

Decision No. 81774

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
LOOMIS COURIER SERVICE, INC., a
corporation, for revocation of its
certificates of public convenience
and necessity.

Application No. 52854
(Filed September 10, 1971)

In the Matter of the Application of
UNITED CLEARINGS, INC., a corporation,
for an order cancelling its certifi-
cates of public convenience and
necessity as a freight forwarder and
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. 52964
(Filed November 2, 1971)

Application of AMERICAN COURIER
CORPORATION, a corporation, for an
order of the Commission suspending
its certificates of public conve-
nience and necessity to operate as
an express corporation and as a
freight forwarder of special commod-
ities between points in the State of
California, or, in the alternative,
for an immediate order revoking and
setting aside supplemental order
entered in Decision No. 78987,
dated August 10, 1971, in
Application No. 51694 and related
matters and Decision No. 79081,
dated August 24, 1971, in
Application No. 51794.

Application No. 52986
(Filed November 9, 1971)

In the Matter of the Application of
LOOMIS COURIER SERVICE, INC., a
California corporation, to extend
freight forwarder service.

Application No. 52136

In the Matter of the Application of
LOOMIS COURIER SERVICE, INC., a
corporation, for a Certificate of
Public Convenience and Necessity to
Operate as an Express Corporation.

Application No. 51694

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

Application of AMERICAN COURIER
CORPORATION, a corporation, for a
certificate of public convenience
and necessity to operate as an
express corporation of special
commodities between points in the
State of California.

Application No. 51458

Application of AMERICAN COURIER
CORPORATION, a corporation, for a
certificate of public convenience and
necessity to operate as a freight
forwarder of special commodities
between points in the State of
California.

Application No. 50963

Handler, Baker & Greene, by Marvin Handler, Attorney
at Law, for Loomis Courier Service, Inc., and
Russell & Schureman, by R. Y. Schureman, Attorney
at Law, for United Clearings, Inc., applicants.
Knapp, Gill, Hibbert & Stevens, by Karl K. Roos,
Attorney at Law, for American Courier Corporation,
applicant in Application No. 52936, interested
party in Applications Nos. 52854 and 52964.
Silver, Rosen & Johnson, by John Paul Fischer,
Attorney at Law, for MDS Courier Services, Inc.,
protestant.
Janice E. Kerr, Attorney at Law, for the Commission
staff.

O P I N I O N

In Application No. 52854, Loomis Courier Service, Inc. (Loomis) seeks an order cancelling its certificates of public convenience and necessity to operate as a freight forwarder and express corporation. United Clearings, Inc. (United) seeks similar relief in Application No. 52964. In Application No. 52986, American Courier Corporation (American) seeks, in the alternative, an order similar to that requested by Loomis and United, or an order requiring Loomis and United to file requisite express corporation tariffs. Because of interrelated subject matter the three applications were consolidated for hearing.

A duly noticed public hearing was held in these consolidated matters before Examiner Donald B. Jarvis in San Francisco on January 25, 26, and 27, 1972. The matter was submitted subject to the filing of briefs, which were filed by May 30, 1972.

These applications are another chapter in the continuing effort of Loomis and United to avoid public utility (as distinguished from permitted carrier) regulation by the Commission. The gist of Loomis' and United's position is that if the Commission does not grant the relief which they request: (1) They may be compelled to acquire highway common carrier operating authority for the bulk of their operations, which they presently conduct under highway carrier permits. It is alleged that highway common carrier operations would be deleterious because they would be required to publish a standardized tariff, which they claim it is virtually impossible to do, for transportation which is presently exempt from the Commission's minimum rate orders. (2) In the alternative, they will be compelled to give up some of their combination air operations.

