

ORIGINAL

Decision No. 78484

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of UNITED CLEARINGS, INC., a corporation, for a certificate of public convenience and necessity as an express corporation of special commodities operating between all points in the State of California, pursuant to Section 1010 of the California Public Utilities Code.

Application No. 51794  
(Filed March 31, 1970; Amended August 25, 1970)

Russell & Schureman, by R. Y. Schureman, Attorney at Law, for United Clearings, Inc., applicant.  
Knapp, Gill, Hibbert & Stevens, by Karl K. Roos, Attorney at Law, for American Courier Corporation, protestant.  
S. A. Scott, John F. Specht and Peter N. Kujachich, for the Commission staff.

O P I N I O N

United Clearings, Inc. (United) requests a certificate of public convenience and necessity authorizing it to operate as an express corporation in the transportation of business records, audit media, tabulation cards, data processing materials, checks, drafts, securities and transit items between all points in the State of California, using airline common carriers as its underlying common carriers.

Public hearing was held before Examiner O'Leary at Los Angeles on August 18, September 21 and 22, 1970. The matter was submitted on the latter date subject to the filing of concurrent briefs.

United presently conducts operations pursuant to a highway contract carrier permit and a certificate of public convenience and

necessity authorizing operations as a freight forwarder between all points and places in California using air common carriers. Said certificate was granted by Decision No. 70161, dated January 4, 1966, in Application No. 47692, as amended by Decision No. 73116.

For a number of years, United has utilized the lines of air common carriers in the State of California in the movement of property by two methods. One method has consisted of the movement of shipments by tendering them to the airlines as air freight, at the airline's tariff rate (air freight operation). Said operation is conducted pursuant to United's certificate of public convenience and necessity as a freight forwarder. The second method consists of the movement of shipments whereby an employee of United purchases a passenger ticket and the property is transported as baggage of the employee (baggage operation). United alleges that until Decision No. 76236 was issued on September 30, 1969 in re MPA Courier Corporation, et al. wherein the Commission determined that a baggage operation similar to that conducted by United required a certificate of public convenience and necessity as an express corporation, United considered such operation to be exempt from regulation.

United presently provides a baggage operation service as follows:

<u>Between</u>	<u>Number of Customers</u>
Los Angeles International-San Diego	4
San Francisco International- Los Angeles International	19
Hollywood-Burbank-San Francisco International	10
San Francisco International-Sacramento	2

United's vice president testified that said service is performed under contract with the shippers served. He also testified that said service would not be provided to any shipper that United could not enter into a contract with. The witness also testified

that he would be willing to enter into a contract with any member of the shipping public who desired to utilize the services his company provides.

If the certificate is granted United intends to publish airport-to airport rates since it is only seeking authority as an express corporation between airports. United's apparent theory is that the express authority is necessary only for a portion of the operation, namely the transportation via an air carrier and that the ground transportation performed in its motor vehicles from origin to airport and from airport to destination is performed pursuant to its highway contract carrier permit and is exempt from minimum rate regulation pursuant to the exemption granted to it and other carriers by Decision No. 65794. Said decision authorized applicant, along with certain other permitted carriers, to depart from observance of the rates, rules and regulations in the Commission's various minimum rate tariffs otherwise applicable to services performed in connection with the transportation of checks, drafts, and/or money orders (moving in process of clearance between banks and/or clearing houses), legal documents, business records, audit media and tabulation cards when transported in vehicles not exceeding a licensed weight of 4,000 pounds.

With respect to its baggage type operation, applicant offers an expedited service wherein it transports shipments from origin to ultimate destination within a specified period of time. In order to provide said service it is necessary to utilize both ground and air transportation. If we accept the theory advanced by applicant we would, in effect, be saying that the complete service could not be performed by an express corporation, and would allow applicant to discriminate between its customers by authorizing it

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to publish airport-to-airport rates only, allowing it to negotiate the amounts charged for ground pickup and delivery service.

