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ORIGINAL

Decision No. 72339

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations and practices of J. W. DOWDLE, an individual, doing business as CATALINA-VEGAS AIRLINES, SWIFT AIR and LAS VEGAS AIRLINE.	Case No. 8458 (Filed June 28, 1966)

William G. Bailey, for respondent.
Sergius M. Boikan, for the Commission staff.

INTERIM OPINION

On June 28, 1966 the Commission issued an order instituting investigation into the operations and practices of J. W. Dowdle, an individual, doing business as Catalina-Vegas Airlines, Swift Air and Las Vegas Airline (respondent) in order to determine whether respondent is a transportation company within the meaning of Article XII, Section 22 of the Constitution of the State of California, and, if so, whether he should be required to file a tariff with the Commission in accordance with General Order No. 105-A.[1/]

A prehearing conference was held September 27, 1966 before Examiner Robert Barnett at the office of the Commission in

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1/ General Order No. 105-A provides, in part, that air transportation companies shall file tariffs showing reasonable rates and shall have no undue or unreasonable discrimination in charges or facilities; that the Commission must authorize any increases in rates and may suspend new rates for a period of up to ten months.

San Diego. Since there was no material controversy respecting the operations of respondent, counsel for the staff and for the respondent stipulated to the material facts concerning those operations and agreed to the filing of briefs without the holding of a hearing; such briefs have been filed.

The stipulated facts are:

Respondent is a sole proprietorship owned by J. W. Dowdle, with his principal place of business in San Diego, California. He is engaged in the transportation by air of persons and their baggage as a common carrier for compensation. Respondent conducts charter flights by air, and scheduled air service between the following pairs of points: San Diego, California, and Las Vegas, Nevada; San Diego, California, and Santa Catalina Island, California; and Orange County Airport, California, and Santa Catalina Island, California.

This investigation is concerned only with respondent's scheduled air taxi service between San Diego and Santa Catalina Island (Catalina), and between Orange County Airport and Catalina. In transporting passengers between the California mainland and Catalina, respondent flies through airspace over the Gulf of Santa Catalina and San Pedro Channel and outer Santa Barbara Channel, which is more than three nautical miles from the lower low-water line of both the California mainland and Catalina. Scheduled service between Catalina and the California mainland is conducted by respondent on a seasonal basis only, beginning on or about May 30 of each year and ending on or about September 30. For that transportation, a Grumman-Mallard aircraft with a capacity of thirteen passengers and a maximum certificated takeoff weight of less

than 12,500 pounds is employed. That aircraft departs with passengers every morning from Lindbergh Field, San Diego at 9:00 a.m. and discharges those passengers at Catalina. Thereupon, the aircraft is flown to Orange County Airport to pick up passengers for the 10:15 a.m. flight to Catalina. The aircraft departs at 4:00 p.m. from Catalina with passengers destined for San Diego and returns to Catalina to pick up, by 5:00 p.m., those passengers destined for Orange County Airport.

The fare between San Diego and Catalina, exclusive of 5 percent federal excise tax, is $12.45 for a one-way trip, $19.95 for a round trip Monday through Thursday, and $24.90 for a round trip Friday through Sunday. The fare between Orange County Airport and Catalina, exclusive of 5 percent federal excise tax, is $7.45 for a one-way trip and $14.90 for a round trip. Children under twelve ride at half fare.

Respondent conducts his operation between Catalina and the California mainland pursuant to Operating Certificate No. 14-WE-20, issued by the Federal Aviation Agency to J. W. Dowdle, dba Swift Air Service, Catalina-Vegas Airlines and Las Vegas Airlines, authorizing operations as an Air Taxi/Commercial Operator.

After stipulating to the above facts respondent moved to dismiss on the ground that this Commission has no jurisdiction over him. This motion was submitted subject to the right of respondent, if his motion be denied, to offer additional evidence on the issue of whether regulation by the Commission constituted an undue burden on interstate commerce.

The questions for determination are:

(1) Has the Commission's authority under the Constitution of the State of California to regulate the rates for transportation of passengers by aircraft been limited by Public Utilities Code Sections 2740-2765 (Passenger Air Carriers' Act)?

