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Basin Flying Service v. Public Service Commission, Dinaland Aviation Incorporated, Flaming Gorge Flying Service : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BASIN FLYING SERVICE,
~~Protestant-Appellant~~, Plaintiff,
vs.
PUBLIC SERVICE COMMISSION, DINALAND AVIATION INCORPORATED and FLAMING GORGE FLYING SERVICE,
~~Respondents-Appellees~~. Defendants.

Case No. 13735

BRIEF OF ~~APPELLANT~~ PLAINTIFF

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BRIEF OF APPELLANT

FACTS

On or about October 18, 1973, Dinaland Aviation Incorporated (herein referred to as "Dinaland") filed its Application for a Certificate of Convenience and Necessity with the Public Service Commission (hereinafter referred to as the "Commission") in Case No. 6943, to operate as an aircraft carrier of passengers and property in intrastate commerce, and in the additional information supplied with that Application asked in the form of allegation and prayer:

"(3) That, in the alternative, Applicant claims that the charter service proposed by the Applicant is not subject to regulation by the Public Service Commission of Utah and that said Commission should so find."

Prior to such filing the Commission had caused to be served on John A. Gardiner as President of Dinaland, and on Dinaland, a corporation, an Order to Show Cause in the Matter of the Investigation of Dinaland Aviation Incorporated and Flaming Gorge Flying Service for Performing Common Carrier Service by Aircraft Without Authority From This Commission (Investigation Docket No. 151).

By Order of the Commission dated November 6, 1973, the above entitled matters were consolidated on the same record, and a Hearing on the matters was held Thursday, December 13, 1973, in the Uintah County Building, Vernal, Utah. Basin Flying Service (herein referred to as "Basin") made its appearance at such Hearing as a Protestant to Dinaland's Application. At that time, the matter of the Application of Dinaland for a Certificate of Public Convenience and Necessity in Case No. 6943 was continued without date.

A memorandum attacking the jurisdiction of the Public Service Commission over non-scheduled airlines was served on Basin on the date of the hearing; Basin replied on January 9, 1974.

By an Order dated April 25, 1974, and in spite of the amendment to the Public Utilities Act, Section

54-1-1, *et seq.*, Utah Code Annotated, 1953, (which amendment was, in part, initiated by the Commission), the Commission took the position that it did not have jurisdiction over fixed-based operators such as Dinaland, and, therefore, left the matter to be resolved by the ". . . Utah Supreme Court for a final determination of this issue." (Page 5, Order of April 25, 1974)

A Petition for Rehearing was filed on May 15, 1974 by Basin; said Petition was denied by an Order of the Commission dated May 30, 1974.

ARGUMENT

POINT 1

DINALAND IS A COMMON CARRIER AND IS SUBJECT, THEREFORE, TO THE JURISDICTION OF THE PUBLIC SERVICE COMMISSION.

The central issue in this matter is whether the Public Service Commission of Utah has the authority to compel a non-scheduled charter aircraft carrier to obtain a Certificate of Public Convenience and Necessity to operate in intrastate traffic within the State of Utah.

Section 54-2-1 (29), Utah Code Annotated, 1953, defines "aircraft carrier" as including:

> ". . . *every corporation and person* . . . operating for public service for hire engaged in intrastate transportation of persons or property; except those air carriers operating with a certificate of

convenience and necessity issued by the federal government." (emphasis added)

The fact that "aircraft carrier" is not included, by its statutory definition, in the term "common carrier" (as that term is defined in Section 54-2-1(14), Utah Code Annotated, 1953) does not exclude from it the effect of that statute.

No inconsistency exists between this construction and the statutory mandate of Section 54-4-25 (1) which provides that:

> "No . . . aircraft carrier (corporation) . . . shall henceforth establish, or begin construction or operation of a . . . line, route, plant or system or of any extension of such . . . line, route, plant or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction; . . ."

The statute clearly expresses the legislative intent; that is to regulate "aircraft carriers" in the interest of public safety; advance the growth and welfare of the public in this area of activity yet protect the interests of present Certificate holders so far as can be done without injury to the public, either to its present welfare or hindering its future growth, development and advancement. See *Utah Light & Traction Co. v. Public Service Commission, et al,* 101 Utah 99, 118 P.2d 683, 690 (1941).