Three public witnesses testified on behalf of the applicant. They represented businesses which have used applicant's service and desire to continue the use of such service.

As of December 31, 1969, applicant indicated a net worth of \$335,884 and its net profit from all operations during 1969 was \$28,801.

A motion to dismiss the application was made by applicant in its brief on two grounds. First, and primarily, it moves to dismiss the application on the grounds that the air courier service performed by it, and proposed to be provided by it in the future, is a private contract service not subject to regulation by this Commission by reason of any provision of the Constitution of the State of California or by reason of any section of the Public Utilities Code of the State of California, and that therefore no certificate as an express corporation is required by it to provide such contract air courier service. Second, it moves in the alternative to dismiss the application on the grounds that if the Commission should ultimately and lawfully determine that such air courier service is in fact a common carrier service, then the Commission should find and conclude that such service is authorized by the statewide certificate of the applicant as a freight forwarder of specified commodities utilizing the underlying services of air common carriers.

With respect to its contention that the service provided is a private contract service, applicant points out, and the evidence discloses, that air courier service is provided to patrons only under long-term negotiated contracts with 30-day cancellation provisions

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running to each party with the exception of possible trial shipments to determine the feasibility for negotiating a permanent contract relationship. "The common law test of common carriage requires an unequivocal intention to dedicate property to public use, and the 'substantial restrictiveness' test formerly attempted to be applied by the Commission is not sufficient to establish that a carrier is a common carrier in the absence of such unequivocal intention to dedicate its property." (Talsky v. Public Utilities Commission, 56 Cal.2d 151 (1961).) The testimony of applicant's vice president discloses that applicant is willing to enter into a contract with anyone who desires the type of service offered by applicant. "Where a carrier is willing to the extent of his facilities and within the limitations of his equipment, to serve anyone who will comply with the requirement that he enter into a contract governing the performance of the transportation, he is nonetheless a common carrier even though he may refuse to serve those who will not enter into such agreement." (Wayne F. Maloney, 42 CRC 69 (1939).) The argument advanced by applicant that the service is a contract service is not convincing and the motion to dismiss on said grounds will be denied.

With respect to the contention that the service proposed is authorized by applicant's freight forwarder certificate, applicant argues that the sole distinction to be made between Section 219 (definition of Express Corporation) and Section 220 (definition of Freight Forwarder) is the requirement contained in Section 220 that such traffic must move at the tariff rate of the underlying carrier. Applicant points out that it does now, and proposes in the future, in all instances to pay the air common carrier its tariff rate for the transportation of the courier and his baggage including any

excess baggage charges levied under the tariff. Because of this applicant asserts that the finding in MPA Courier Corporation and American Courier Corporation, Decision No. 76236, dated September 30, 1969 relating to the necessity for express corporation authority is erroneous in that it is based on the incorrect assumption that the tariff rate will not be paid to the air common carrier. Decision No. 76236 is not based on an incorrect assumption as applicant asserts. Said decision states "The baggage operation contemplates payment not of any freight tariff rate for the property being shipped but rather a payment of a passenger fare, the baggage being transported as an incident thereof and without specific charge." Section 220 of the Public Utilities Code (freight forwarder definition) contemplates the payment of the common carrier's tariff rate for the property being shipped rather than the payment of some other tariff rate, such as a passenger fare, as is the case in the instant application. Here again applicant's argument is not convincing and the motion to dismiss on said grounds will be denied.

American Courier Corporation opposes a grant of the authority requested on the grounds that the traffic presently available is not sufficient to support additional certificated express corporation operations. At the conclusion of applicant's presentation protestant made a motion that the application be dismissed, which was taken under submission. Said motion will be denied.