American takes the position that it can operate under any authority required by the Commission, but it should be treated the same as Loomis and United so that it will not be placed at a competitive disadvantage. Protestant, MDS Courier Services, Inc. (MDS), opposes granting the applications. MDS contends that previous Commission decisions requiring or granting Loomis, United, and American freight forwarder and express corporation operating authority are correct; that the Commission may not disregard the applicable statutes which require such operating authority; and that operations can be practically and profitably conducted under the required operating authorities. The Commission staff (staff) takes the position that the applications are an attempt to relitigate matters decided adversely to the applicants in previous, final decisions of the Commission; that there are no changed circumstances which would warrant conclusions different from those in the previous decisions; and that, insofar as the applications seek cancellation of public utility operating authority, they should be denied.

The material issues presented are: (1) Has the character of Loomis', United's, and American's courier operations, which encompass ground transportation in combination with air freight or air baggage operations, been determined in prior final decisions of the Commission? (2) If prior final Commission decisions requiring and granting Loomis, United, and American freight forwarder and air express corporation operating authority are presently controlling, has there been a sufficient change of circumstances since those decisions to warrant their modification? (3) If Loomis, United, and American are required to conduct their combination ground transportation - air freight or air baggage operations under freight forwarder or express corporation operating authority, should they be required to publish door-to-door or airport-to-airport rates?

Loomis, United, and American presently hold highway contract carrier permits. Loomis and American also hold radial highway common carrier permits.

We are here concerned with some of the transportation which applicants refer to as courier operations. These operations consist of the transportation of business records and documents such as cancelled checks, drafts and money orders in the process of clearing, inventory records, sales records, tabulation cards, etc. In courier operations, applicants generally contract with a customer to provide pickup and delivery at specified times. The material is picked up at a branch of a bank or other commercial establishment and taken to a central point for recording or processing. In a reverse movement material from the central point is transported to the branches. There are four types of courier operations:

- (1) Operations which involve only ground transportation.
- (2) Operations which involve ground transportation and chartered aircraft.
- (3) Operations which involve ground transportation in combination with air freight transported by an air common carrier.
- (4) Operations which involve ground transportation in combination with an employee of the transporting carrier purchasing an airline ticket on an air common carrier and having the material transported as incidental baggage. This proceeding directly relates to ground transportation in combination with air freight or air baggage operations.^{1/}

^{1/} No issue was raised with respect to exclusive ground transportation operations or ground transportation in combination with chartered aircraft. It is possible that this decision may have indirect effects on these operations. The Commission expresses no opinion, nor will any findings be made, about these operations.

In Decision No. 65794^{2/} (1963 unreported) the Commission granted Loomis and United, among others, an exemption from minimum rates in connection with their exclusively land courier operations conducted under highway permit carrier operating authority. American was granted a similar exemption in 1969. (MPA Courier Corp. and American Courier Corp. (1969) 70 CPUC 204.)^{3/} In 1965 Loomis filed Application No. 47373 which sought a certificate of public convenience and necessity to operate as a freight forwarder. The freight forwarder certificate was requested to cover ground transportation in combination with air common carriers. The Commission granted the certificate in Decision No. 70507 entered on March 29, 1966. Decision No. 70507 indicated that:

"Applicant requested a determination of whether its operation is that of a contract carrier or a freight forwarder and of whether the Commission should impose rate regulation. Points and authorities were filed on the legal issues involved." (D. 70507, p. 2.)

The Commission considered the question of the nature of Loomis' ground-air operations and made, in part, the following findings and conclusions:

^{2/} Case No. 5432, Pets. 271, 272; Case No. 5435, Pets. 40, 41; Case No. 5439, Pets. 22, 23; Case No. 5441, Pets. 62, 63.

^{3/} American subsequently purchased the operations of MPA.

"Findings

"The Commission finds that:

"1. Applicant is a California corporation having authority from this Commission to perform services as a carrier of property for compensation throughout the State pursuant to highway contract carrier and city carrier permits. It has been providing service as proposed by the application continuously since February 1, 1965 under said permits.

