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**ORIGINAL**

Decision No. 74292

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the operations and  
practices of IMPERIAL COMMUTER  
AIRLINES, INC.

Case No. 8744  
(Filed January 9, 1968)

Ewing, McKee and Kirk, by  
Russell J. Kirk, for respondent.  
Mathews, Lewis, Bergen & Henderson,  
by E. J. Minette, for  
Mrs. Lois Brittain,  
interested party.  
S. M. Boikan, Counsel, and  
John DeBrauwere, for the  
Commission staff.

O P I N I O N

The Commission instituted an investigation to determine whether or not Imperial Commuter Airlines, Inc. (respondent) may have operated or may be operating as a passenger air carrier as that term is defined in Section 2741 of the Public Utilities Code between certain specified cities in California without first having obtained a certificate of public convenience and necessity from this Commission authorizing such operation, and whether or not respondent should be ordered to cease and desist until it has obtained authority for such operation.

A public hearing was held before Examiner Rogers in El Centro on April 9, 1968 and the matter submitted. At the conclusion of the hearing the respondent moved to dismiss on the ground the Commission has no jurisdiction over respondent's operations. This motion will be denied.

Respondent's Authority

Section 2743 of the Public Utilities Code provides as follows:

"The provisions of this chapter do not apply to common carriers of passengers by aircraft who operate within this state pursuant to the provisions of a current certificate of public convenience and necessity issued by the federal government."

The record herein makes it crystal clear that the F.A.A. authority held by respondent (Exhibits 5 and 14) in no sense comprises a "certificate of public convenience and necessity" issued by the federal government. All that the respondent possesses is an operating certificate (Exhibit 5) and operating specifications (Exhibit 14). These documents are issued to each applicant which meets certain requirements relative thereto (Exhibit 15). There is no requirement that the holder of the operating certificate demonstrate that public convenience and necessity require the issuance thereof. The California Public Utilities Code as above quoted (Section 2743) refers to a certificate of public convenience and necessity issued by the federal government and states that when a carrier holds such certificate, the provisions of the Code (Chapter 4 of Part 2) are not applicable.

However, the provisions of the Federal Aviation Act which are contained in Sections 1301 et seq. of 49 U.S. Code do not appear to apply to a carrier such as the respondent, which does not have a certificate of public convenience and necessity.

Section 1301 provides, inter alia, as follows:

- (3) "Air Carrier" means any citizen of the United States who undertakes whether directly or indirectly or by a lease or any other arrangement to engage in air transportation.
- (4) "Air Commerce" means interstate, overseas or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or (sic) aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
- (10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Section 1371, insofar as pertinent, provides as follows:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Subdivision (b) provides for a written application for such certificate; Subdivision (c) provides for notice and public hearing on the application before the certificate is issued.

There was very little dispute as to the factual matters involved. We find the following facts to be true:

1. Respondent is a California corporation. Its articles of incorporation were filed with the Secretary of State on May 24, 1967. The principal purpose for which it was formed was to engage in the operation of an interstate airline business for the transportation of passengers and freight (Exhibit 1).
2. Respondent has five one- or two-engine passenger planes, each of which has a gross take-off weight of not to exceed 12,500 pounds. These are the types of planes it uses, and proposes to use in the future.
3. Respondent has the use of terminals in Imperial, Calexico, Riverside and San Diego, California. It has the insurance required by this Commission (Exhibit 9) and has filed tariffs with this Commission for its California operations (Exhibit 8).

4. On August 30, 1967, respondent was granted operating certificate No. 14 WE 7 by the Federal Aviation Agency, authorizing respondent to operate as an air taxi/commercial operator (Exhibit 5). At the same time the Federal Aviation Agency authorized the respondent to conduct air taxi operations as an air carrier engaged in air transportation or commercial operation as a commercial operator using aircraft of 12,500 lbs. or less maximum certificated take-off weight. This authority included scheduled operations between Imperial, California, and Las Vegas, Nevada (Exhibit 14). This operating certificate is not a certificate of public convenience and necessity.

5. Between September 1, 1967 and February 28, 1968, respondent carried approximately 3,643 individual fare basis, revenue paying passengers by airplanes between termini and points wholly within California (Exhibit 12). Such service was rendered without authority from this Commission.

6. Between October 19, 1967 and March 27, 1968, both dates inclusive, respondent performed a total of 12 charter operations carrying passengers by airplane for compensation between Imperial, California, on the one hand, and Las Vegas or Tonopah, Nevada, on the other hand; and between Imperial, California, on the one hand, and Parker or Phoenix, Arizona, on the other hand (Exhibit 13).

7. In March, 1968, the respondent advertised individual fare, scheduled, air flights between Imperial, California, and San Diego, California, and between Imperial, California, and Las Vegas, Nevada, in an Imperial, California newspaper (Exhibit 6).

