

Decision No. 85038

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Applications
of COURIER EXPRESS, INC., a
corporation, for a certificate of
public convenience and necessity
to institute a freight forwarding
service.

Application No. 53416
(Filed June 22, 1972)

In the Matter of the Application
of COURIER EXPRESS, INC., a
corporation, for a certificate of
public convenience and necessity
to institute an express corporation
service.

Application No. 53417
(Filed June 22, 1972)

AND RELATED MATTERS.

Case No. 5432
Petition for Modification
No. 706
Case No. 5439
Petition for Modification
No. 161
Case No. 5441
Petition for Modification
No. 247
(Filed June 23, 1972)

Silver, Ross, Fischer & Stecher, by John Paul
Fischer, Attorney at Law, for Courier
Express, Inc., applicant.

Russell & Schureman, by R. Y. Schureman, for
United Couriers, Inc.; Knapp, Stevens, Grossman
& Marsh, by Warren N. Grossman, Attorney at
Law, for Purolator Courier Corp.; and John L.
Glovka, Attorney at Law, for Loomis Courier
Service, Inc.; protestants.

Gerald K. Trant and J. C. Kaspar, for California
Trucking Association, interested party.
John R. Laurie, for the Commission staff.

O P I N I O N

Courier Express, Inc. (Courier) has filed Application No. 53416, which seeks a certificate of public convenience and necessity to operate as a freight forwarder. In Application No. 53417, Courier seeks a certificate of public convenience and necessity to operate as an express corporation. In Cases Nos. 5432 (Petition 706), 5439 (Petition 161), and 5441 (Petition 247), Courier seeks an exemption from minimum rates for operations under its highway contract carrier operating authority. These proceedings were consolidated for hearing because of interrelated subject matter.

Applications Nos. 53416 and 53417 were filed on June 22, 1972. The petitions for exemptions from minimum rates were filed on June 23, 1972. These matters were held in abeyance during the pendency of the Loomis case^{1/} because the Commission deemed it uneconomical and unnecessary to have the parties relitigate the same legal issues which were before it in Loomis. When the Supreme Court denied a writ of review to our Loomis decision, the matters were restored to the Commission's hearing calendar. A duly noticed public hearing was held in these consolidated matters before Examiner Donald B. Jarvis in Los Angeles on March 11 and 12, 1975, and it was submitted on the latter date.

During the course of these proceedings, Courier changed its corporate name to C EX Inc., although it continues to conduct business under the fictitious names of Courier Express, Inc. and Air Courier Express. The record will reflect the name change, but we will continue to refer to it herein as Courier to provide consistency with the pleadings and evidence herein.

^{1/} Loomis Courier Service, Inc. et al. (1973) 75 CPUC 440, review denied July 10, 1974, S.F. No. 23068.

Courier holds a highway contract carrier permit as the only operating authority granted it by this Commission. It also holds authority from the Civil Aeronautics Board to operate as an air freight forwarder in interstate air transportation.

The primary issue with respect to Courier's operations which involve only ground transportation is whether they should be exempt from minimum rates. Courier seeks authority for operations which involve ground transportation in combination with air freight transported by an air common carrier (freight forwarder) and operations which involve a Courier employee purchasing an airline ticket and having the material transported as incidental baggage (express corporation). For the purposes of this decision the term air courier service encompasses either or both types of operations.

Courier's president and chief operating officer previously worked, for 17 years, for protestant United Couriers, Inc. (United), where he progressed from a route driver to general manager of southern California operations. He formed Courier in 1966. Courier has 65 pieces of operating equipment. It employs 130 employees, 80 of whom work part-time. It operates a maintenance garage which does major and minor repairs to its vehicles as well as routine service. Courier's balance sheet, as of September 30, 1974, indicated that it had assets of \$333,528 with liabilities of \$161,467. Its gross revenue for the nine months ending September 30, 1974 was \$932,649.

Courier commenced its contract carrier operations in the Los Angeles Basin Territory, where it primarily transported shipments within the territory weighing less than 10 pounds, which were exempt from minimum rates.^{2/} Courier, in response to the needs of its

^{2/} MRT 2, Item 42, Para. 3.

customers, expanded its contract carrier operations beyond the Los Angeles Basin Territory. In addition, Courier has engaged in some air express or freight forwarding activities to satisfy the requirements of its customers.