* * *

"3. Applicant is collecting individual shipments of property at varied points in this State and transporting such shipments by motor vehicle to nearby airports, consolidating said shipments into larger shipments, placing as consignor the consolidated shipments on air common carriers for transportation to one of the other points, receiving said shipments as consignee at the destination, breaking bulk thereat and thereafter delivering the individual shipments by motor vehicle. All transportation at the point of origin and at the point of destination is performed by applicant's employees. Transportation by air is at the air common carrier's applicable tariff rates and the air carrier's rates are paid by applicant. Applicant charges and collects from the customer for whom the service is performed, rates for the overall service and includes said air carrier's tariff rates. Said rates have no relation to the air carrier's tariff rates.

* * *

"5. Applicant performs and will perform the proposed service for any responsible person or company desiring to use the service and willing to pay the negotiated rates therefor.

"6. Applicant is operating as a freight forwarder by consolidating small shipments into single large movements and by regularly using air or land common carriers to provide the necessary transportation throughout the State of California. Public convenience and necessity require that applicant be granted a certificate as a freight forwarder and that it be required to file tariffs.

"Conclusions

"Based on the foregoing findings the Commission concludes that:

"1. Applicant is rendering service as a freight forwarder as defined in Section 220 of the Public Utilities Code, using air and land common carriers as its underlying common carriers for service between points in California.

"2. As a freight forwarder applicant is required by law to file tariffs setting forth the rates, rules and regulations applicable to the service it provides.

"3. The Commission has jurisdiction over applicant's proposed operations considered herein. . . ." (D. 70507, pp. 5-6.) No petition for rehearing or petition for a writ of review was filed in connection with Decision No. 70507. It became final in 1966.

United filed an application, similar to Loomis', for freight forwarder operating authority in 1965. (Application No. 47692.) The application was granted in Decision No. 70161 entered on January 4, 1966, as amended in Decision No. 73116 entered on September 26, 1967. Decisions Nos. 70161 and 73116 had findings and conclusions similar to those in Decision No. 70507. No petition for rehearing or petition for writ of review was filed in connection with Decision No. 73116. It became final in 1967.

Decisions Nos. 70507, 70161, and 73116 did not distinguish between air freight and air baggage operations.^{4/}

Subsequently, American filed Application No. 50884, and related applications, seeking freight forwarder operating authority.^{5/} In considering Application No. 50884, the Commission distinguished between the air freight and baggage operations:

"In its brief American questions whether or not this Commission has jurisdiction over freight forwarders utilizing the services of an air carrier. The brief contends that air carriers are not included in the definition of a common carrier set forth in Section 211 and therefore questions whether, in the light of Section 203 of the Public Utilities Code, a consolidation and breakbulk service utilizing air carriage can be considered a freight forwarder operation requiring certification. Section 211 of the Public Utilities Code begins with the following:

"'Common Carrier' includes:" (Emphasis supplied.)

The word 'includes' does not mean that the common carriers listed are the only common carriers. Section 220 of the Public Utilities Code defines a Freight Forwarder as follows:

"'Freight Forwarder' means any corporation or person who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the property via the line of any common carrier at the tariff rates of such carrier or who receives such property as consignee thereof." (Emphasis supplied.)

The word 'any' means not only those common carriers listed in Section 211 but also any common carrier included in Cal. Const. Article XII Sec. 17. A commercial airline is a common carrier within the purview of this Section.

^{4/} Decision No. 70161 made the certificate applicable to air charter operations, but this provision was deleted in Decision No. 73116.

^{5/} Loomis appeared as a protestant in the proceeding.

