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Decision No. 92323 OCT 22 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
Emery Air Freight Corporation, a )  
Delaware corporation, for a )  
certificate of public convenience and )  
necessity to operate as a highway )  
common carrier for the transportation )  
of property in intrastate commerce. )

Application No. 59809  
(Filed July 10, 1980)

O P I N I O N

Emery Air Freight Corporation (Emery) operates as an air freight forwarder and express carrier nationally and between points in California. Emery now holds a certificate of public convenience and necessity to operate as a highway common carrier issued by Decision No. 89361 dated September 6, 1978 in Application No. 58130.<sup>1/</sup> Under the terms of its existing certificate, Emery is restricted to operations within defined geographical areas centered in San Francisco and Los Angeles.

Emery also holds a certificate of public convenience and necessity to operate as a freight forwarder of shipments having a prior or subsequent movement by air in connection with a surface movement. Emery points out in its application that United States District Court has enjoined this Commission from regulating "any

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<sup>1/</sup> The certificate granted in D.89361 authorizes Emery "to conduct operations as a highway common carrier, as defined in Section 213 of the Public Utilities Code, via the lines of air common carriers, highway common carriers and passenger stage corporations". The certificate is similar in geographical scope as its freight forwarder certificate issued in D.87818 in A.57318.

air carrier having authority under Title IV of the Federal Aviation Act of 1958...<sup>2/</sup>

Emery states that it is an air carrier operating under authority granted to it by the Civil Aeronautics Board (CAB) pursuant to Title IV of the Federal Aviation Act of 1958. Accordingly, Emery asserts that authority of this Commission over Emery's activities in California under its CAB authority has been enjoined.

In this application, Emery seeks an ex parte order of the Commission authorizing operations as a highway common carrier between all points in California without the restriction of a prior or subsequent movement by air. A copy of the proposed certificate is set forth in Appendix C to the application. Emery proposes the usual restrictions including exclusion of used household goods and personal effects, automobiles and other vehicles, livestock, liquids and other commodities in bulk, cement, logs, articles of extraordinary value, refrigerated commodities, and explosives and other hazardous materials. The proposed certificate is not limited with respect to weight of individual packages or shipments. However, applicant points out that the average shipment weight for its system in 1979 was 72 pounds.

Emery states that it proposes to commence operations under the proposed certificate by handling the surface carriage of freight between San Diego, Los Angeles, San Francisco, and Sacramento. It plans to provide one daily schedule between each of the four metropolitan areas, with on-call service between the metropolitan areas and between such areas and other points in accordance with customers' requirements and market demand.

The application contains data that shows Emery has the equipment, financial ability, and experience to provide the proposed service.

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<sup>2/</sup> Sierra Flite Service Inc., et al. v California Public Utilities Commission et al., C 79-0840 S.W. Indirect air carriers, as defined in 49 USC 1301(10), include firms which assemble and ship air freight (Airborne Freight Corp. v CAB (1948 DC), 257 F 2d 210). Emery operates as an indirect air carrier.

In support of Emery's request, the application states that Emery's present certificate precludes it from transporting surface shipments as a highway common carrier unless such movement is coupled with a prior or subsequent movement by air, and such certificate has a limited geographic scope. The application asserts that such limitations result in a substantial inconvenience to California shippers, costly and needless inefficiencies in Emery's operations, and discrimination against shippers whose freight both originates and terminates within California.

The application states that Emery's present certificate has become archaic because efficient air freight service has become increasingly intermodal. Recent developments in the airline industry have substantially reduced the availability of direct air service between many points. Many communities are no longer served by overnight air cargo service, as airlines have completely curtailed or substantially reduced their cargo service on short hops or from and to small communities as a result of higher operating costs. Reliable next-day service can be provided between points where air cargo service no longer is adequate only by means of surface transportation.

Under the restrictions in Emery's present highway common certificate, intrastate shipments must be transported by air. On certain short hauls, less expense would be incurred by Emery by transporting the shipments in expedited service entirely on the ground than by paying the high air freight charges assessed to it by the airlines.

Other efficiencies, reductions in operating costs, and conveniences to shippers which assertedly would occur as a result of the granting of the requested authority are described in the application.

Emery asserts that the purpose of the proposed authority is to provide for the convenience of its present customers; the transportation by Emery of expedited shipments of limited size and weight for overnight delivery at premium rates has not been, and under the proposed certificate, will not be, similar in nature to the operations of highway common carriers transporting heavier and bulkier shipments of less time-sensitive cargo. Emery anticipates that the proposal will not result in any increase in freight volume which it presently experiences, nor will it cause diversion to it of shippers using the services of other carriers. Emery asserts, however, unless the authority is granted as requested, the accessibility of Emery's expedited service to existing and potential customers will continue to be inhibited to the detriment of shippers relying on overnight service.

