Opinion No. 63-83

July 17, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Bob White, Director Aviation Division State Corporation Commission Santa Fe, New Mexico

QUESTION

FACTS

The United States Department of Interior, Bureau of Indian Affairs has issued an invitation for bids for a contract to supply milk and ice cream to various schools located either within the State of New Mexico, or in the neighboring states of Arizona or Utah. The purchase is to be f.o.b. point of intended use. Since all parties bidding on this contract can purchase the commodities involved at approximately the same price, and because various types of transporters are bidding against one another, the primary variable in bidding will be the cost of transportation, and the primary source of revenue or profits will come from the transportation feature of the contract. Several common air carriers licensed in this state are interested in bidding. In all instances the authority held by the carriers is from their base of operation to points within the State of Mexico and return. Two of the carriers are based in Gallup and one in Grants. The commodities will be picked up in Gallup and flown to each of the points indicated in the contract. Some of these trips will be intra-state and some will be interstate, but returning to the point of origin in New Mexico.

QUESTIONS

1. Considering that these companies or individuals are elsewhere engaged in the transportation business as common carriers, would they be considered to be common carriers for the purposes of this particular operation?

2. Would common air carriers engaged in this type of operation be restricted to the authority granted by the Corporation Commission?

3. Would the Common Air carrier at Grants be in violation of his authority if he picked up his commodities in Gallup and made either intra-state or interstate deliveries and returned to Grants?

4. Would the common air carriers be bound by the rates posted and approved by the Commission?

5. If the carrier would not be considered a common carrier for the purposes of this transaction, would operating a merchandising enterprise put the carrier in violation of any law, rule or regulation of the State of New Mexico?

CONCLUSIONS

1. Yes, but see analysis.

2. See analysis.

3. See analysis.

4. See analysis.

5. See analysis.

OPINION

*{*178}* **ANALYSIS**

1. The first question presented requires a determination of the status of a carrier who is normally employed as a common carrier, but in this instance contracts to supply commodities to the purchaser by buying them from a wholesaler and reselling them to the purchaser after transporting them to the point of intended use. The question is further complicated by the fact that the carrier will be engaged in both intra-state and interstate commerce in fulfilling the contract. Under these circumstances, the issues becomes one of determining whether such carrier is a common carrier or a merchandiser.

Section 44-1-6, N.M.S.A., 1953 Compilation, disposes of the intra-state-interstate aspect of the first question. This section provides:

". . . Every person, firm, corporation, association or company at any time engaged, either regularly or for the time being only, in the transportation of persons or property for hire between points within this state or from a point within this state and return thereto, is hereby declared to be a common carrier within the meaning and purview of Section 7 of Article XI of the Constitution of the state of New Mexico." (See also In re Reilly's Estate, 63 N.M. 352, 319 P. 2d 1069, 1072).

It is obvious that the status of the carriers involved here are not affected by the type of commerce involved, i.e. whether it is intra-state or interstate. The question of whether the carriers involved in this case are common carriers (under the definition in Section 44-1-6, supra) or private carriers presents a somewhat more difficult situation. It should be noted at the outset that common carriers as defined in Section 44-1-6, supra, include those carriers who are commonly thought of as either common carriers or contract carriers. That is, the definition includes those carriers "engaged . . . in the transportation

of persons or property for hire. . ." This definition includes both those carriers who hold themselves out to the public as willing to transport the goods of any person for hire, and having a public duty, therefor, to do so, (In re Rodgers, 279 N.W. 800, 134 Neb. 832), and those carriers who carry for individual parties on a contract basis (In re Rodgers, supra). This distinction between common carriers and contract carriers is drawn by the Inter-state Commerce Act, 49 Stat. 543, 544, 49 U.S.C.A. Section 303 (a) 14 and 15. It is not important in the present case since, as noted above, the law of New Mexico does not make such a distinction. Thus, it is obvious that the mere fact that the air carriers involved in the present case contract with the Department of Interior to supply designated places with milk, taking title thereto, as opposed to merely "transporting" milk from one place to another does not in and of itself make the carriers "private carriers".

The main bone of contention in the present case is whether the fact that the carriers purchase the commodities from a wholesaler and resell them to the purchaser makes them a "merchandiser" or private carrier *{*179}* since they will have title to the goods while transporting them. It is the opinion of this office that even though the carrier retains title to the goods, and bears the risk of loss during transit, and even though he carries only at the request of the purchaser under the contract, he remains a common carrier subject to regulation by the State Corporation Commission. This conclusion is supported by the fact that the carrier is admittedly a common carrier under the definition in Section 44-1-6, supra, under normal operations, and his profits in the present case come almost entirely from the transportation and not the buying and selling. Of course, this opinion is only concerned with the air carriers who might be involved, and not any other parties, such as milk wholesalers or distributors. The Tenth Circuit Court of Appeals Opinion in **Scott v. Interstate Commerce Commission,** 213 F.2d 300, is considered persuasive and authorative support for the present conclusion. Although this case involved motor carriers rather than air carriers, the facts are so similar to the facts involved here that the distinction between modes of transportation is not important. In the Scott case the carrier contracted with various oil companies to supply them with such amounts of oil as they should order. The deliveries were from a point in New Mexico, Artesia, to points both in New Mexico and Arizona. The carrier was to receive the oil in his tank trucks at the refiners in amounts specified to him by the buyer, he was invoiced for the oil by the refinery, and, upon delivery to the purchaser, he charged the purchaser the cost of the oil plus an "additional charge which is comparable to but less than the cost of transportation by the common carrier". The carrier, relying primarily on the fact that he took title to the oil at the refinery, contended that he was transporting his own property and was not a common carrier or contract carrier subject to regulation by the Interstate Commerce Commission. The Court rejected this argument stating that "legal ownership of the products at the time of their transportation is not necessarily controlling." The Court stated at p. 304:

"Scott's primary business being that of transporting by motor vehicle in interstate commerce gasoline and other petroleum products under individual contracts or agreements for compensation, he falls within the class of a contract carrier, even though

title to such products is vested in him at the time of their transportation." (citations omitted).