"During the course of the hearing the question arose as to whether or not the baggage operation conducted by MPA and American is a freight forwarder operation as defined by Section 220 of the Public Utilities Code. The baggage operation contemplates payment not of any freight tariff rate for the property being shipped but rather the payment of a passenger fare, the baggage being transported as an incident thereof and without specific charge. It appears therefore that the baggage operation is not an operation meeting all the criteria of the definition contained in Section 220 of the Public Utilities Code. Although the baggage operation is not that of a freight forwarder this does not mean that such operation is not within the jurisdiction of this Commission. Section 219 of the Public Utilities Code defines an Express Corporation as follows:

"Express corporation" includes every corporation or person engaged in or transacting the business of transporting any freight, merchandise, or other property for compensation on the line of any common carrier or stage or auto stage line within this State."

The baggage operation meets all the criteria of said definition." (MPA Courier Corp. and American Courier Corp. (1969) 70 CPUC 203, 206-07.)

The Commission found in part:

"1. That portion of MPA's and American's operation wherein property is tendered to air common carriers as air freight meets all of the requisites of the definition of a freight forwarder as defined in Section 220 of the Public Utilities Code.

"2. That portion of MPA's and American's operation wherein property is transported as baggage accompanying an employee traveling as a passenger does not meet all of the requisites of the definition of a freight forwarder as defined in Section 220 of the Public Utilities Code." (70 CPUC at p. 203.)

American was granted a freight forwarder certificate for those portions of its operations which were within the purview of the statutory definition of freight forwarder. American petitioned for rehearing. Among the grounds for rehearing was that it should have been granted express corporation operating rights in the light of the findings. The Commission entered an Order Amending Decision and Denying Rehearing. (Decision No. 76434, unreported, entered November 18, 1969.) Decision No. 76434, among other things, granted American express corporation operating authority.

As a consequence of the MPA decision Loomis and United filed applications for certificates of public convenience and necessity to operate as express corporations in connection with their baggage operations. (Applications Nos. 51794, 51694, 52136.) The Commission granted Loomis and United express corporation operating rights. (Decision No. 78585 (Loomis) and Decision No. 78484 (United).)

United, in its application for express corporation operating authority, again raised the contention that express corporation operating authority was not necessary for its baggage operations. The contention was considered by the Commission.

"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 running to each party with the exception of possible trial shipments to determine the feasibility for negotiating a permanent contract relationship. '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." (United Clearings, Inc. (1971) 72 CPUC 118, 120-22.)

The Commission found that United's baggage operations were those of an express corporation and granted it express corporation operating authority.

The decisions which granted Loomis, United, and American express corporation operating authority required the publication of door-to-door tariff rates.

American published and filed with the Commission an Air Freight Forwarder and Express Tariff based on door-to-door rates. Loomis and United published air freight forwarder tariffs.^{6/} Loomis and United sought, and were granted, extensions of time in which to file their express corporation tariffs. While the extensions were pending, they filed the instant applications. The extensions of time have been continued pending the disposition thereof. (Decisions Nos. 80130, 80131.) American filed its present application and in conjunction therewith sought to have its Air Freight Forwarder and Express Tariff suspended. In order to equalize the competitive situation among the parties the Commission authorized American to suspend its express corporation tariff. (Decision No. 79517.) The suspension has been continued during the pendency of these consolidated proceedings. (Decision No. 80132.)

Loomis and United contend that the previous Commission decisions, holding their air freight and baggage operations require freight forwarder and express corporation operating authority, are wrong. They assert that they are private, contract carriers and not subject to regulation under the Public Utility Act. They assert that the Commission has jurisdiction to modify the previous decisions under Public Utilities Code Section 1070 and changed circumstances.

^{6/} There is a question of whether these tariffs are in compliance with the authorizing decisions because they contain airport-to-airport rates.

The primary thrust of Loomis' and United's arguments is that their all ground transportation service is presently being operated under contract carrier permit authority with an exemption from minimum rates; that in order to operate as an air freight forwarder or air express corporation it is necessary to operate the combination ground transportation as a highway common carrier rather than a highway permit carrier; and that the result of this will be to change the character of their operations to one which is not practical.