Applicant Dinaland would have the Commission believe that it is ousted of jurisdiction to regulate and control activity such as it has performed or proposes to

perform in intrastate traffic because it conducts a "non-schedule" air carrier operation. In describing Dinaland's service, Mr. Gardiner soared to spectacular heights of caprice and whimsy; that revealing bit of dialogue between Mr. Gardiner and Dinaland's counsel appears on pages 15 and 16 of the transcript:

> Q. Sir, do you hold yourself out to the public to provide a transportation service for any person who chooses to employ Dinaland Aviation, Inc.?
>
> A. Not necessarily. We feel that we have the right to turn down anyone at any time for various reasons. One would be because of weather. One would be because we might be having some maintenance done on a particular airplane, and if someone happens to call that we are not in good standing with, that want to go somewhere, we reserve the right to turn them down at any time.
>
> Q. So if somebody called you to provide a charter flight for him and you didn't like that individual for any reason whatsoever, such as the color of his eyes, in your judgment, could you turn him down?
>
> A. Yes.
>
> Q. And would you do so?
>
> A. Yes.

On more sober reflection, Mr. Gardiner's arbitrariness was tempered somewhat in a subsequent dialogue, as follows:

Q. Mr. Gardner [sic], when you stated that you could turn anybody down for any reason, would that statement be qualified by any Federal or State Law, as it pertains to civil rights or due to race, color, creed, et cetera?

A. I think the Civil Rights Act, and as long as there is any Federal money appropriated for an airport, you cannot discriminate against any persons, regardless of race, color, or creed.

Q. So when you said that, it would not be your intent to discriminate against people?

A. The biggest share of the time, we turn down flights is because of bad weather, instrument conditions. We have to reserve that right because we are not certified yet for instrument flying, the carrying of passengers and cargo. (Tr. p. 17)

The "et cetera" in the question and Mr. Gardiner's response (involving race, color and creed) disposed, at least momentarily, of the ticklish problem of eye color.

Yet, Dinaland persists in attributing ultra special meanings to flight terms such as "non-scheduled," "irregular routes" and "irregular times." On one hand the operation is unscheduled and irregular—to the point of appearing, downright haphazard; the operator would give precedence to a wife's shopping trip over a call for a business flight (Tr. p. 18). But then, in describing the type of service Dinaland holds itself out

to perform, Mr. Gardiner details a 60 by 80 foot metal hanger, heated, with office facility, pilots' lounge and a fuel service; student instruction; charter air taxi service (Tr. p. 15). He expansively notes that it holds a license from the State Aeronautics Division, State of Utah, and a "Federal FAA license which covers us for the carrying of passengers, cargo freight, to any point in the Continental United States, Canada, and Mexico. That is single and multi-engine." (Tr. p. 16)

In describing its operation Dinaland is depicting precisely the type of activity the legislature felt should be controlled and regulated by the Commission; Dinaland put itself squarely within the meaning of "common carrier" in spite of what it maintains is the exclusionary effect of "scheduled" as that word is used in Section 54-2-1 (14), Utah Code Annotated, 1953.

A "common carrier" has been defined as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering its services to the public generally. *Travis v. Dickey*, 96 Okla. 250, 222 P. 527 (1924) citing R.C.L.; *United States v. Ramsey*, 197 F. 144 (8th Cir. 1912), 42 L.R.A. (N.S.) 1031. We submit that the admission by Dinaland that there could be no discrimination, in terms of service, for reasons of "race, color, or creed" opens the service (notwithstanding color of eyes and a spouse's shopping trip) "to the public generally." Dinaland consistently describes the service it provides as being "on call" (Tr. p. 15). The Courts have held that a common carrier

by air need not have a regular schedule of flights (*Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, 72 F. Supp. 609 D. C. Alaska, 1947); or a fixed route (*Cushing v. White*, 101 Wash. 172, 172 P. 229, 1918); or a relatively unlimited carrying capacity. A carrier may limit its operations solely to charter flights and still be a common carrier (*Alaska Air Transport Inc., v. Alaska Airplane Charter Co., supra*).

It is not the self serving label adopted by Dinaland that is determinative; it is not what Dinaland declares itself to be but rather what the circumstances show it to be. The crucial test as to "whether one is a common carrier is whether he holds himself out as such, expressly or by a course of conduct, that he will carry for hire on a uniform tariff all persons applying . . . so long as he has room" Fixel: *Aviation*, 3rd Ed. (1948) Sec. 372, p. 261.

Dinaland has by its activities and description of its operations held itself out to be a common carrier. As such it must be so treated for the safety and welfare of the community; it must be subject to the regulatory control of this Commission as that control was authorized and directed by the legislature.