(2) Does respondent's air service between Catalina and San Diego, and between Catalina and Orange County Airport, through airspace over the Gulf of Santa Catalina, Outer Santa Barbara Channel, and San Pedro Channel constitute interstate air transportation as that term is defined in Section 101(21)(a) (49 U.S.C.1301) of the Federal Aviation Act of 1958, as amended (the Act)?

(3) Have Congress, in enacting the Act,and the Civil Aeronautics Board (CAB), in promulgating Part 298, Classification and Exemption of Air Taxi Operators (14 CFR 298), which exempts respondent's operation from Section 403 of the Act (requiring the filing, posting, and publication of tariffs, observance thereof, notice of tariff changes and filing of divisions of rates), from Section 404 of the Act (insofar as it requires the establishment of just and reasonable rates and classifications, just and reasonable divisions of rates with other air carriers, and forbids unjust or unreasonable preference or discrimination), and from Section 407(d) of the Act (empowering the CAB to prescribe the form of accounts and records of air carriers), preempted the field to the exclusion of state regulation of that operation?

We answer questions one and three in the negative and question two in the affirmative.

I

The authority of the California Public Utilities Commission to regulate the rates and charges for the transportation of passengers and property by aircraft in common carriage in California stems from powers directly granted to it by Article XII of the Constitution, particularly by Sections 17, 19, 20, 21, and 22. Sections 19, 20, 21, and 22 contain the words "railroad or other transportation company" and "railroads and other transportation companies," and Section 17 contains the words "railroad, . . . and other transportation companies . . ." In Section 17, railroad and other transportation companies are declared to be "common carriers," and in Section 23, every common carrier is declared to be a "public utility." In People v. Western Airlines (1954) 42 Cal 2d 621, 268 P 2d 723, the Supreme Court of California held that airlines are "other transportation companies," "common carriers," and "public utilities" within the meaning of Article XII of the Constitution. Hence they are subject to the provisions of the Constitution dealing with such entities. Under Section 22 of Article XII, the Commission has power to establish rates of charges for the transportation of passengers and freight by airlines; tariffs covering such transportation must be filed with the Commission; no rates other than tariff rates may be charged; and the Commission has power to examine books and records, hear and determine complaints, issue subpoenas, take testimony, and punish for contempt.

In 1965 the Public Utilities Code was amended to give the Commission power to issue certificates of public convenience and necessity authorizing the operation of passenger air carriers (Passenger Air Carriers' Act, Public Utilities Code Sections 2740-2765). "Passenger air carrier" was defined as "a person or corporation owning, controlling, operating, or managing aircraft as a common carrier of passengers for compensation wholly within this state, between terminal points including intermediate points if any" (Section 2741).

Respondent argues that the legislature, in adopting Section 2741, has limited the jurisdiction of the Commission to airflights made by carriers "wholly within this state" and that the Commission should not disregard this unequivocal restriction and limitation as to its jurisdiction with reference to respondent, who is not operating "wholly within this state."[2/]

The staff argues that it is not seeking to subject respondent to the regulatory scheme embodied in Sections 2740-2765 but that only the applicability of the Commission's constitutional rate jurisdiction to respondent's Catalina-mainland operation is at issue.

In People v. Western Air Lines, supra, the Supreme Court discussed contentions similar to those raised by respondent, and rejected them. The Court held the constitutional provisions to be

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2/ It is clear that respondent does not operate "wholly within this state" within the meaning of Section 2741; see Part II of this opinion, infra.

self-executing and recognized that the legislature might enact legislation to facilitate the exercise of the powers directly granted by the Constitution but, "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 (Western Assn. etc. R.R. v. Railroad Com. (1916) 173 C 802, 804, 162 P 391)," (42 C 2d at 637).

We conclude that the Commission's constitutional jurisdiction over transportation companies is not limited by the enactment of the Passenger Air Carriers' Act.

II

Respondent's air service between Catalina and San Diego, and between Catalina and Orange County Airport constitutes interstate air transportation as that term is defined in Section 101(21)(a) of the Federal Aviation Act of 1958, as amended.

Under Section 101(10) of the Act, "air transportation" is defined for our purposes as follows:

> "'Air transportation' means interstate, overseas, or foreign air transportation . . ."

By Section 101(21), "Interstate air transportation" means:

> ". . . the carriage by aircraft of persons or property as a common carrier for compensation or hire . . ., in commerce, between, . . .
> (a) . . . places in the same State of the United States through the airspace over any place outside thereof; . . ."