Freight forwarders and express corporations operate over the lines of other common carriers, except for pickup and delivery, the limits of which do not include territory in excess of three miles from the corporate limits of any city or from the post office of an unincorporated point. (Pub. Util. Code §213; Pacific Southwest Railroad Assn. v California Motor Express, Ltd. (1946) 46 CRC 509, 515; Investigation of Kagarise, et al. (1940) 42 CRC 675, 684-86; Valley Express Co. v Carley & Hamilton, Inc. (1938) 41 CRC 327, 336; Southern Pacific Co. v Stanbrough, et al. (1932) 37 CRC 766, 771.) To the extent Loomis' and United's pickups and deliveries in the air-ground courier operations are in excess of three miles of an appropriate incorporated city or post office in an unincorporated area, it would be necessary to have these operations conducted by a common carrier. (Investigation of 20th Century Delivery Service, Inc. (1948) 48 CRC 78, 82; Pacific Freight Lines v Valley Motor Lines, Inc. (1941) 43 CRC 559, 563; Pacific Freight Lines v Lawrence Warehouse Company (1932) 37 CRC 199, 203.)

Loomis and United contend that they would be compelled to obtain highway common carrier authority^{7/} to conduct some of the ground operations; that it would be necessary for a highway common carrier to publish a tariff for these operations; and that it is not practical to publish such a tariff.

The questions of whether the air freight and air baggage operations of Loomis and United constitute common or contract carriage and the practicality of publishing a common carrier tariff therefor have been resolved against them in the decisions of the Commission, heretofore enumerated, which have become final. Unless there has been a material change in circumstances since the previous Commission decisions, Loomis and United are bound thereby.

(Petitions of Desert Express, etc. (1957) 56 CPUC 1; Application of Southern Pacific Co. (1969) 70 CPUC 150; Application of Southern Pacific Co. (1964) 62 CPUC 649.)

The primary point upon which Loomis and United base their contention of changed circumstances is the Commission's decision in Investigation of Brinks, Inc. (1971), unreported, Decision No. 79027 in Case No. 9229. Brinks was an investigation on the Commission's own motion to determine whether Brinks, Inc. was operating as an express corporation without appropriate operating authority from the Commission. The investigation never went to hearing. It was discontinued in Decision No. 79027, which held that "On the basis of the facts disclosed by our staff we find that there is insufficient evidence on which to make a finding of public utility status and thus no reason to continue the course of this proceeding."

^{7/} They contend it would not be economical or practical to utilize a third party common carrier to move the expedite type of shipments here involved.

There is nothing in this record to indicate that the facts presented are the same as those in Brinks. Just as Loomis correctly contends^{8/} that evidence adduced by protestant MDS about its operations cannot be used as the sole basis for a finding that Loomis conducted similar operations, so too, Loomis and United cannot rely on Brinks without establishing substantial similarity. Furthermore, contemporaneous with the entry of this decision, the Commission has instituted an investigation upon its own motion to determine whether Brinks is conducting freight forwarder or express corporation operations without authority from this Commission.

The contention that public utility operating authority should not be required for the air courier operations here under consideration because it is impractical to publish tariffs therefor has no merit. The record indicates that MDS and American have published such tariffs. Although Loomis and United contend that MDS's operations are somewhat different from theirs, the same contention is not made with respect to American. It is possible to prepare a tariff which gives recognition to the volume shipper as well as the smaller one on a consolidated air-ground courier movement.

Loomis and United also contend that, if the Commission does not find that they may operate without freight forwarder and express corporation operating authority, the Commission should authorize them to publish airport-to-airport rates. There is no merit in this contention. Where Loomis and United act as a freight forwarder or express corporation they must assume "the characteristic burdens of the transportation business." (United States v Drum (1962) 368 US 370, 375.) It has been held that:

^{8/} Loomis Reply Brief, pp. 10-11.

