

Opinion No. 60-146

August 10, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: New Mexico State Corporation Commission State Capitol Building Santa Fe, New Mexico. Attention: Mr. G. Y. Fails, Commissioner

QUESTION

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A charter air service company requested by letter that the Corporation Commission authorize the upward revision of the company's air freight rate schedule for a specified route to make said rates conform with those charged by other carriers for comparable services. No notice was given nor was a hearing held on the proposed change and the Commission did not act on the application. However, the applicant was later advised by a letter from a Commission employee that the Commission had reviewed the request and authorized the new rate schedule. Pursuant to that letter the company commenced to impose the new rates.

1. Is a rate schedule valid if approved and promulgated in the above described manner.
2. If the rate schedule is invalid, should the Commission require the subject carrier to reimburse shippers to the extent of the difference between the old and the new rates?
3. Are there any punitive sanctions which may be imposed upon either the carrier or the subject Commission employee under circumstances such as those outlined in the above statement of facts?

CONCLUSIONS

1. No.
2. See analysis.
3. See analysis.

OPINION

{*528} ANALYSIS

The answers to the first two questions are governed by the rules and regulations of the State Corporation Commission, promulgated in October of 1949, regulating aircraft

common carriers. The rules and regulations were adopted in the exercise of the rule making power granted the Commission by § 44-1-7, N.M.S.A., 1953 Compilation.

A negative answer to the first question is clearly demanded by Rule XI of said rules and regulations. That rule prescribes in pertinent part that:

"No change shall be made in any rate, fare or charge, or any classification, rule, regulation or practice affecting such rate, fare or charge, or the value of the service thereunder, specified in any effective tariff or a common carrier by aircraft, except upon approval by the Commission. . . ."

If we assume the stated facts to be true, it appears that the new rate schedule was not approved by the Commission as is required by the aforementioned rule. The letter from the Commission employee purporting to authorize the institution of the new freight rates did not serve to validate the new schedule.

Before answering the second question posed, it should be pointed out that since the present rate charged by the carrier was not properly put into effect, immediate steps should be taken to secure proper Commission authorization for those rates. Commission approval should be sought pursuant to the rate provisions of Rule XI of the aforementioned Commission rules and regulations.

In answering the second question, further consideration must be given to the Commission rules and regulations. Rule VIII thereof provides, in part, as follows:

"1. The Commission, upon application or complaint or upon its own initiative, after notice and opportunity for hearing, may by order alter, amend, modify, suspend or revoke any certificate in whole or in part for **wilful failure to comply with any provision of any order, rule or regulation of the Commission** pertaining thereto, or with any term, condition or limitation of such certificate." (Emphasis added).

In listing with more particularity the "wilful violations" which may be made the basis of the above described Commission actions, the same rule, in paragraph 2, includes "(a) failure to comply with Rule XI." We have previously examined a portion of that rule in connection with the first question. The penalty provisions of the rules and regulations do not specify any sanctions exercisable by the Commission other than those mentioned in Rule VIII. It will be noted that there is no provision in the rules and regulations specifically authorizing Commission-enforced reimbursement of overcharges. It is very possible that the Commission does have this power as a necessary incident of its rate setting authority. However, we do not feel that it is necessary to decide that question at this time.

Upon the facts assumed for the purpose of answering this opinion request, it appears that while there was a violation of Rule XI which invalidated the new rate schedule, the violation was not wilful. Therefore, it is our opinion that if it is determined that the desired {*529} rate schedule is reasonable and proper, the Commission is under no

legal compunction to seek the reimbursement of shippers who have paid the subject invalid rates.

Turning now to the third question, it is our opinion that this office cannot properly give a formal opinion upon the possibility or advisability of seeking criminal prosecution of either the Commission employee in question or the subject carrier. This aspect of the present problem is not one of general public interest. Furthermore, a determination of this nature should more properly be made by the appropriate district attorney after a thorough investigation of the facts. Therefore, we decline to express any opinion in this regard.

Furthermore, as regards Commission action pursuant to Rule VIII (supra), it should be noted that that rule appears to require that actionable violations of rules and regulations must be wilful.

By: F. Harlan Flint

Assistant Attorney General