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Decision No. 88035 OCT 25 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operation of PACIFIC SEABOARD AIRLINES, INC., a California corporation.	Case No. 10304 (Filed April 5, 1977)

Wallace S. Fingerett, Attorney at Law, for respondent.
Henry R. Voss, for Golden West Airlines; A. S. Ross, for Metroplex Helicopter Airways; Brownell Merrell, Jr., for Pacific Southwest Airlines; and Clayton D. Wright, for Wright Airlift International, Inc.; interested parties.
Thomas F. Grant, Attorney at Law, for the Commission staff.

O P I N I O N

This is an investigation instituted on the Commission's own motion to determine whether Pacific Seaboard Airlines, Inc., dba Los Angeles Helicopter Airlines, respondent, is providing a scheduled passenger air carrier service without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation in violation of Section 2752 of the Public Utilities Code. The matter was heard April 28, 1977 before Administrative Law Judge J. E. Thompson at Los Angeles and was submitted on briefs June 17, 1977.

There is a preliminary matter to be discussed. In its closing brief respondent attached a number of exhibits including an affidavit of Laurence E. Bain, summaries of statistical data, and copies of tickets. Commission staff (staff) has moved to strike

those exhibits and the references thereto included in respondent's brief asserting that respondent is attempting to introduce new evidence for the first time for which it has failed to lay a proper foundation and on which staff would be precluded from its right to cross-examine a would-be witness sponsoring such evidence. The staff's motion is granted.

There is little dispute regarding the manner in which respondent conducts air operations, the issue presented is whether the Commission has jurisdiction to regulate those operations. Although respondent made no such assertion at the hearing nor in its opening brief, in its closing brief it contends for the first time that it was not given adequate notice of hearing in order to prepare its case. The file shows that the Order Instituting Investigation, which sets forth the time and place of hearing, was mailed to respondent and to its attorney on April 6, 1977. Additional notice of hearing was mailed to respondent and to its attorney on April 14, 1977. Respondent had at least 10 days' notice of hearing in accordance with Rule 52 of the Commission's Rules of Practice and Procedure. In any event respondent raises that issue too late, it did not request postponement or continuance at the hearing.

Findings

1. Respondent is a corporation engaged in providing a scheduled airline service with helicopter aircraft between the following points in the Los Angeles area: Los Angeles International Airport, Hollywood Burbank Airport, Van Nuys Airport, and Long Beach Municipal Airport.

2. Respondent does not hold from the Commission a certificate of public convenience and necessity authorizing passenger air carrier operations between the points specified above.

3. Respondent has filed registration with the Civil Aeronautics Board as an air taxi operator of 3-passenger Bell Helicopters performing scheduled passenger, scheduled cargo, on-demand passenger, and on-demand cargo service. It does not hold a current certificate of public convenience and necessity issued by the federal government.

4. Respondent has entered into multilateral ticketing and baggage agreements with a number of foreign and domestic air carriers through International Air Transport Association and Air Traffic Conference of America. It has also entered into bilateral agreements for ticketing and baggage exchange with American Airlines, Air Sunshine, China Airlines, and Pan American Airways.

5. Interline transportation over through routes in interstate or foreign commerce with airlines with whom respondent has agreements is performed with ticket stock of Air Traffic Conference of America and International Air Transport Association. Respondent uses its own ticket stock with respect to tickets issued at its own counters for transportation wholly over its own line.

6. At each of the airports listed in Finding 1 applicant maintains a ticket counter at which it issues timetables and tickets to all comers desiring transportation between the points that it serves.

7. Respondent holds itself out to the public at large to transport passengers by aircraft as a common carrier between the following points: Los Angeles International Airport, Hollywood Burbank Airport, Van Nuys Airport, and Long Beach Municipal Airport; and in providing such transportation operates wholly within the State of California.

8. On at least three separate occasions respondent transported passengers between points in California; which passengers were not traveling as part of an interstate journey.

9. Respondent is a corporation operating aircraft as a common carrier of passengers for compensation between points within this State.

Discussion

Respondent clearly falls within the definition of a passenger air carrier as set forth in Section 2741 of the Public Utilities Code. It is not covered by the exclusionary provisions of Section 2743 in that it does not conduct its operations pursuant to a current certificate of public convenience and necessity issued by the federal government. Its registration under Part 298 of the Economic Regulations of the Civil Aeronautics Board is not a certificate of public convenience and necessity issued by that agency.