"A freight forwarder is one who in the ordinary course of business assembles and consolidates small shipments into a single lot, assumes responsibility for the transportation of such property from a point of receipt to a point of destination, utilizes the services of carriers by rail, water or motor vehicle to help accomplish the movement, breaks the consolidated shipment up into its component parts, and distributes the goods to their destination point." (Emphasis added.) (Household Goods Carrier's Bureau v United States (1968 ND Cal) 288 F Supp 641, 642.)

An express corporation's service also encompasses complete transportation from pickup to delivery. (Investigation of Frost (1928) 31 CRC 668, 670.) Authorization of airport-to-airport rates would be improper because such rates would not cover all of the transportation involved.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. In 1963, the Commission granted Loomis and United, among other things, an exemption from minimum rates in connection with their exclusively land courier operations conducted under highway permit carrier operating authority in Decision No. 65794. The Commission granted a similar exemption to American in 1969. (MPA Courier Corp. and American Courier Corp. (1969) 70 CPUC 204.)

2. In 1965, Loomis filed Application No. 47373 which sought a certificate of public convenience and necessity to operate as a freight forwarder. The freight forwarder certificate was requested to cover ground transportation in combination with air common carriers. The Commission granted the certificate in Decision No. 70507 entered on March 29, 1966. Decision No. 70507 indicated that:

"Applicant requested a determination of whether its operation is that of a contract carrier or a freight forwarder and of whether the Commission should impose rate regulation. Points and authorities were filed on the legal issues involved." (D. 70507, p. 2.)

The Commission considered the question of the nature of Loomis' ground-air operations and made, in part, the following findings and conclusions:

"Findings

"The Commission finds that:

"1. Applicant is a California corporation having authority from this Commission to perform services as a carrier of property for compensation throughout the State pursuant to highway contract carrier and city carrier permits. It has been providing service as proposed by the application continuously since February 1, 1965 under said permits.

* * *

"3. Applicant is collecting individual shipments of property at varied points in this State and transporting such shipments by motor vehicle to nearby airports, consolidating, said shipments into larger shipments, placing as consignor the consolidated shipments on air common carriers for transportation to one of the other points, receiving said shipments as consignee at the destination, breaking bulk thereat and thereafter delivering the individual shipments by motor vehicle. All transportation at the point of origin and at the point of destination is performed by applicant's employees. Transportation by air is at the air common carrier's applicable tariff rates and the air carrier's rates are paid by applicant. Applicant charges and collects from the customer for whom the service is performed, rates for the overall service and includes said air carrier's tariff rates. Said rates have no relation to the air carrier's tariff rates.

* * *

"5. Applicant performs and will perform the proposed service for any responsible person or company desiring to use the service and willing to pay the negotiated rates therefor.

"6. Applicant is operating as a freight forwarder by consolidating small shipments into single large movements and by regularly using air or land common carriers to provide the necessary transportation throughout the State of California. Public convenience and necessity require that applicant be granted a certificate as a freight forwarder and that it be required to file tariffs.

"Conclusions

"Based on the foregoing findings the Commission concludes that:

"1. Applicant is rendering service as a freight forwarder as defined in Section 220 of the Public Utilities Code, using air and land common carriers as its underlying common carriers for service between points in California.

"2. As a freight forwarder applicant is required by law to file tariffs setting forth the rates, rules and regulations applicable to the service it provides.

"3. The Commission has jurisdiction over applicant's proposed operations considered herein. . . ."
(D. 70507, pp. 5-6.)

3. United filed an application, similar to Loomis', for freight forwarder operating authority in 1965. (Application No. 47692.) The application was granted in Decision No. 70161 entered on January 4, 1966, as amended in Decision No. 73116 entered on September 26, 1967. Decisions Nos. 70161 and 73116 had findings and conclusions similar to those in Decision No. 70507.