8. On March 23, 1968, the respondent had available Imperial to Las Vegas scheduled air passenger service. On March 23 and 30 and April 6 and 7, 1968, respondent had planes and pilots available for such service and had many inquiries concerning it. It had no passengers on the said dates and made no scheduled common carrier flights to Las Vegas on said dates or any other dates.

9. At all times since March 23, 1968, respondent has held itself out and has been ready, willing and able to perform the proposed scheduled service between Imperial, California, and Las Vegas, Nevada. During said period it has had the equipment, the personnel, and the ability to operate the proposed service, but it has never actually performed such scheduled service.

Conclusions

Upon the foregoing findings the Commission concludes that:

1. Respondent's operations are those of a passenger air carrier operating wholly within this state, as defined in Section 2741 of the Public Utilities Code, and therefore require certification from this Commission.
2. Respondent's interstate charter operations as set forth in Finding No. 6 above, were not conducted pursuant to a federally issued certificate of public convenience and necessity and as such do not fall within the purview of Public Utilities Code Section 2743.
3. Respondent's operations having been conducted without a certificate of public convenience and necessity as required by Section 2752 of the Public Utilities Code must be ordered to be discontinued.
4. Respondent's motion to dismiss is denied.

O R D E R

IT IS ORDERED that Imperial Commuter Airlines, Inc. cease and desist its operations as a passenger air carrier, as defined in Section 2741 of the Public Utilities Code, between points wholly within California unless and until it secures from this Commission

a certificate of public convenience and necessity as required by Section 2752 of the Public Utilities Code.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Imperial Commuter Airlines, Inc. and the effective date of this decision shall be twenty days after the date of such service.

Dated at San Francisco, California, this 25th day of June, 1968.

*John E. Mitchell*  
President

*Augustin*  
*William James J.*  
*Paul P. M...*  
Commissioners

Commissioner William M. Bennett  
Present but not participating.

WILLIAM M. BENNETT, Dissenting Opinion

I dissent.

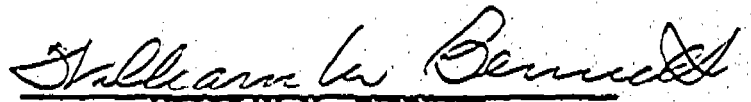
The instant opinion contains no meaningful language concerning the jurisdictional problem which is here posed. The opinion finds that this respondent "was granted operating certificate No. 14 WE 7 by the Federal Aviation Agency authorizing respondent to operate as an air taxi/commercial operator." The opinion further finds that the Federal Aviation Agency authorized the respondent to "conduct air taxi operations as an air carrier engaged in air transportation or commercial operation as a commercial operator using aircraft of 12,500 lbs. or less maximum certificated take-off weight." Significantly the opinion advises "This authority included scheduled operations between Imperial, California and Las Vegas, Nevada."

One comes then to the immediate question of the authority of this Commission to intrude upon an operation which the opinion itself finds to be interstate in nature and which is authorized by operating authority from a federal agency. I am unable to find any basis for the assertion of jurisdiction by this Commission as a matter of fact or law. Whether or not such is desirable is of no assistance in resolving a question of jurisdiction.

And motives of Imperial Commuter Airlines, Inc. seemingly of concern to some members of the Commission are hardly the basis upon which one can create jurisdictional authority. This Commission could just as well assume state authority over federally certificated interstate airline operations by imputing to carriers an intent to escape state authority by indulging in interstate operations. It is not the corporate intent or motive which is controlling rather it is the fact of federal authority for whatever reason which precludes the intrusion of this Commission upon an interstate operation.

Apparently the majority is unable to accept the routine notion that one may be federally authorized and one may be engaged in interstate commerce even though the flying business to say the least is less than booming. And the opinion which is less than a model of clarity seems to draw some strength from the recitation that Imperial Commuter Airlines, Inc. advertised service between California and Nevada but the people failed to respond. This rather simplistic method of excluding an operation as interstate could be a complete escape from federal authority by any large carrier which simply sought haven from federal authority by grounding its planes within a state.

One searches in vain in the opinion as written for those points in California which are intrastate in nature and which are in violation of some provision of California law and which, and this most importantly, are not either in interstate commerce or directly related to it. The opinion gives no such intrastate operation which compels at least the lawyer member of this Commission - unimpressed by the legal reasoning of his brethren - to the horn book opinion that this case is none of our business. I consider today's order to be meaningless because it is beyond our power and I consider it to be an intrusion upon federal authority. I assume this applicant may be one of those hard pressed to defend his legal rights by appeal and so if this order becomes final I confidently feel and fear that the majority will use this simplistic precedent as the cornerstone for all manner of expanding tangled, chaotic and invalid state jurisdiction until one well financed respondent or applicant proceeds to enlighten the Commission by the process of appeal.

  
WILLIAM M. BENNETT  
Commissioner

Dated: San Francisco, California  
June 25, 1968