Since the termini of respondent's operation at issue in this case, Catalina Island, on the one hand, and San Diego and Orange County Airport, on the other hand, are places in the same

state, the only question respecting the applicability of the Act to respondent's Catalina-mainland service is whether that operation takes place through airspace over any place outside of California.

This question was settled by United States v. California (1965) 381 US 139, 14 L ed 2d 296, when the United States Supreme Court, in determining California's title to and ownership of submerged offshore lands, held that neither the Gulf of Santa Catalina nor the San Pedro Channel nor Outer Santa Barbara Channel were inland waters, and that the boundary of California extends only to the waters lying either within three miles from the California mainland or within three miles of offshore islands. Since the distance between Catalina and the closest point on the California mainland is more than 30 miles, flights between the mainland and Catalina must take place through airspace over a place on the high seas, outside of the State of California. (Accord: Wilmington Transp. Co. v. Railroad Com. of Calif. (1915) 236 US 151, 59 L ed 508 (the Catalina Steamship case).)

In Island Airlines, Inc. v. Civil Aeronautics Board, 352 F 2d 735 (1965), the Court held that common carriage by aircraft of persons or property as a common carrier for compensation or hire in commerce between points in the same state through airspace over the high seas was "interstate air transportation" within the meaning of those words as they are used in Section 101(21)(a) of the Act. (See, United Airlines, Inc. v. CPUC (1952) 109 F Supp 13.)

We conclude that respondent's air service between Catalina and San Diego, and between Catalina and Orange County Airport constitutes interstate air transportation.

III

It is argued by respondent that Congress, in enacting the Act, and the CAB in promulgating Part 298, Classification and Exemption of Air Taxis Operators, which exempts respondent's operation from Sections 403, 404, and 407 (d) of the Act, have displaced state regulation of the subject matter. We do not agree.

The question of whether state authority to regulate interstate commerce has been displaced in areas where federal authority has been exerted cannot be decided by mechanical formulae. Indeed, if there are presumptions in this area, they weigh heavily in favor of the validity of state legislation. As Justice Stone has said by way of an approach:

> "As a matter of statutory construction, Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose." (Maurer v. Hamilton (1940) 309 US 598, 84 L ed 969, 980.)

Three tests have been suggested to aid in the determination of this question. (Head v. Board of Examiners (1963) 374 US 424, 10 L ed 2d 983, 995-997.)

The first test is whether the subject matter, air transportation, by its very nature admits only of national supervision. Nothing in the decisions of the Supreme Court of the United States suggests such a view of the regulatory field. Notwithstanding Mr. Justice Jackson's dictum in Northwest Airlines v. Minnesota (1944) 322 US 292, 303, 88 L ed 1283, 1290, that,

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by Federal permission, subject to Federal inspection, in the hands of Federally certificated personnel and under an intricate system of Federal commands . . . (the aircraft's) privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any State Government,"

no cases have been found wherein the Supreme Court has forbidden economic regulation of air transportation by the states.[3/] The unquestioned jurisdiction of state commissions to regulate intrastate air transportation is convincing evidence that air transportation, as such, does not admit only of national supervision. (Cf. People v. Western Air Lines (1954) 42 C 2d 621, 642-645). Where state regulation in some respects has been displaced the Supreme Court has recognized that state regulation in other respects might be constitutional. (Head v. Board of Examiners, supra; Florida Lime and Avocado Growers v. Paul, (1963) 373 US 132, 10 L ed 2d 248; Colorado Com. v. Continental Air Lines (1963) 372 US 714, 10 L ed 2d 84.)

3/ Respondent has an operating certificate from the Federal Aviation Agency (FAA) authorizing flight operations in accordance with Part 135 of the FAA's rules and regulations. (14 CFR 135). That part covers such topics as aircraft airworthiness, flight operations (e.g. landing, takeoff, weather conditions) and air traffic control; all for small aircraft. Aspects of safety of operation of aircraft, interstate or intrastate, for transportation or nontransportation purposes are subject to the FAA, and we recognize this exclusive authority. While appropriate authority must be obtained from the FAA before operating any aircraft, the mere fact of having obtained such authority in no way relieves any carrier from the obligation of obtaining economic authority, when such authority is required by federal or state law. (People v. Western Air Lines, supra.)