4. Decisions Nos. 70507, 70161, and 73116 did not distinguish between air freight and air baggage operations.

5. Subsequent to the Loomis and United applications, American filed Application No. 50884, and related applications, seeking freight forwarder operating authority. In considering Application No. 50884, the Commission distinguished between the air freight and baggage operations:

"In its brief American questions whether or not this Commission has jurisdiction over freight forwarders utilizing the services of an air carrier. The brief contends that air carriers are not included in the definition of a common carrier set forth in Section 211 and therefore questions whether, in the light of Section 203 of the Public Utilities Code, a consolidation and breakbulk service utilizing air carriage can be considered a freight forwarder operation requiring certification. Section 211 of the Public Utilities Code begins with the following:

"'Common Carrier' includes:' (Emphasis supplied.)

The word 'includes' does not mean that the common carriers listed are the only common carriers. Section 220 of the Public Utilities Code defines a Freight Forwarder as follows:

"'Freight Forwarder' means any corporation or person who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the property via the line of any common carrier at the tariff rates of such carrier or who receives such property as consignee thereof.' (Emphasis supplied.)

The word 'any' means not only those common carriers listed in Section 211 but also any common carrier included in Cal. Const. Article XII Sec. 17. A commercial airline is a common carrier within the purview of this Section.

"During the course of the hearing the question arose as to whether or not the baggage operation conducted by MPA and American is a freight forwarder operation as defined in Section 220 of the Public Utilities Code. The baggage operation contemplates payment not of any freight tariff rate for the property being shipped but rather the payment of a passenger fare, the baggage being transported as an incident thereof and without specific charge. It appears therefore that the baggage operation is not an operation meeting all the criteria of the definition contained in Section 220 of the Public Utilities Code. Although the baggage operation is not that of a freight forwarder this does not mean that such operation is not within the jurisdiction of this Commission. Section 219 of the Public Utilities Code defines an Express Corporation as follows:

"Express corporation" includes every corporation or person engaged in or transacting the business of transporting any freight, merchandise, or other property for compensation on the line of any common carrier or stage or auto stage line within this State."

The baggage operation meets all the criteria of said definition." (MPA Courier Corp. and American Courier Corp. (1969) 70 CPUC 203, 206-07.)

The Commission found in part:

"1. That portion of MPA's and American's operation wherein property is tendered to air common carriers as air freight meets all of the requisites of the definition of a freight forwarder as defined in Section 220 of the Public Utilities Code.

"2. That portion of MPA's and American's operation wherein property is transported as baggage accompanying an employee traveling as a passenger does not meet all of the requisites of the definition of a freight forwarder as defined in Section 220 of the Public Utilities Code."
(70 CPUC at p. 208.)

American was granted a freight forwarder certificate for those portions of its operations which were within the purview of the statutory definition of freight forwarder. American petitioned for rehearing. Among the grounds for rehearing was that it should have been granted express corporation operating rights in the light of the findings. The Commission entered an Order Amending Decision and Denying Rehearing. (Decision No. 76434, unreported, entered November 18, 1969.) Decision No. 76434, among other things, granted American express corporation operating authority.

6. As a consequence of the MPA decision Loomis and United filed applications for certificates of public convenience and necessity to operate as express corporations in connection with their baggage operations. (Applications Nos. 51794, 51694, 52136.) The Commission granted Loomis and United express corporation operating rights. (Decision No. 78585 (Loomis) and Decision No. 78484 (United).)

7. United, in its application for express corporation operating authority, again raised the contention that express corporation operating authority was not necessary for its baggage operations. The contention was considered by the Commission.

"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 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." (United Clearings, Inc. (1971) 72 CPUC 118, 120-22.)

The Commission found that United's baggage operations were those of an express corporation and granted it express corporation operating authority.

8. The decisions which granted Loomis, United, and American express corporation operating authority required the publication of door-to-door tariff rates.

