

ORIGINAL

Decision No. 78276

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Air California for  
a modification in its Certificate  
of Public Convenience and Necessity  
in either direction between San  
Diego, on the one hand, and San Jose/  
Oakland, on the other hand.

Application No. 52165

In the Matter of the Application of  
PACIFIC SOUTHWEST AIRLINES for a  
certificate of public convenience  
and necessity in either direction  
between San Diego and Sacramento,  
nonstop; San Diego and Sacramento via  
San Francisco/San Jose or Oakland;  
San Diego/Santa Ana/San Francisco/  
San Jose/Oakland; San Diego/Santa  
Ana/San Francisco or San Jose or  
Oakland and Sacramento; Santa Ana/  
San Francisco/San Jose/Oakland; Santa  
Ana and Oakland via San Jose; Santa  
Ana and Sacramento via San Francisco/  
San Jose or Oakland; Santa Ana and  
Sacramento, nonstop.

Application No. 51080

ORDER CONTINUING HEARING IN APPLICATION NO. 52165;  
CONSOLIDATING APPLICATIONS NOS. 52165 AND 51080 (PHASE I);  
AND SETTING PREHEARING CONFERENCE FOR FEBRUARY 10, 1971

By Decision No. 76110, dated September 3, 1969, in Applications Nos. 50261, 50381, and 50438, Air California (Air Cal) was authorized to conduct daily nonstop air passenger carrier service between San Diego and San Jose and between San Diego and Oakland.

Air Cal's application was opposed by Pacific Southwest Airlines (PSA) and Western Airlines. Neither protestant provided identical service, although PSA at that time was operating two non-stop flights each week between San Diego and Oakland. The basis of the award to Air Cal was that the present available nonstop service

A. 52165, 51020 ds

between these points was inadequate in the light of the number of one-stop flights provided, and that no other carrier had authority to operate nonstop flights between San Diego and San Jose.

By Decision No. 77360, dated June 16, 1970, inauguration of Air Cal's San Diego service was extended until November 16, 1970. However, on August 27, 1970 Air Cal filed Application No. 52165 to modify its nonstop authority between these points so that it could operate from San Diego via Santa Ana (Orange County Airport) to San Jose and Oakland. PSA filed a protest. Because an early hearing was not possible, as well as for other reasons set forth in the decision, the Commission temporarily granted Air Cal's request until March 1, 1971 (Decision No. 77768, dated September 22, 1970).

The modification consisted of temporarily removing the restriction in Air Cal's certificate of public convenience and necessity issued in Decision No. 76110. This restriction prohibited any connecting service between points Air Cal was authorized to serve.

Shortly thereafter, a prehearing conference was held in Application No. 52165, and a public hearing was set for February 8-11, 1971, in San Diego.

In the meantime, on or about September 21, 1970, PSA commenced nonstop service between San Diego and San Jose. On December 10, 1970, Air Cal retaliated by commencing Case No. 9160, which is a complaint action against PSA asserting that its nonstop service lacks proper certificate authority from the Commission. A public hearing was held on January 6, 1971 in Case No. 9160, and the matter is now submitted subject to the filing of briefs.

A. 52165, 51080 ds

On January 13, 1971, Air Cal filed a petition to further modify its request in Application No. 52165. This additional request seeks permission to carry local passengers between San Diego and Santa Ana and between San Jose and Oakland. Air Cal requested that this modification be granted ex parte before the hearing scheduled in February, and that the matter be included in that hearing for final determination.

On January 14, 1971, the Commission staff filed a motion requesting that the February hearing be continued until a decision is rendered in Case No. 9160. The staff contends that too many traffic projections will have to be presented at the February hearing in order to encompass the different possible outcomes of Case No. 9160.

PSA countered Air Cal's petition for modification by filing on January 15, 1971, a protest to it and a request that it be consolidated for hearing with PSA's Application No. 51080,<sup>1/</sup> filed on May 16, 1969. PSA contends that such consolidation is required because as a result of Air Cal's petition for further modification, both carriers now seek to provide identical service between San Diego and Santa Ana, as well as between San Diego and San Jose/Oakland via Santa Ana.

On January 18, 1971, PSA responded by letter to the Commission staff's motion. It declared PSA's opposition to any continuance of the February hearing and any extension of Air Cal's temporary authority granted in Decision No. 77768 if hearing is delayed. It

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<sup>1/</sup> In this application, PSA requests authority to operate nonstop service between San Diego and Sacramento, and between Santa Ana and Sacramento. It also seeks authority to carry passengers between San Diego and San Francisco, Oakland, and San Jose via Santa Ana, and then to Sacramento. PSA proposes to carry local passengers between San Diego and Santa Ana.

A. 52165, 51080 ds

urges that there is no connection between the issues presented in Application No. 52165 and those presented in Case No. 9160.

On January 21, 1971 Air Cal filed a response to the staff's motion, and to PSA's protest and request for consolidation of its petition for modification. Air Cal opposes both a continuance of the February hearing and a consolidation of its additional petition with Application No. 51080. It urges that the February hearing proceed and include its request to carry local passengers between San Diego and Santa Ana, and between San Jose and Oakland.

