

Opinion No. 69-140

December 4, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Mr. Mark Sloan, Sr. Director, Aviation Department, State Corporation Commission,
P.O. Box 1269, Santa Fe, N.M. 87501

QUESTIONS

Is an air carrier hauling persons and property as an independent contractor for hire for the United States Government to and from points and places within the State of New Mexico required to have a certificate of public convenience and necessity from the State Corporation Commission?

CONCLUSION

Yes.

OPINION

{*225} ANALYSIS

Under the New Mexico statutes, "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 returned 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." § 44-1-6, N.M.S.A., 1953 Compilation.

Under Section 44-1-8, N.M.S.A., 1953 Compilation it is provided that any common carrier defined in Section 44-1-6, supra, must have a certificate of public convenience and necessity for the hauling of persons or property for hire. Section 44-1-7, N.M.S.A., 1953 Compilation, provides that the State Corporation Commission may issue rules and regulations to govern and regulate those engaged in air transportation for hire.

In determining whether or not a carrier is required to have a certificate of public convenience and necessity, the Corporation Commission must determine if the carrier is hauling persons or property for hire. See **State ex rel. State R. Comm'n v. Ramsey**, 151 Neb. 333, 37 U.W.2d 502 (1949). See also, **Marsh Aviation Co. v. State Corp. Comm'n**, 55 N.M. 178, 228 P.2d 959 (1951); **In re Reilly's Estate**, 63 N.M. 352, 319 P.2d 1069 (1958). The fact that the shipper is a government agency does not alter the fact that the carrier is hauling for hire. **Pacific N. Airlines, Inc. v. Alaska Airlines, Inc.**,

80 F. Supp. 592 (D. Alas. 1948). See also, **Hacienda, Inc. v. CAB**, 298 F.2d 430, 434 (9th Cir. 1962), cert. denied, 369 U.S. 885 (1962).

Under the Federal Aviation Act a person transporting goods or persons for hire by air in interstate commerce is required to have an interstate certificate of public convenience and necessity. 49 U.S.C.A. § 1371. See **Railway Express Agency, Inc. v. CAB**, 345 F.2d 445 (D.C. Cir. 1965), cert. denied, 328 U.S. 879 (1965). Under the federal act, the Civil Aeronautics Board does have the power to exempt carriers from the requirement of an interstate certificate of public convenience and necessity. 49 U.S.C.A. § 1301 (3). Neither the New Mexico statutes nor the Air Carrier Regulations grant to the State Corporation Commission any similar authority to make exemptions.

{*226} The only remaining question is whether or not a person holding a contract to provide intrastate services for the United States government is exempt from state regulation. The United States Supreme Court has held that the United States Constitution does not prohibit such state regulation. **Penn Dairies, Inc. v. Milk Control Comm'n.** 318 U.S. 261, 87 L. Ed. 748, 63 S. Ct. 617 (1943). Although the carrier is required to have a certificate of public convenience and necessity, the United States government is apparently entitled to negotiate a special rate with the carrier and is not bound by state tariffs. **United States v. Georgia Public Serv. Comm'n.** 371 U.S. 285, 9 L. Ed. 2d 317, 83 S. Ct. 397 (1963). Opinion of the Attorney General No. 66-6, issued January 13, 1966.