The second test is whether there is evidence of congressional intent to exclusively occupy the field. In this case the evidence shows no such congressional intent. Certainly there is no direct assertion by Congress as to its intent. The basis of federal jurisdiction over air transportation is bottomed on the commerce power of Congress, an exercise of the same source of power as that under which Congress has long regulated navigable waters. (Braniff Airways v. Nebraska Board of Equalization (1953) 347 US 590, 98 L ed 967, 975.) And the federal commerce power over navigable waters does not prevent state action consistent with that power. (Wilmington Transp. Co. v. Railroad Com. of Calif., supra.) When considering the effect of state regulation of racially discriminatory practices on interstate airlines the Supreme Court was "satisfied that Congress in the Civil Aeronautic Act of 1938, and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised' will not frustrate any part of the purpose of the federal legislation." (Colorado Com. v. Continental Air Lines, 10 L ed 2d at 91.) Lastly, and most persuasively on this subject, the CAB requires air taxi operators serving points in Alaska, or points in Alaska and Canada, to obtain authority either from Alaska or the CAB. (14 CFR 298.21(c).) At least the CAB is of the opinion that Congress did not want to prohibit state regulation in this field.

The third test is whether as a practical matter both regulations can be enforced without impairing the federal superintendence of the field. Does the operation of federal and state

laws conflict so that state law must yield in the interests of a particular federal regulatory scheme? This case presents no such conflict. It is apparent that the CAB sees no such conflict. Indeed, it recognizes that regulation by Alaska, rather than conflicting with federal regulation, fills a necessary gap.

Because economic regulation of interstate air transportation of persons or property may be imposed by the CAB, the CAB has the power to regulate respondent's operation between Catalina and the mainland. But the fact is, the CAB is not presently regulating that operation.

Section 416(b) of the Act authorizes the CAB to grant exemption, under appropriate conditions, from air carrier economic regulation or any provisions of such regulation to any air carrier or class of air carriers.[4/] Pursuant to this general exemptive power, the CAB has promulgated Part 298 of Economic Regulations, Classification and Exemption of Air Taxi Operators, which exempts air carriers engaged in the direct transportation of persons or

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4/ "(b)(1) The Board, from time to time and to the extent necessary, may exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

property by air who do not utilize aircraft having a maximum certificated takeoff weight greater than 12,500 pounds from, among other things, the following provisions of Title IV of the Act:

(1) Section 403, which requires the filing of tariffs covering air transportation of persons and property and any divisions of rates for air transportation, the observance of rates published in those tariffs, and prohibits changes in those tariffs except upon 30 days' notice.

(2) Section 404 which requires the establishment of just and reasonable rates and just and reasonable divisions on joint rates, and prohibits unreasonable or undue prejudice or preference with respect to persons, locales, and descriptions of traffic.

(3) Section 407(d) which empowers the CAB to prescribe the form of accounts and records to be kept by air carriers.

These exemptions applicable to air taxi operators are pertinent to this discussion as it turns out that the scope of the Commission's jurisdiction under the California Constitution is confined to the very subject matter which the CAB does not regulate.

However, respondent argues that the CAB, in choosing to refrain from exercising economic regulation over air taxi operators, has made an affirmative statement of federal policy. It is claimed that the CAB's purpose was to encourage, develop, and promote air transportation by air taxi operators by providing relief from onerous economic restrictions. While this could be a result of the exemption, statements explaining the CAB's position take a different tack. At least four reasons for the adoption of the exemption for air taxi operations from CAB economic regulation

have been put forward by that agency: (CAB ER-167 dated February 20, 1952, 17 FR 635; CAB ER-16024 dated April 5, 1965, 30 FR 4636.)

(1) The reported operations of these carriers amount to approximately 2 percent of the total revenue plane mileage of the certificated domestic trunk and local service carriers.

(2) Air taxi operators often render service to points not served by certificated carriers, and even when they parallel service by certificated carriers, they are not really in competition with them.

(3) The burden of imposing CAB-type regulation might well be too great for air taxi operators to bear.[5/]

(4) The CAB staff is inadequate to perform the task of regulating air taxi operators.