The evidence adduced by Courier in support of its applications for express corporation and freight forwarder operating authority is of two types: (1) Evidence by shippers of the need for the proposed service and (2) evidence by shippers that they want the continuation of service presently rendered.^{3/}

The data processing officer for the United California Bank testified that the bank had formerly used protestants Loomis Courier Service, Inc. (Loomis), Purolator Courier Corp. (Purolator), and United. The bank presently uses Courier because its scheduling and service best meets the bank's needs. The bank requires three daily movements between San Diego and Los Angeles. Originally, Courier handled all three as ground movements. Because of the bank's scheduling requirements, Courier is handling one of these movements by air. In addition, the bank has shipments from Los Angeles to San Francisco. These shipments are presently picked up in Los Angeles by Courier and taken to the airport where they are shipped air freight for the bank's account. In San Francisco they are picked up by another carrier and delivered to the bank. The process is reversed for shipments from San Francisco to Los Angeles. The data processing officer testified that if Courier were granted the requested operating authority the bank would utilize it for the entire Los Angeles-San Francisco operation, and this service would better meet the needs of the bank.

^{3/} The question of unlawful operations and the effect thereof is hereinafter considered.

The assistant manager of the computer center of the Bank of California testified on behalf of Courier. He indicated that the bank presently used Courier for ground transportation in southern California. The bank finds Courier's service to be excellent and responsive to its needs. The bank presently uses United for air shipments between San Diego-Los Angeles and Los Angeles-San Francisco. United's schedules do not coincide with the bank's needs, and the bank has had to change its operations to its detriment. The bank has been unable to find another air courier service which will meet its needs. The bank believes that if Courier is granted the authority requested herein, Courier will establish an air courier operation which will meet the needs of the bank.

The accounting manager, branch-payroll-benefits, for the Title Insurance and Trust Company testified that the title company presently used Courier for local ground movements in southern California and certain interstate movements; Courier provides excellent service to the title company. It requires service between Los Angeles and the following points: San Francisco Bay Area, Sacramento, and San Diego. The title company uses the service of Loomis but is dissatisfied with it and has terminated it in most areas. The dissatisfaction stems from missed pickups and failure to inform it about delays in shipments. The accounting manager testified that if Courier were granted the authority requested, the title company would use Courier's air service operations.

The general manager of League Data Processing Service testified on behalf of Courier. He indicated that his company had a need for the movement of data processing reports by ground transportation throughout southern California and from southern California to northern California by air courier service. The company formerly used the services of United but switched to Courier when United was unable to meet its needs. In addition to ground service, Courier had recently started to provide it with air courier service from southern to northern California, which meets the needs of the company.

An assistant vice-president of Security Pacific National Bank and Union Bank's manager of central mail and motor pool testified in behalf of Courier. Their testimony may be summarized, generally, as indicating that they were using the services of one or more of the protestants for air courier service within California; that each air courier service had set schedules; that their operations were increasing to where they needed service at times when the existing air courier operations did not provide service; that if Courier were granted the authority requested it would institute service at times when the existing air couriers do not provide service; and that they would use such service.

The protestants do not seriously challenge the requested exemption from minimum rates. They do, however, contend that Courier should not be granted express corporation and freight forwarder operating authority because it lacks the requisite fitness for such authority, and public convenience and necessity do not require such a grant.

The material issues presented in these proceedings are:

- (1) Should Courier be granted an exemption from the minimum rates for operations conducted under its highway contract carrier operating authority? (2) Do public convenience and necessity require that Courier be granted freight forwarder and/or express corporation operating authority? (3) Does Courier have the requisite fitness for freight forwarder and/or express corporation operating authority?

Many permitted carriers operating ground transportation courier services have received exemptions from observance of applicable minimum rate tariffs. Each of the protestants herein has such an exemption. In Decision No. 65794, Petition of Loomis Armored Transport et al. (1963) 61 CPUC 260(unreported), the Commission found that:

"...the minimum rates from which petitioners seek exemption are rates that have been prescribed for the transportation of general commodities. In the establishment of minimum rates for such commodities, some of the more important rate factors that enter into the determination of the rates are the weight and bulk of the shipments. In contrast, the record is clear that these factors have relatively little bearing upon the rates for petitioners' services, and that the principal determinants thereof are the security and service requirements in connection with the armored car transportation and the service requirements in connection with the courier transportation. In view of these and other dissimilarities between petitioners' services and those which are subject to the minimum rate provisions in issue herein, we find that said minimum rate provisions are not appropriate minimum rates, rules and regulations for the armored car and courier services which petitioners provide. Petitioners' request for exemption of the armored services from the minimum rates will be granted. Their request for exemption of the courier services will also be granted." (Decision No. 65794 at p. 5.)

