with eight or more passengers when the temperature was above a

certain point. The conclusion was that if this was the case Holiday would be unable to meet its break-even load factor at all times. Counsel for Pacific made the point that safety of airline operations depends to a large extent upon the prudence of the carrier above and beyond the rules laid down by the Federal Aviation Agency. This point is as applicable to Holiday as it is to Pacific; certainly the public is dependent upon the expertise of the individual airline and its respective personnel as well as upon the regulatory agency charged with overseeing safety in flight. Here it is up to Holiday and the Federal Aviation Agency to see that operations are conducted within the scope of the operating specifications of the particular aircraft in use. Whether compliance with such requirements will preclude Holiday from meeting its necessary break-even load factor has not been established on this record.

Pacific has raised the issue of unlawful operation by Holiday in the complaint it has filed. It raises the same issue in its protest to the granting of the application on the basis that the alleged violation of the Public Utilities Code does not indicate a "compliance disposition" and that the application should therefore be denied.

The section of the code with which Pacific is concerned is Section 2752:

"2752. No passenger air carrier shall engage in any operation in this state without first having obtained from the commission a certificate of public convenience and necessity authorizing such operation."

Holiday does not deny its operation without benefit of a certificate of public convenience and necessity. Its answer and the explanation of Henry Kengla given under oath was to the effect that since Holiday was operating prior to September 17, 1965, the effective date of the Passenger Air Carriers Act, under a valid Air Taxi certificate issued by the Federal Aviation Agency, had its tariff on file

with this Commission and had made application for a certificate of public convenience and necessity, it had done all it could toward complying with the Public Utilities Code and that the code does not specifically state that passenger air carriers operating prior to the effective date of the Act must terminate operations until they have secured the requisite certificate from the Commission. Furthermore, this Commission did not order Holiday to terminate its operation.

This proceeding is the first instance in which the specific question heretofore set out has been presented. Pacific cites prior Commission decisions and Civil Aeronautics Board decisions in which certification was denied because of prior unlawful operations by the applicant. Those cases, however, do not involve the factual problem presented here wherein the alleged unlawful operation was occasioned by the passage of regulatory legislation subsequent to the commencement of the service.

While we recognize that Holiday had done everything which appeared necessary and that the code does not specifically require the cessation of its operation, we must nevertheless conclude that the operations of Holiday from September 17, 1965 to the present time have been in violation of Public Utilities Code Section 2752. It is also true, however, that the Commission had heretofore been silent on the application of Section 2752 and that upon the factual situation presented here there can obviously be a legitimate difference of opinion as to whether or not Section 2752 was in fact actually violated. There is a public need for this service and the Commission would be doing a disservice to the public and the applicant were it to order Holiday to cease and desist operations because of its interpretation of Section 2752.

There was evidence presented at the hearings that Holiday has carried passengers in the co-pilot seat next to the pilot and that when it does so it can transport 12 passengers. There is a door which can be locked separating the pilot's compartment from that of the passengers in the De Havilland Dove. We point out to Holiday, Section 21416 of Division 9 of the Public Utilities Code, State Aeronautics Act, which requires a locked door between passengers and pilot while the aircraft is in flight. That section is to be enforced by the Division of Aeronautics of the Department of Public Works and not by this Commission. Its enforcement is relevant to us, however, inasmuch as it may affect the actual number of available passenger seats in an aircraft. This Commission expects that Holiday, as it has stated, will comply with this Section of the Public Utilities Code and all other applicable laws.

On May 11, 1966 Pacific filed a Petition For Issuance of Proposed Report Under Rule 69 of the Commission's Rules of Procedure; on May 20, 1966 Holiday filed its objections to said petition. The Commission denies the petition of Pacific.

#### Findings

1. Holiday Airlines, Inc., and its predecessor Henry Kengla, doing business as Holiday Airlines, have been operating as a passenger air carrier continuously from June 15, 1965 between Tahoe Valley Airport, Oakland International Airport and San Jose Municipal Airport, all within the State of California.

2. Holiday Airlines, Inc. has not demonstrated the need for, nor its ability to serve, the points of Fresno or Los Angeles.

3. There presently exists a public need for the passenger air carrier service that is being provided by Holiday Air Lines, Inc.

4. Holiday Airlines, Inc., possesses the business experience in the field of air operations, and the requisite insurance coverage to receive a certificate of public convenience and necessity.

5. The present and prospective financial stability of Holiday Airlines, Inc., does not preclude the granting to it of a certificate of public convenience and necessity.

6. Holiday Airlines, Inc., can economically serve the points of Tahoe Valley Airport, Oakland International Airport and San Jose Municipal Airport as a passenger air carrier flying De Havilland Dove aircraft at a one-way fare of \$11.95 per person plus tax, or a round-trip fare of \$21.90 per person plus tax with a minimum schedule of one flight in each direction daily.

7. Pacific Air Lines, Inc., is an interstate air carrier under the economic regulation of the Civil Aeronautics Board. It serves, among other points in California, Tahoe Valley Airport and San Francisco International Airport by way of Sacramento.

8. The services provided by Holiday Airlines, Inc., on the one hand, and Pacific Air Lines, Inc., on the other hand, are not directly competitive or directly comparable and there exists a public need for applicant's service.

9. The passenger air carrier service conducted by Holiday Airlines, Inc., or its predecessor Henry Kengla, doing business as Holiday Airlines, after September 17, 1965, was in violation of Section 2752 of the Public Utilities Code.

Based upon the foregoing findings of fact the Commission concludes that a certificate of public convenience and necessity should be granted to Holiday Airlines, Inc., that despite applicant's violation of Section 2752 no cease and desist order should be issued and that the complaint of Pacific Air Lines, Inc., should be dismissed.

Holiday Airlines, Inc., is hereby placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Holiday Airlines, Inc., authorizing it to operate as a passenger air carrier as defined in Section 2741 of the Public Utilities Code, as set forth in Appendix A, attached hereto and hereby made a part hereof.
2. Holiday Airlines, Inc., is hereby authorized to establish a fare of \$11.95 per person, one way, and \$21.90 per person, round trip, all fares plus tax.
3. In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations:
  - (a) Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. By accepting the certificate of public convenience and necessity herein granted, applicant is placed on notice that it will be required, among other things, to file annual reports of its operations and to comply with and observe the insurance requirements of the Commission's General Order No. 120-A.

Failure to file such reports in such form and at such time as the Commission may direct, or to comply with and observe the provisions of General Order No. 120-A, may result in a cancellation of the operating authority granted by this decision.

- (b) Within thirty days after the effective date of this order, applicant shall reissue its tariffs to comply with the authorization granted herein.
- (c) The tariff filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 105-A.

4. The complaint of Pacific Air Lines, Inc., Case No. 8405, is dismissed.

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

Dated at San Francisco, California, this 6<sup>th</sup> day of DECEMBER, 1966.

*Walter L. Martin* President  
*George G. Brewer*  
*Fredrick B. Halliwell*  
*Augustus*  
*William V. Pennington* Commissioners

Holiday Airlines, Inc., by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to transport passengers by air in either direction in De Havilland Dove aircraft or other similar aircraft having a gross weight under 12,500 pounds:

1. Between Tahoe Valley Airport, on the one hand, and Oakland International Airport and San Jose Municipal Airport, on the other hand.

Issued by California Public Utilities Commission.

Decision No. 71648, Application No. 47901.