Exhibit H to the application sets forth the charges for shipments of 70 pounds or less, and Exhibit I sets forth the rates for shipments of any weight that Emery proposes to charge if the application is granted. The proposed rates are the same as Emery now charges in its air freight operations. In the future Emery desires to raise or lower its intrastate charges in the percentages or amounts that it adjusts its corresponding interstate rates in order to keep its interstate and intrastate charges uniform. Emery states that its present rates reflect systemwide operating costs which, to a large extent, are dependent upon the air cargo charges of scheduled commercial and chartered airlines which have the authority to increase or decrease such rates and charges without regulatory authorization.

Although Emery has the ability to immediately adjust charges for interstate shipments to wholly or partially offset air carrier rate changes, any increase in rates for intrastate shipments transported under the proposed authority would require

approval by the Commission. Emery alleges that, even with expedited rate proceedings, lack of uniformity between rates prevailing in California and adjusted rates between other points on its system is inevitable with resulting duplication and inefficiency. Emery asserts that this Commission in the past has recognized that in those industries which are not natural monopolies there can be a wide latitude in the degree of regulation required and that whenever free market forces can govern an industry, they should be allowed to do so with as little government intrusion as necessary. The Commission has further stated its policy that such competitive industries should be given as much flexibility to respond to changing conditions as is reasonable without Commission approval for each change, provided the carrier acts in a reasonable manner and does not engage in anticompetitive or other objectionable practices. (Pacific Southwest Airlines (1978) 84 CPUC 171.)

Accordingly, Emery requests that the Commission permit it to increase or decrease its rates for intra-state shipments between points in California a maximum of twenty percent annually above or below the rates set forth in Exhibits H and I respectively, subject to the requirement that Emery file tariffs reflecting any such change no later than ten days in advance of the change.

Emery states that it is aware of no highway common carrier with which the proposed service is likely to compete. However, it served a copy of this application on the California Trucking Association, and, at the direction of the assigned Administrative Law Judge, served a copy upon United Parcel Service, Inc. Notice of the filing of the application also appeared on the Commission's Daily Calendar. There are no protests or requests for hearing.

Findings of Fact

1. Applicant operates as a freight forwarder and express corporation, primarily for movement of air freight, both within California and nationally.

2. This Commission has been enjoined from regulating applicant's air forwarder and air express operations by a United States District Court order issued in Sierra Flite Service, Inc., et al. v Calif. P.U.C., C 79-0840 S.W.

3. Applicant now holds a certificate of public convenience and necessity to operate as a highway common carrier between limited points, subject to the condition that shipments transported as a highway common carrier shall have an immediate prior or subsequent movement by air.

4. Applicant desires to engage in highway common carrier operations for the transportation of shipments which are not accorded prior or subsequent movement by air.

5. The services to be performed under the proposed highway common carrier certificate are intended to augment Emery's air freight forwarder and express operations by providing an alternate means of surface transportation when expeditious air freight service between origin and destination is not available to Emery.

6. Emery has the financial ability, equipment, and experience to provide the proposed service.

7. It can be seen with certainty that there is no possibility the activity in question may have a significant effect on the environment.

8. Public convenience and necessity require that applicant be authorized to engage in operations as a highway common carrier in intrastate commerce as proposed in the application.

9. A public hearing is not necessary.

10.a. Applicant conducts essentially a nationwide package forwarding operation under a uniform schedule of rates.

b. Applicant's interstate and California intrastate air forwarding rates are not subject to regulatory control and it may make timely upward and downward adjustments in those rates to correspond to the changes in the cargo rates of air carriers, which rates also are not subject to regulatory control.

c. Applicant desires to maintain rates for its intrastate highway common operations on the same levels as its interstate and intrastate air forwarding rates, and to adjust said highway common carrier rates concurrently with the adjustment of its air forwarding rates.

d. Applicant's air forwarding rates are substantially higher than the rates maintained by highway carriers of general commodities within California. Applicant's proposed highway common carrier operations are not competitive with other surface carriers of small shipments from the standpoint of freight rates and charges.

11. In order to accomplish rapid adjustment of its surface rates to correspond with its air forwarder rate adjustments, applicant seeks a rate window under which it will be permitted to increase or decrease its surface rates by a maximum of twenty percent annually above or below the initial tariff rates it intends to file as more specifically set forth in Exhibits H and I appended to the application.