These reasons show that the CAB is concerned with the relative size of the air taxi operation from the CAB viewpoint; with the impact of air taxi operations on certificated carriers; with the economic burden of CAB regulation on air taxi operators; and with the priority of tasks that the CAB is called upon to perform in relation to its budgetary restrictions. It is hardly necessary to say that an operation insignificant from the point of view of the CAB's regulatory jurisdiction may well be significant from the point of view of this Commission's much smaller jurisdiction. And the paring down of regulatory activity by the CAB

5/ Whether imposing this Commission's regulation on respondent will create an undue burden on interstate commerce will be resolved in the reopened proceeding.

because of budget restrictions certainly does not reflect adversely upon the desirability of state regulation of air taxi operators. Rather, it indicates its desirability when such regulation is practicable. We conclude that this Commission's regulation of respondent's Catalina-mainland operations does not conflict with any federal purposes embodied in Part 298 as the CAB has enunciated those purposes.

It is difficult to accept respondent's contention that federal authority has been exerted in Part 298 by way of exemption from regulation, or that the CAB is economically regulating respondent's operation by not regulating it. Of course, the CAB could if it wished withdraw the benefit of Part 298 from respondent's Catalina-mainland operation, and thereby displace this Commission's regulation. But, as local air commerce becomes substantial, detailed regulation by a central bureau in Washington, D.C., will become both impracticable and ineffective. It will be impracticable because long-distance regulation from the nation's capital would entail unendurable expense and delay for small local operators; because the governmental machinery necessary to administer all local regulation from a central bureau would be unwieldy; and because senior officials of the federal agency could not give proper attention to the manifold problems entailed in regulating all the local carriers of the nation, without undue distraction from their more important function of regulating the trunkline and supplemental air carriers. Centralized regulation of local air carriers from Washington, D.C., would be ineffective, because the central bureau could not possibly have

thorough and current knowledge of local problems and conditions, and because centralized control would deny to the patrons of local air lines, and to the general public directly affected by local air service, a readily accessible means of obtaining relief from inadequate service, undue discriminations, and unreasonable rates.

The California Public Utilities Commission has considerable experience in regulating airlines. Under our constitutional rate jurisdiction and under the Passenger Carriers Act we have an important interest in developing an air transportation system adequate to the state's needs; we are well equipped to protect the public's interest in such transportation.

We conclude that federal law has not displaced state regulation of respondent's operation.

IV

Nothing in the cases cited by respondent, Island Airlines, Inc. v. C.A.B. (1965) 352 F 2d 735 and United Airlines v. CPUC (1952) 109 F Supp 13, is contrary to the result reached herein. Island Airlines dealt with Hawaiian inter-island transportation, and the exemption afforded by Part 298 to respondent was not available to Island Airlines. Indeed, that carrier was in direct competition with federally certificated and subsidized carriers. None of those circumstances are present here. As for the United Airlines case, the CAB was actually regulating air transportation between Catalina on the one hand and Los Angeles,

Wilmington, and Long Beach on the other hand, at the time United Airlines brought its action for declaratory relief in the Federal District Court. Again that very crucial circumstance is not present here.

Finally, respondent argues that if this Commission finds that it has jurisdiction to regulate Catalina-mainland flights then, by parity of reasoning, this Commission could also find that it has jurisdiction to regulate respondent's California-Nevada flights. But respondent does not make the necessary distinction between flights between states and flights within the same state that pass over the high seas. The only state having any interest whatever in respondent's operations between Catalina and the mainland is California. Respondent's airplane does not pass through airspace over any other state. The possibility of conflict between states, which would render state control of rates for transportation between two or more states difficult or impossible, is not present in this case. It is settled that if we were to attempt to regulate California-Nevada flights we would be imposing an undue burden on interstate commerce. (Southern Pacific Co. v. Arizona (1944) 325 US 761, 89 L ed 1915.) However, respondent's Catalina-mainland operation is purely a matter of local concern.

We find that respondent's Catalina-mainland operation is in interstate commerce. We find that nothing in those matters presented for decision by respondent's motion to dismiss precludes the California Public Utilities Commission from asserting jurisdiction to regulate respondent; as to other matters and issues we reopen the proceedings, pursuant to stipulation, to take such evidence as the parties may wish to present.

INTERIM ORDER

IT IS ORDERED that:

1. The motion to dismiss is denied.

2. Further hearings in this matter shall be held at a time and place to be designated.

Dated at Los Angeles, California, this 27th day of APRIL, 1967.

President

Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.