

ORIGINAL

Decision No. 92521 DEC 16 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
for the purpose of considering and)
determining minimum rates for trans-)
portation of any and all commodities)
statewide including, but not limited)
to, those rates which are provided in)
Minimum Rate Tariff 2 and the revis-)
ions or reissues thereof.)

Case No. 5432
OSH 924
(Filed November 4, 1976)

And Related Matters.)

Case No. 5439
OSH 292
(Filed November 4, 1976)

Case No. 5441
OSH 374
(Filed November 4, 1976)

William R. Haerle, Attorney at Law, for
California Trucking Association,
interested party.
Elmer Sjostrom, Attorney at Law, and
Carroll D. Smith, for the Commission staff.

OPINION AND ORDER

Commission Minimum Rate Tariffs (MRTs) 2, 1-B, 9-B,
and 19, respectively, named minimum class and commodity rates
for the transportation of general freight statewide and within the
East Bay, San Diego, and San Francisco drayage territories by
highway carriers.

Express corporations and freight forwarders, as defined in Public Utilities Code Sections 219 and 220, came under the Commission's jurisdiction as common carriers by a 1933 statute and were made subject to the minimum rates contained in the above MRTs when they were established after the enactment of the Highway Carriers' Act.

Because of certain operating characteristics of express corporations and freight forwarders when they use air carriers for transportation, the Commission, in Decision No. 86342 dated August 31, 1976,^{1/} exempted express corporations and freight forwarders from the governing provisions of MRTs 1-B, 2, 9-B, and 19. This exemption applied only when the carriers used air carriers for all or part of the California intrastate transportation performed. Specifically, the Commission found that: (1) minimum rates were not designed for express corporations or freight forwarders operating via the lines of air carriers and that it would be in the public interest to exempt such carriers from its minimum rate program, and (2) an expeditious method should be adopted to handle the tariff changes of these carriers and a general order should be established for that purpose.

The California Trucking Association (CTA) requested rehearing of Decision No. 86342 which was granted by Decision No. 86573 dated October 26, 1976. The rehearing was assigned OSH 924 in Case No. 5432 et al., and a hearing was not held until April 2, 1980 because of the Commission's reregulation program.

^{1/} By ex parte order.

At the hearing a representative of the Commission's Legal Division moved that briefs be filed by the parties limited to the question of the Commission's jurisdiction over express corporations and freight forwarders using air carriers to provide their service. This motion was made because of the recent federal preemption of the Commission's jurisdiction over intrastate air transportation.^{2/} The motion was granted and the date for the filing of briefs was set for April 30, 1980, but was extended to May 7, 1980 at the request of CTA.

The Commission staff counsel briefed the issue of whether this Commission is enjoined from regulating air express corporations and air freight forwarders pursuant to Sierra Flite Service, supra. The brief states that (1) under Title IV all "air carriers" are required to obtain a certificate of authorization from the Civil Aeronautics Board, (2) firms which assemble and ship air freight are "indirect air carriers" (Airborne Freight Corp. v CAB (1958) 257 F 2d 210), and (3) in R.E.A. Inc. v CAB (1965) 345 F 2d 445, the Court held that evidence supported C.A.B.'s finding that express agency's operations under proposed agreements with airlines under which agency would ship cargo by air would constitute indirect air carriage. The Court stated:

"'Indirect air carrier' is one who holds out to public that it will undertake to transport property by air and enters into contracts with shippers wherein it binds itself to discharge such undertaking with respect to particular shipments."

^{2/} The U.S. District Court in Sierra Flite Service, Inc., et al. v California Public Utilities Commission, et al., C 79-0840SW enjoined the Commission from regulating "...any air carrier having authority under Title IV of the Federal Aviation Act of 1958, as amended, including any carrier exempted pursuant to 49 U.S.C. § 1386(b) or part 298 of the Civil Aeronautics Board's Economic Regulations (14 C.F.R. part 298). The Commission has filed an appeal with the U.S. Court of Appeals (9th Cir.) challenging the District Court's holding.

We conclude that air express corporations and air freight forwarders in California are air carriers having authority under Title IV of the Federal Aviation Act of 1958, as amended, and therefore the California Public Utilities Commission is enjoined from regulating such carriers under Sierra Flite Service, supra.

Findings of Fact

1. Express corporations and freight forwarders using air carriers to perform service in California are required to obtain authority as indirect air carriers under Title IV of the Federal Aviation Act before commencing operations.

2. In Sierra Flite Service, supra, this Commission is enjoined by a federal district court from regulating air carriers having authority under Title IV of the Federal Aviation Act of 1958.

Conclusions of Law

1. Air express corporations and freight forwarders are air carriers under the Federal Aviation Act of 1958.

2. Since the Commission is enjoined by the court in Sierra Flite Service, supra, from regulating air carriers, these proceedings should be discontinued without prejudice.

IT IS ORDERED that Case No. 5432, OSH 924, Case No. 5439, OSH 292, and Case No. 5441, OSH 374 are discontinued without prejudice.

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

Dated DEC 16 1980, at San Francisco, California.

John E. Byron
President

Richard D. Howell

Clair J. DeBarr

Commissioners

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

Commissioner Leonard M. Grimes, Jr., being necessarily absent, did not participate.