The record indicates that Courier's ground courier service operations are similar to those performed by other carriers and that it should be granted an exemption from the minimum rates for such service.

The testimony adduced by Courier indicates that public convenience and necessity require that it be granted freight forwarder and express corporation operating authority if it is fit to hold such authority. The record indicates that the air courier service provided by the protestants is not sufficient to meet all the needs of the shipping public and that if the requested authority is granted Courier's operations will help meet such needs.

The contention of lack of fitness is based upon two points: (1) Courier conducted express operations without requisite authority from the Commission. (2) Courier transported shipments as a highway contract carrier without regard to the minimum rates without securing an exemption from the Commission. Under the particular facts herein presented, we do not believe that these facts, when looked upon in the light of the entire record, indicate a lack of fitness. .

The protestants herein represent a substantial segment of the air express and air freight forwarder industry in California.^{4/} For many years the protestants, or their predecessors in interest, challenged the Commission's jurisdiction over them as express corporations and freight forwarders. (See, e.g., Loomis Courier Service, Inc. et al., supra; United Clearings, Inc. (1971) 72 CPUC 118; MPA Courier Corp., etc. (1969) 70 CPUC 203-04.) As a result of this protracted litigation, Loomis and United did not file express corporation tariffs and Purolator's was suspended until after the denial of a writ of review by the Supreme Court in the Loomis case. Thus, for a period of years the protestants were possessors of operating authority which they claimed they did not need and were conducting operations without filed or effective tariffs. As indicated, the present applications for operating authority were filed in June of 1972 and were held during the pendency of the Loomis case. During this period of time, Courier, in order to meet requests of its customers and to be competitive with other courier companies, conducted operations for which express corporation and freight forwarder operating authority was required. To hold under these circumstances, that Courier lacks fitness for the operating

^{4/} Protestant Purolator Courier Corp. acquired the operating rights of American Courier Corp. in Decision No. 82196 in Application No. 50963.

authority requested herein would be to disregard reality and glorify form over substance. (Civil Code § 3528.) A portion of Courier's showing is based upon operations which it has now been finally resolved were unlawful.^{5/}

"The general rule is that common carrier operating authority will not be granted on a showing which rests upon unlawful operations. (20th Century Delivery Service (1948) 48 CPUC 78, 84.) However exceptions have been carved out of the rule when the public interest so requires. Fleetlines, Inc. (1952) 52 CPUC 286, 294; Inglewood City Lines (1943) 44 CRC 704, 707-08; T. W. Gilboy (1942) 44 CRC 457, 459; Circle Freight Lines (1950) 49 CRC 377, 384; N. A. Gotelli (1941) 43 CRC 491, 494; E. C. Coats (1923) 23 CRC 30; cf., Holiday Airlines (1966) 66 CPUC 537, 542-43; The Gray Line Tours Company (1973) Decision No. 81036, Attachment A, p. 37 fn. 14.)" (John R. Zavaleta, etc. (1973) 75 CPUC 361, 369.)

The Commission here is confronted with a situation where the protestants, who complain of the unlawful operations, were themselves operating, for all practical purposes, without complying with applicable regulations during the period in question. A similar situation obtains with respect to Courier's operations with respect to the minimum rates. As indicated, Courier was lawfully providing courier service in the Los Angeles Basin Territory under an exemption from the minimum rates contained in MRT 2. Were it not for the consolidation of these proceedings, the requested exemptions from minimum rates would have been granted sooner. Protestants, Courier's competitors, all have exemptions from the minimum rates. We do not find lack of fitness in Courier's providing some service to meet the needs of its customers outside the Los Angeles Basin Territory without first having received authorization to deviate from the minimum rates because of the peculiar facts presented herein. In the

^{5/} However, a substantial portion of Courier's showing is based upon prospective service to be rendered if the requested operating authority is granted.

circumstances, the Commission finds that the public interest would best be served if the authority requested herein were granted.