The similarity of the facts in the **Scott** case, particularly those stated on page 304, to those in the present case make it especially persuasive. This is not a case where the transportation is merely an incident of another service performed, e.g, transportation of insecticide for crop dusting, (see **Rountree v. State Corporation Commission,** 40 N.M. 152, 56 P. 2d 1121), but rather is a case where a party, whose normal business is transportation for hire, contracts to transport commodities to a purchaser for a fee dependant on the transportation. It is our opinion that the air carriers involved are common carriers.

2. The second question is whether the common air carriers engaged in this type of operation are restricted to the authority granted by the Corporation Commission. At first blush the answer to this question would seem to be clearly yes. However, the facts state that a part of the operation *{*180}* will be in interstate commerce. It thus becomes apparent that the part of the operation in interstate commerce should be primarily controlled by the Civil Aeronautics Board. It is obvious that the carriers must be licensed by the Civil Aeronautics Board to operate in interstate commerce unless they come within the minimum size exemption. So far as the licensing provisions of the New Mexico law are concerned in this case, Section 44-1-8, N.M.S.A., 1953 Compilation, requires that any common carriers, as defined by the act, whether transporting persons or property within this state, or from points within this state and returning, shall be licensed by the State Corporation Commission. It is further noted that in interpreting the regulation power of the Commission under Section 44-1-7, N.M.S.A., 1953 Compilation, the Attorney General held in Opinion number 4878, 1945-46, that common carrier aircraft which initiates flights inside of New Mexico though extending their operations to points outside the state and returning to New Mexico, are subject to regulation by the State Corporation Commission. Since the regulatory power of the commission is a valid exercise of police power of the state, and since the regulations are required by law to be compatible with the Air Commerce Act of the United States, 49 U.S.C. Section 171 and 401, it is our opinion that such regulations, even though in interstate commerce, is within the provisions of the United States Constitution. It is evident from the discussion above that the Commission can require a license by air carriers, and can regulate such carriers within this state. Thus, the common carriers involved in the present case must have authority from the Commission to carry on their operations, initiated in this state, and must therefore extend their licenses to cover the situation herein presented. It should be noted in this respect that the facts as stated show that the carriers only have authority to operate from their base of operation to points within the State of New Mexico and return. If the operation of the carriers is from points within this State to points without the State and return, then they have exceeded their authority. We are informed that the commission has in the past impliedly authorized operations "from any point within this state and return thereto" when the air carrier was licensed to operate "between points within this state". It is our opinion that such implied license is within the authority of the commission, but we believe the better practice would be to specifically include such authority in the license.

3. The third question is whether the common carrier in Grants would be in violation of his authority if he picked up the commodities in Gallup and made either intrastate or interstate deliveries and returned to Grants. The part of this question dealing with interstate deliveries was answered in the discussion regarding question two. From the facts given, the carrier has never been licensed by the commission to operate from a base in New Mexico to points outside the state and return. Such license is specifically required by Section 44-1-8, supra. Such license may be implied, however, as pointed out above. Rule III of the Rules and Regulations of the State Corporation Commission regarding aircraft common carriers requires a showing of public convenience and necessity prior to the issuance of a certificate to engage in transportation for hire wholly or partially within the state of New Mexico. Thus, it can readily be seen that prior to licensing an air carrier to operate from Grants to points and places in New Mexico, *{*181}* the carrier must prove that public convenience and necessity require such an operation. The license is predicated on the finding that the public convenience requires such an operation out of Grants. The air carrier must prove that Grants and the surrounding area need such service. If, after the license were issued, the carrier could then make his base of operation Gallup, and could provide carrier service from Gallup to points and places in New Mexico, he would be circumventing the primary purpose of the requirement for showing of public necessity and convenience and necessity. Thus, a carrier who desired to provide service out of Gallup, but could not show a public need, could merely find a community needing service, obtain a license to operate out of that community, and then proceed to service Gallup. Such circumvention of the intent of the law is patently fallacious. It is our opinion that one terminal point of cargo or passengers must be the town where the carrier's operation is based.

4. The fourth question asks whether the common carriers would be bound by the rates posted and approved by the Commission. This question must be answered separately with regard to the intra-state and interstate phases of the transportation. It is our opinion that the commission clearly cannot control the rates of the interstate aspect of the commerce. See **Houston E. & W. T. R. Co. v. United States,** (the Shreveport Rate Case), 234 U.S. 342. It should be noted that Article XI, Section 9 of the Constitution of New Mexico authorizes the Corporation Commission to bring an action before the Interstate Commerce Commission, or any lawful authority having jurisdiction of the premises, to obtain relief from "unjust, excessive or unreasonable" or other rates that discriminate against citizens of this state. It would seem that such procedure would also apply to air carriers. Regarding the intra-state aspect of the question, it is equally clear that the commission is authorized to control the rates of carriers transporting in intra-state commerce. See Article XI, Section 7, New Mexico Constitution.

The answer to question five is moot since this opinion declares that the air carriers involved in the factual situation presented are common carriers within the definition of Section 44-1-6, supra.

By: James E. Snead

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