9. American published and filed with the Commission an Air Freight Forwarder and Express Tariff based on door-to-door rates. Loomis and United published air freight forwarder tariffs. Loomis and United sought, and were granted, extensions of time in which to file their express corporation tariffs. While the extensions were pending, they filed the instant applications. The extensions of time have been continued pending the disposition thereof. (Decisions Nos. 80130, 80131.) American filed its present application and in conjunction therewith sought to have its Air Freight Forwarder and Express Tariff suspended. In order to equalize the competitive situation among the parties the Commission authorized American to suspend its express corporation tariff. (Decision No. 79517.) The suspension has been continued during the pendency of these consolidated proceedings. (Decision No. 80132.)

10. In Investigation of Brinks, Inc. (1971), unreported, Decision No. 79027 in Case No. 9229, the Commission discontinued an investigation on its own motion to determine whether Brinks, Inc. was operating as an express corporation without proper authority. "On the basis of the facts disclosed by our staff we find that there is insufficient evidence on which to make a finding of public utility status and thus no reason to continue the course of this proceeding."

11. There is nothing in this record to indicate that the facts presented are the same as those in the Brinks decision.

12. MDS and American have published freight forwarder and express corporation tariffs for their combination ground-air freight and air baggage operations on a door-to-door basis.

13. Freight forwarders and express corporations customarily render service from a point of receipt of a shipment to a point of destination.

Conclusions of Law

1. Decisions Nos. 70507 and 78585 have become final, are in full force and effect, and Loomis is bound thereby.

2. Decisions Nos. 70161, 73116, and 78484 have become final, are in full force and effect, and United is bound thereby.

3. Decisions Nos. 76236 and 76434 have become final, are in full force and effect, and American is bound thereby.

4. There has not been a change in circumstances since the entry of Decisions Nos. 70507, 78585, 70161, 73116, 78484, 76236, and 76434 to warrant the modification or change of any of those decisions.

5. The combination ground-air freight courier operations of Loomis, United, and American require freight forwarder operating authority.

6. The combination ground-air baggage operations of Loomis, United, and American require express corporation operating authority.

7. The freight forwarder and express corporation certificates of public convenience and necessity granted to Loomis, United, or American should not be cancelled unless they discontinue those operations which require such operating authority.

8. The extension of time granted Loomis and United to file express corporation tariffs should be terminated. Loomis and United should be ordered to file such tariffs within 120 days after the effective date of the ensuing order.

9. The suspension of American's express corporation certificate and tariff should be terminated within 120 days after the effective date of the ensuing order.

10. The freight forwarder and express corporation tariffs required for the aforesaid ground-air courier operations of Loomis, United, and American should contain door-to-door rates.

O R D E R

IT IS ORDERED that:

1. The extension of time granted in Decision No. 80131 to Loomis Courier Service, Inc. to file an express corporation tariff is hereby terminated. Loomis shall file its tariff, with rates on a door-to-door basis within one hundred twenty days of the effective date of this order or discontinue those of its air-ground courier operations which require express corporation operating authority.

2. The extension of time granted in Decision No. 80130 to United Clearings, Inc. to file an express corporation tariff is hereby terminated. United shall file its tariff, with rates on a door-to-door basis within one hundred twenty days of the effective date of this order or discontinue those of its air-ground courier operations which require express corporation operating authority.

3. Decision No. 80132 which authorized the suspension of American Courier Corporation's certificate of public convenience and necessity to operate as an express corporation is hereby terminated. Within one hundred twenty days after the effective date of this order, American shall amend its express corporation tariff to make it again operative. The tariff shall provide door-to-door rates. If American does not cause its express corporation tariff to become operative within the one hundred twenty days, it shall discontinue those of its air-ground courier operations which require express corporation operating authority.

4. Applicants are entitled to no other relief in these consolidated proceedings.

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

Dated at San Francisco, California, this 21st day of AUGUST, 1973.

Veronica L. Stinson
President
William J. Stinson
[Signature]
[Signature]
Commissioners

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.