12. In those industries which are not natural monopolies, such as the transportation of property, there can be a wide latitude in the degree of regulation required to keep those industries' practices in conformance with the public interest.

13. Free market forces should govern the level at which applicant can maintain its rates for the proposed highway common service designed to supplement its expedited forwarder service.

14. Applicant's request for a rate window is reasonable as it will provide the needed flexibility to adjust its California intrastate highway common carrier rates at the same time and to the same levels as corresponding adjustments in its interstate and intrastate air forwarder rates, which are not subject to regulation. The granting of this relief will not result in undue discrimination, nor will it adversely affect competing highway common carriers whose rates will be substantially below the rates applicant intends to maintain for its proposed highway common carrier operations.

Conclusions of Law

1. A new and separate certificate of public convenience and necessity to operate as a highway common carrier should be granted as requested in the application.

2. Under Section 454(b) of the Public Utilities Code the Commission may determine the nature of the showing required by common carriers for a rate increase within the parameters of Section 454. The showing described in Finding 10 (above) is satisfactory to the Commission under Section 454(b) as justification for the rate window increase sought by Emery.



3. Applicant should be authorized the rate window requested in the application in connection with the highway common operations granted herein, to the extent provided in the order which follows. ✓

To the extent that this certificate duplicates, in whole or in part, any other certificated authority held by this carrier or granted in the future, such operative rights may not be separated to allow the sale or transfer of one or more of such duplicating rights, or portion thereof, and the retention of another certificated right to perform the same service.

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 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 Emery Air Freight Corporation, a Delaware corporation, authorizing it to operate as a highway common carrier as defined in Section 213 of the Public Utilities Code, between the points and over the routes set forth in Appendix A of this decision.

2. In providing service pursuant to the authority granted by this order, applicant shall comply with the following service regulations. Failure to do so may result in 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. Applicant is placed on notice that if it accepts the certificate it will be required, among other things, to comply with the safety rules administered by the California Highway Patrol and the insurance requirements of the Commission's General Order No. 100-Series.
- (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 maintain its accounting records on a calendar-year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before April 30 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 as required by the General Order.

3. In connection with the highway common carrier service authorized in Ordering Paragraph 1:

(a) Emery Air Freight Corporation is authorized to establish the rates and charges and governing rules as more specifically set forth in Exhibits H, I, and J.

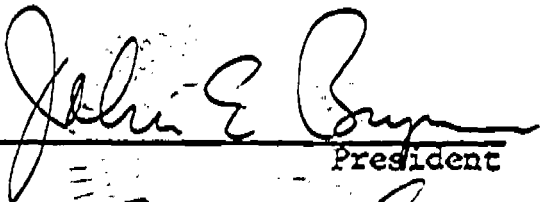
(b) Emery Air Freight Corporation is authorized to raise the rates and charges so established by amounts not exceeding 20 percent per year or lower the rates and charges as established by amounts not exceeding 20 percent per year for a period of five years from the date of this order.

(c) Rate increases or decreases authorized in the foregoing subparagraph may become effective ten days after filing with the Commission. In no event shall such rates be less than the rates set forth in transition tariffs for the transportation

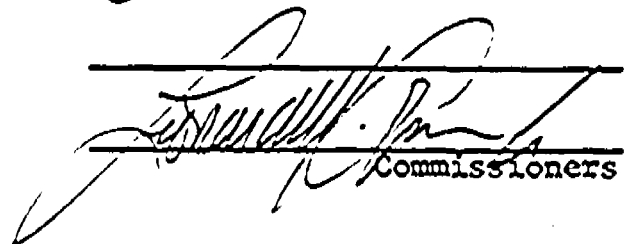
of general commodities issued by the Commission pursuant to  
Decision No. 90663.

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

Dated           OCT 22 1980          , at San Francisco, California.

  
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President

  
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Commissioners

Commissioner Vernon L. Sturgeon, being  
necessarily absent, did not participate  
in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being  
necessarily absent, did not participate  
in the disposition of this proceeding.

EMERY Air Freight Corporation, a Delaware Corporation, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to conduct operations as a highway common carrier as defined in Section 213 of the Public Utilities Code for the transportation of general commodities as follows:

- A. Between all points and places in Los Angeles Basin Territory as described in Note A hereof.
- B. Between all points on or within twenty-five (25) statute miles of the following described routes:
  1. Interstate Highway 5 between Redding and San Ysidro.
  2. State Highway 99 between Red Bluff and Wheeler Ridge.
  3. U.S. Highway 101 between Crescent City and Los Angeles.
  4. Interstate Highway 10 between Los Angeles and Indio.
  5. Interstate Highway 80 between San Francisco and Truckee.
  6. Interstate Highway 580 between Oakland and its junction with Interstate Highway 5 near Westley.