#### Discussion

Air Cal's additional petition filed on January 13, 1971 seeks operating authority on a route for which PSA has on file an identical request (Application No. 51080). If Air Cal's entire request in Application No. 52165 is granted on a permanent basis, Air Cal will have operating authority for through one-stop service between San Diego and San Jose/Oakland via Santa Ana, including authority to carry local passengers between San Diego and Santa Ana. This same operating authority is requested by PSA in Application No. 51080.

Although we do not prejudge the size of the market on these routes via Santa Ana, it appears that the proposals (i.e., Applications Nos. 52165 and 51080) must be treated as mutually exclusive, because it seems unlikely that the Commission would grant in separate hearings operating rights to both carriers for the same route. This likelihood is supported by the experience which resulted after both carriers entered into direct competition between Hollywood-Burbank and San Jose/Oakland. It is also supported by the generally depressed economic conditions facing the airline industry today.

A. 52165, 51080 ds

When two or more carriers file applications which are mutually exclusive, a comparative hearing is required in order to provide a fair hearing for each applicant. (Ashbacher Radio Corp. v. Federal Communications Comm., 326 U.S. 327 (1946); Northwest Airlines v. Civil Aeronautics Board, 194 F.2d 339 (1952); Delta Airlines v. Civil Aeronautics Board, 228 F.2d 17 (1955); 1 Davis, Administrative Law 572.) This can be accomplished by consolidating Air Cal's Application No. 52165 and the specific, relevant route segments requested by PSA in Application No. 51080. In this manner the evidence presented by one applicant may be weighed by the Commission against that presented by the other before any permanent operating authority is granted.

Air Cal urges that the February hearing be held to resolve its request for temporary authority to transport local passengers between San Diego and Santa Ana, and that consolidation with Application No. 51080 be delayed until a hearing for permanent authority is conducted. This procedure is contrary to the requirements set down in the Ashbacher case, supra.

Therefore, the Commission will grant a continuance of the February hearing currently scheduled in Application No. 52165, and in lieu thereof we will set a prehearing conference for Wednesday, February 10, 1971, in San Francisco, at 10 a.m. in a consolidated proceeding involving Application No. 52165 and the pertinent routes included in Application No. 51080. This part of Application No. 51080 will be designated Phase I of that proceeding. Hearing on the remaining routes requested by PSA in Application No. 51080 will be designated Phase II of that proceeding and will be held at a later time. It is hoped that an early hearing will be possible in the consolidated proceeding, either during March, April or June.

A. 52165, 51080 ds

The Commission also concludes that in the meantime Air Cal's temporary authority granted in Decision No. 77768, which expires on February 28, 1971, should be extended until August 31, 1971. This extension is granted in order to avoid disruption in service to the public. Moreover, it is not at all clear that PSA will be able to demonstrate at the hearing that it can acquire operating rights at the Orange County Airport.

The Commission further concludes that in order to prevent further delays in the consolidated proceeding involving Applications Nos. 52165 and 51080 (Phase I), no further amendments, or petitions, requesting additions to the route authority sought in this consolidated proceeding will be accepted. It is hoped that in this manner decisions in the consolidated proceeding and in Case No. 9160 will resolve the controversy concerning nonstop air passenger carrier service between San Diego and San Jose and one-stop service via Santa Ana to San Jose and Oakland.

IT IS ORDERED that:

1. Application No. 51080 is divided into two phases. Phase I consists of Pacific Southwest Airlines' request to conduct air passenger carrier operations between San Diego and San Jose/Oakland via Santa Ana, including the carriage of local passengers between San Diego and Santa Ana. Phase II includes the following routes:
  - a. Nonstop service between San Diego and Sacramento; and between Santa Ana and Sacramento.
  - b. Service between San Diego and Sacramento via San Francisco/San Jose or Oakland.
  - c. Service between Santa Ana and San Francisco and Sacramento.
  - d. If operating authority is granted to PSA in Phase I, through service between Santa Ana and Sacramento via San Jose/Oakland.

A. 52165, 51080 ds

2. Application No. 52165 and Application No. 51080 (Phase I) are consolidated and will be heard together. Additional amendments, motions, or petitions to add other route segments to this consolidated proceeding will not be accepted. A prehearing conference in this consolidated proceeding will be held on Wednesday, February 10, 1971, at 10 a.m. in San Francisco. Public necessity requires that this prehearing conference be called on less than ten days' notice.

3. The hearing presently scheduled for February 8-11, 1971, in Application No. 52165 is continued.

4. The temporary authority granted to Air California by Decision No. 77768, dated September 22, 1970, is extended until August 31, 1971.

5. All motions, protests, and petitions inconsistent with the order herein are denied.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 2nd  
day of FEBRUARY, 1971.

[Signature]  
Chairman  
[Signature]  
[Signature]  
Commissioners

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