The staff assisted in the development of the record through examination of applicant's witnesses. In its brief it requested a statement as to the extent surface transportation may be performed by an express corporation. "An express corporation is limited by statute to transportation over the lines of a common carrier, and

such common carrier must be properly authorized." (20th Century Delivery Service, Inc., and Cannonball Express and Messenger Co. (1948) 48 Cal.P.U.C. 76.)

After consideration the Commission finds that:

1. United presently holds a certificate of public convenience and necessity as a freight forwarder and a highway contract carrier permit.

2. United utilizes the lines of common carriers by air in the movement of property by either tendering the property to the airline as air freight or by having the property transported as baggage accompanying an employee who has purchased a passenger ticket.

3. Prior to the issuance of Decision No. 76236 on September 30, 1969, United believed the operations, for which authority is requested herein, were exempt from regulation.

4. Service is not provided to any shipper unless the shipper will enter into a contract with United.

5. United will enter into a contract with any member of the shipping public who desires to utilize United's service.

6. When property is transported as baggage, United does not pay any freight tariff rate for the property being transported, but rather a payment of a passenger fare, the baggage being transported as an incident thereof and without specific charge.

7. The pickup and delivery service by motor vehicle from and to the airport is an integral part of the service offered by United.

8. For all practical purposes the service to be conducted by United would not be a new service but the continuation of a service which preceded that being provided by American Courier Corporation.

9. Public convenience and necessity require that a certificate of public convenience and necessity to operate as an express corporation be issued to United.

Based upon the above findings the Commission concludes that:

1. American Courier Corporation's motion to dismiss the application should be denied.

2. United's motion to dismiss the application should be denied.

3. The application should be granted as set forth in the ensuing order.

United Clearings, 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.

Since an express corporation is limited by statute to transportation over the lines of a common carrier, United Clearings, Inc. is hereby placed on notice that if it desires to perform the pickup and delivery service beyond the limits set forth in Section 213 of the Public Utilities Code, it should apply for appropriate common carrier authority or in the alternative engage another carrier holding appropriate authority to perform said pickup and delivery service.



O R D E R

IT IS ORDERED that:

1. The motions to dismiss are denied.

2. A certificate of public convenience and necessity is hereby granted to United Clearings, Inc., authorizing it to operate as an express corporation as defined in Section 219 of the Public Utilities Code by air and land common carrier as set forth in Appendix A attached hereto and made a part hereof.

3. In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations. Failure so to do may result in a cancellation of the operating authority granted by this decision.

- (a) Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. Applicant is placed on notice that, if it accepts the certificate of public convenience and necessity herein granted, it will be required, among other things, to file annual reports of its operations.
- (b) Within one hundred twenty days after the effective date hereof, applicant shall establish the service herein authorized and file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than ten days after the effective date of this order on not less than ten days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the establishment of the service herein authorized.
- (d) 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. 117.

(e) Applicant shall comply with the requirements of the Commission's General Order No. 84-Series for the transportation of collect on delivery shipments. If applicant elects not to transport collect on delivery shipments, it shall make the appropriate tariff filings as required by the General Order.

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

Dated at San Francisco, California, this 30<sup>th</sup> day of MARCH, 1971.

[Signature]  
Chairman

[Signature]  
Vernon L. Sturgen

[Signature]  
Commissioners

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

United Clearings, Inc., by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to operate as an express corporation as defined in Section 219 of the Public Utilities Code, via the lines of air and land common carriers between all points and places within the State of California, subject to the following limitations:

1. The authority is limited to the following commodities: business records, audit media, tabulation cards, data processing materials, checks, drafts, securities and transit items.

2. Transportation by land common carriers is authorized only in conjunction with prior or subsequent transportation by an air common carrier except that in case of an emergency, such as an airport being closed because of weather conditions which would curtail the operations of air common carriers, land common carriers may be used to perform transportation between airports.

3. United Clearings, Inc. shall establish door-to-door rates for service between all points of collection and distribution.

Issued by California Public Utilities Commission.

Decision No. 78484, Application No. 51794.