Except that pursuant to the authority herein granted carrier shall not transport any shipments of:

1. Used household goods, personal effects and office, store and institution furniture, fixtures and equipment not packed in salesmen's hand sample cases, suitcases, overnight or boston bags, briefcases, hat boxes, valises, traveling bags, trunks, lift vans, barrels, boxes, cartons, crates, cases, baskets, pails, kits, tubs, drums, bags (jute, cotton, burlap or gunny) or bundles (completely wrapped in jute, cotton, burlap, gunny, fibreboard, or straw matting).

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2. Automobiles, trucks and buses, viz.: new and used, finished or unfinished passenger automobiles (including jeeps), ambulances, hearses and taxis, freight automobiles, automobile chassis, trucks, truck chassis, truck trailers, trucks and trailers combined, buses and bus chassis.
3. Livestock, viz.: barrows, boars, bulls, butcher hogs, calves, cattle, cows, dairy cattle, ewes, feeder pigs, gilts, goats, heifers, hogs, kids, lambs, oxen, pigs, rams (bucks), sheep, sheep camp outfits, sows, steers, stags, swine or wethers.
4. Liquids, compressed gases, commodities in semi-plastic form and commodities in suspension in liquids in bulk, in tank trucks, tank trailers, tank semitrailers or a combination of such highway vehicles.
5. Commodities when transported in bulk in dump-type trucks or trailers or in hopper-type trucks or trailers.
6. Commodities when transported in motor vehicles equipped for mechanical mixing in transit.
7. Portland or similar cements, in bulk or packages, when loaded substantially to capacity of motor vehicle.
8. Logs.
9. Articles of extraordinary value.
10. Trailer coaches and campers, including integral parts and contents when the contents are within the trailer coach or camper.
11. Commodities requiring the use of special refrigeration or temperature control in specially designed and constructed refrigerator equipment.
12. Explosives subject to U. S. Department of Transportation Regulations governing the Transportation of Hazardous Materials.

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In performing the service herein authorized, carrier may make use of any and all streets, roads, highways and bridges necessary or convenient for the performance of said service.

## Note A

## LOS ANGELES BASIN TERRITORY

Los Angeles Basin Territory includes that area embraced by the following boundary: Beginning at the point the Ventura County-Los Angeles County Boundary Line intersects the Pacific Ocean; thence northeasterly along said county line to the point it intersects State Highway 118, approximately two miles west of Chatsworth; easterly along State Highway 118 to Sepulveda Boulevard; northerly along Sepulveda Boulevard to Chatsworth Drive; northeasterly along Chatsworth Drive to the corporate boundary of the City of San Fernando; westerly and northerly along said corporate boundary of the City of San Fernando to Maclay Avenue; northeasterly along Maclay Avenue and its prolongation to the Angeles National Forest Boundary; southeasterly and easterly along the Angeles National Forest and San Bernardino National Forest Boundary to Mill Creek Road (State Highway 38); westerly along Mill Creek Road to Bryant Street; southerly along Bryant Street to and including the unincorporated community of Yucaipa; westerly along Yucaipa Boulevard to Interstate Highway 10; northwesterly along Interstate Highway 10 to Redlands Boulevard; northwesterly along Redlands Boulevard to Barton Road; westerly along Barton Road to La Cadena Drive; southerly along La Cadena Drive to Iowa Avenue; southerly along Iowa Avenue to State Highway 60; southeasterly along State Highway 60 and U.S. Highway 395 to Nuevo Road; easterly along Nuevo Road via Nuevo and Lakeview to State Highway 79; southerly along State Highway 79 to State Highway 74; thence westerly to the corporate boundary of the City of Hemet; southerly, westerly and northerly along said corporate boundary to The Atchison, Topeka & Santa Fe right-of-way; southerly along said right-of-way to Washington Road; southerly along Washington Road through and including the unincorporated community of Winchester to Benton Road; westerly along Benton Road to Winchester Road (State Highway 79) to Jefferson Avenue; southerly along Jefferson Avenue to U.S. Highway 395; southerly along U.S. Highway 395 to the Riverside County-San Diego County Boundary Line; westerly along said boundary line to the Orange County-San Diego County Boundary Line; southerly along said boundary line to the Pacific Ocean; northwesterly along the shoreline of the Pacific Ocean to point of beginning, including the point of March Air Force Base.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

Decision 92323, Application 59809.