Respondent argues that by enactment of the Federal Aviation Act (49 USCS 1301 et seq.) Congress has preempted the field of economic regulation of common carriers by aircraft, and that the regulations prescribed by the Civil Aeronautics Board for air taxi operators (14 CFR Part 298) pursuant to the powers conferred under that Act undertake to regulate the entry into the field of air carriers operating small aircraft as common carriers in intrastate commerce. It has been established that this Commission has jurisdiction to regulate intrastate air transportation of passengers by common carriers even though those same carriers are also engaged in transportation of interstate commerce subject to regulation by the Civil Aeronautics Board. The Commission first exercised its jurisdiction in Inv. Airline Fares (1951) 50 CPUC 563. The matter of the supremacy of the federal government in the field of intrastate air transportation was pleaded in a petition for review to the California Supreme Court, which petition was denied on August 2, 1951 without opinion. Petition for rehearing was denied by that court on August 30, 1951. The United States Supreme Court on

January 7, 1952 dismissed an appeal from the order denying the writ (342 U.S. 908). The same question arose in People v Western Airlines (1954) 42 C 2d 621. There the California Supreme Court recited the proceedings regarding Inv. Airline Fares (1951) 50 CPUC 563 and stated:

> "While it would seem that the right of the state commission to regulate the intrastate rates of this defendant and of others similarly situated has been judicially established and that this might be sufficient for the determination of this issue so far as this court is concerned, again we prefer, in view of the present arguments, to state the reasons why the defendant's contentions are not persuasive."

The court discussed this issue at some length and held:

> "There is no language indicating that Congress intended to preempt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the airspace outside of the state."

Petition for Rehearing in People v Western Airlines was denied by the California Supreme Court April 28, 1954; appeal dismissed by United States Supreme Court 348 U.S. 859.

In its closing brief respondent for the first time takes another and different approach. It asserts:

> "The Public Utilities Commission has failed to meet its burden of convincing proof to a reasonable certainty that Seaboard carries only a de minimis number of interstate passengers. By the Commission staff's own evidence, Seaboard has carried only three passengers whose journeys were wholly intrastate, and these passengers were members of the Commission's own staff."

Respondent then goes on to expound a theory that if the majority of passengers it has transported were through ticketed for an interstate journey via the lines of air carriers certificated by the Civil Aeronautics Board, that this Commission loses jurisdiction to regulate its intrastate passenger transportation.

In the first place, respondent misdescribes the evidence. While it is true that staff presented testimony that on three separate occasions its representatives purchased tickets from respondent and were transported by respondent, that evidence, together with other evidence such as respondent's printed timetables distributed at the ticket counters and its publication in the Official Airline Guide, shows that respondent has unreservedly and unequivocally held itself out to any and all persons to provide intrastate air transportation between the points involved. It may be that because of its interline agreements with the interstate carriers providing for confirmed advance bookings, and because respondent's aircraft will only accommodate three passengers, the majority of the passengers it has transported have been ticketed on a through interstate route. That is of no consequence. What is decisive is that respondent will transport any and all intrastate passengers within the limitations of its aircraft. Nor could it be found that the number of intrastate passengers at the airports who could avail themselves of respondent's transportation service would be insignificant. While total traffic at the respective airports and total O & D traffic between those airports and California points is not of record in this proceeding, we do receive those reports and it is within our knowledge that California intrastate passenger traffic to and from those airports is substantial; indeed, it is common knowledge among those involved with airline transportation that the Los Angeles-San Francisco Bay corridor is the most heavily travelled air segment in the United States.

We claim no jurisdiction over respondent's operations under the multilateral or bilateral agreements entered into by it for through movements beyond California. We hold, however, that this Commission does have jurisdiction over the operations of respondent in transportation of passengers solely between points in California.

Conclusions

1. Congress has not assumed control of air transportation so as to include transportation of passengers solely between points in California and not involving use of airspace outside of the state, and hence has not ousted California's control over such transportation by air carriers.

2. Respondent has violated Section 2752 of the Public Utilities Code by engaging in passenger air carrier operations in this State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation.

3. Respondent should be ordered to cease and desist from further violation of Section 2752.

O R D E R

IT IS ORDERED that Pacific Seaboard Airlines, Inc., a corporation, shall cease and desist from engaging in any operation as a passenger air carrier, as that term is defined in Section 2741 of the Public Utilities Code, unless and until it has first obtained from the Commission a certificate of public convenience and necessity authorizing such operation.

The Executive Director shall cause a copy of this order to be served upon respondent and the effective date of this order shall be twenty days after completion of such service.

Dated at San Francisco, California, this 25th day of OCTOBER, 1977.

President

Commissioners

Commissioner Robert Batinovich, being necessarily absent, did not participate in the disposition of this proceeding.