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

Findings of Fact

1. Applications Nos. 53416 and 53417 were filed on June 22, 1972. Cases Nos. 5432 (Petition 706), 5439 (Petition 161), and 5441 (Petition 247) were filed on June 23, 1972. The Commission consolidated the matters for hearing because of interrelated subject matter. These matters were not set for hearing during the pendency of Loomis Courier Service, Inc. et al. (1973) 75 CPUC 440 because the Commission deemed it uneconomical and unnecessary to have the parties relitigate the same legal issues which were before it in Loomis. The Supreme Court denied a petition for a writ of review in Loomis on July 10, 1974 (S.F. No. 23068).

2. Courier has changed its corporate name to C EX Inc. It still continues to do business under the fictitious names of Courier Express, Inc. and Air Courier Express.

3. Courier holds Highway Contract Carrier Permit No. T95,216 issued by this Commission.

4. Courier holds authority from the Civil Aeronautics Board to operate as an air freight forwarder in interstate air transportation.

5. Courier's president and chief operating officer has 26 years of experience in courier transportation operations. Courier has 65 pieces of operating equipment. It employs 130 employees, 80 of whom work part-time. Courier operates a maintenance garage which does major and minor repairs to its vehicles as well as routine service. Courier's balance sheet, as of September 30, 1974, indicated that it had assets of \$333,528 with liabilities of \$161,467. Its gross revenue of the nine months ending September 30, 1974 was \$932,649.

6. Courier has the ability, including financial ability, to provide the service for which authority is herein requested.

7. Courier commenced contract carrier operations in 1966. It primarily transported shipments weighing less than 10 pounds within the Los Angeles Basin Territory. Such shipments were exempt from minimum rates under Item 42, paragraph 3 of MRT 2.

8. Carriers authorized to provide air courier service generally adhere to set schedules. The schedules of the presently authorized carriers do not meet all of the needs of the public for this type of service.

9. Some users of air courier service have not received adequate service from existing carriers authorized to provide such service.

10. Granting the authority requested herein would help meet the needs of the public for air courier service and is in the public interest.

11. The protestants represent a substantial segment of the air express and air freight forwarder industry in California. For many years the protestants, or their predecessors in interest, challenged the Commission's jurisdiction to regulate them as freight forwarders or express corporations. During the pendency of the protracted litigation challenging the Commission's jurisdiction, the Commission suspended the effective date of orders requiring Loomis and United to file express corporation tariffs and authorized Purolator to suspend its tariff. These suspensions were not vacated until after the Supreme Court denied a writ of review in the Loomis case on July 10, 1974.

12. During the period when protestants did not have express tariffs in effect, Courier engaged in some air courier operations to meet the needs of its customers. Under the particular facts presented, this conduct does not render Courier unfit to receive the operating authority requested.

13. Many permitted carriers which operate ground transportation courier services have received exemptions from observance of applicable minimum rate tariffs. Each of the protestants has such an exemption.

14. Courier's ground courier service operations are similar to those performed by other carriers, and it should be granted an exemption from the minimum rates for such service. The exemption would have been granted sooner but for the consolidation of these matters.

15. During the pendency of these consolidated matters, Courier, in order to be competitive and meet the needs of its customers, engaged in ground transportation of shipments weighing less than 10 pounds outside the Los Angeles Basin Territory without applying minimum rates and without authority exempting such movements from the application of the minimum rates. Under the particular facts presented this conduct does not render Courier unfit to receive the operating authority requested.

16. Public convenience and necessity require that Courier be granted a certificate of public convenience and necessity to operate as a freight forwarder by air and land carrier as set forth in Appendix A and by this reference made a part hereof.

17. Public convenience and necessity require that Courier be granted a certificate of public convenience and necessity to operate as an express corporation by air and land common carrier as set forth in Appendix B and by this reference made a part hereof.

18. We find with reasonable certainty that the projects involved in these proceedings will not have a significant effect on the environment.

Conclusions of Law

1. Courier should be granted a certificate of public convenience and necessity to operate as a freight forwarder by air and land carrier as set forth in Appendix A and by this reference made a part hereof.

2. Courier should be granted a certificate of public convenience and necessity to operate as an express corporation by air and land common carrier as set forth in Appendix B and by this reference made a part hereof.

3. Courier should be exempt from the minimum rates in connection with its ground courier operations.

Applicant is 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. 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.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to C EX Inc. authorizing it to operate as a freight forwarder as defined in Section 220 of the Public Utilities Code as more particularly set forth in Appendix A of this decision.

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

- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted.
- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than thirty days after the effective date of this order on not less than thirty days' notice to the Commission and the public, and the effective date of

the tariff filings shall be concurrent with the establishment of the authorized service.

- (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. 80-Series.
- (e) Applicant shall file with the Commission, on or before March 31 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.
- (f) 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 required by the General Order.
- (3) Applicant shall comply with the requirements of the Commission's General Order No. 100-Series and the safety rules administered by the California Highway Patrol if applicant intends to operate a motor vehicle under this authority.

3. A certificate of public convenience and necessity is granted to C EX Inc. authorizing it to operate as an express corporation as defined in Section 219 of the Public Utilities Code as more particularly set forth in Appendix B of this decision.

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

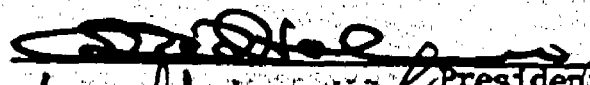
- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted.
- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than thirty days after the effective date of this order on not less than thirty days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the establishment of the authorized service.
- (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. 80-Series.
- (e) Applicant shall file with the Commission, on or before March 31 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.
- (f) 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 required by the General Order.

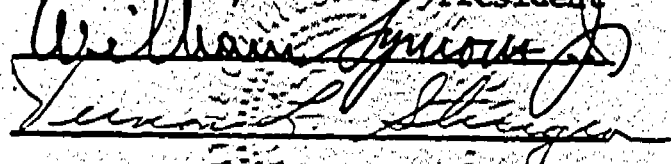
5. C EX Inc. is exempted from observance of the rates, rules, and regulations in Minimum Rate Tariff 2, Minimum Rate Tariff 19, Minimum Rate Tariff 1-B, and Minimum Rate Tariff 9-B in connection with the transportation of checks,

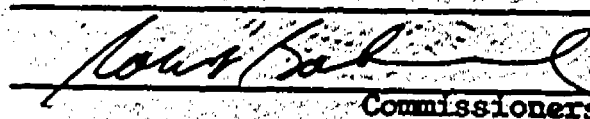
drafts, money orders, securities, transit items, sales audit items, business records, audit media, tabulation cards, data processing materials, legal documents, and printed or reproduced documents or data when transported in a vehicle not exceeding a licensed weight of 4,000 pounds. ✓

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

Dated at San Francisco, California, this 21st day of OCTOBER, 1975.



President


Commissioners


Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.

C EX INC.
doing business as
COURIER EXPRESS, INC.
AIR COURIER EXPRESS

C Ex Inc., a California corporation, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to operate as a freight forwarder as defined in Section 220 of the Public Utilities Code via the lines of air common carriers, highway common carriers and passenger stage corporations, between all points in the State of California subject to the following conditions:

- (1) The authority is limited to the following commodities: checks, drafts, money orders, securities, transit items, sales audit items, business records, audit media, tabulation cards, data processing materials, legal documents and printed or reproduced documents or data. ✓
- (2) C Ex Inc. shall establish door-to-door rates for service between all points which it is authorized to serve.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

Decision No. 85038, Application No. 53416.

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Appendix B

C EX INC.
doing business as
COURIER EXPRESS, INC.
AIR COURIER EXPRESS

Original Page 1

C Ex Inc., a California corporation, 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 common carriers, highway common carriers and passenger stage corporations, between all points in the State of California subject to the following conditions:

- (1) The authority is limited to the following commodities: checks, drafts, money orders, securities, transit items, sales audit items, business records, audit media, tabulation cards, data processing materials, legal documents and printed or reproduced documents or data. ✓
- (2) Pick-up or delivery services authorized to be performed by C Ex Inc. are limited to vehicles not exceeding a licensed weight of 4,000 pounds.
- (3) C Ex Inc. shall establish door-to-door rates for service between all points which it is authorized to serve.

(END OF APPENDIX B)

Issued by California Public Utilities Commission.

Decision No. 85038, Application No. 53417.