This Court has repeatedly emphasized the underlying policy of public utility regulation. One of the most recent reassertions of this policy was expressed in *Cottonwood Mall Shop. Ctr., Inc. v. Utah Power and Light Co.*, 440 F.2d 36, 40 (10th Cir. 1971), *cert. denied*, 404 U.S. 857, 30 L.Ed.2d 99, 92 S.Ct. 107, wherein the Court stated:

> "The analysis begins with the long-ago, but still pertinent, declaration of the Utah Supreme Court on the underlying policy of public utility regulation. In *Gilmer v. Public Utilities Commission,* 1926, 67 Utah 222, 247 P. 284, that Court pointed out that though competition was usually a desirable goal, the states had found the case to be otherwise in the public utility field. The states felt it more suitable to put these activities under closely controlled, state granted monopolies. This means that in construing these statues—which of course expressly cover the physical operational activities of Cottonwood—*we must give a liberal reading to provisions subjecting the activity to regulation while simultaneously giving a more narrow scope to the exceptions.*" (emphasis added)

Basin submits that the statute cloaks the Commission with the requisite authority to regulate aircraft carriers—whether scheduled or non-scheduled—as long as such carrier is operating for public service, for hire and is engaged in intrastate transportation of persons or property. Considerations of public policy and welfare tip the scales in favor of regulation and against the exceptions claimed by Dinaland. To do otherwise would defeat the legislative purpose of the 1969 amendments to Sections 54-2-1 and 54-4-25, Utah Code Annotated, 1953.

POINT II

DINALAND IS AN AIRCRAFT CARRIER WITHIN THE CONTEMPLATION OF SEC-

TION 54-2-1 (29) AND IS SUBJECT TO REGULATION BY THE PUBLIC SERVICE COMMISSION.

Dinaland has taken the position that it is not a common carrier as that term is defined in Section 54-2-1 (14), Utah Code Annotated, 1953. This is based on the inclusion of the word "scheduled" prior to the words "aircraft carrier" in the definition of "common carrier." The word "scheduled" however, is not found in the regulatory part of the statute, Section 54-4-25 (1), Utah Code Annotated, 1953, which provides:

> "54-4-25. CERTIFICATE OF CONVENIENCE AND NECESSITY PREREQUISITE TO CONSTRUCTION AND OPERATION—CERTIFICATES ISSUED TO ELECTRICAL CORPORATIONS BROUGHT UNDER ACT—AIR CARRIERS.—(1) No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, heat corporation, automobile corporation, *aircraft carrier* (corporation), . . . shall henceforth establish, or begin construction or operation of a railroad, street railroad, aerial bucket tramway, line, route, plant or system or of any extension of such railroad, street railroad, aerial bucket tramway, , , ,without having first obtained from the commission a certificate . . ." (emphasis added)

Dinaland would have us ignore the plain meaning of the above Section and insert "scheduled" before "aircraft carrier" in order ". . . to bring Section 54-4-25

(1) . . . into conformity with the entire statutory scheme." (Page 5 of Reply of Dinaland to the Memorandum of Basin, February 13, 1974) On the contrary, "scheduled" should be *removed* from the definition set forth in Section 54-2-1 (14) in order to correct the statutory scheme.

If we were to assume that Dinaland would not qualify as a common carrier under Utah law, (although we do not so admit), the effect of Section 54-2-1 (14) Utah Code Annotated, 1953, is inescapable; it does not require that one be a common carrier in order to come under the jurisdiction of the Public Service Commission. As Section 54-2-1 (29), Utah Code Annotated provides:

> "(29) The term 'aircraft carrier' includes every corporation and person, and lessee, trustee and receivers or trustees appointed by any court whatsoever, *operating for public service for hire engaged in intrastate transportation of persons or property;* except those air carriers operating with a certificate of convenience and necessity issued by the federal government." (emphasis added)

Dinaland is clearly an "aircraft carrier" in the public service. While it is true one cannot be a "common carrier" by definition without being in the public service, the converse is not true; an individual or corporation can be in the public service without meeting all of the requirements or possessing the characteristics of a common carrier; and one who is an "aircraft carrier"

is subject to the jurisdiction of the Public Service Commission.

Dinaland would remove jurisdiction from the Public Service Commission merely because one of the four statutory refrences to the term "aircraft carrier" included the modifier, "scheduled." [Section 54-2-1 (14)] None of the remaining three [Sections 54-2-1 (29), 54-4-25 (1) and 54-4-25 (6)] includes this term which seemingly was added as an afterthougrt in longhand by an unknown party.

The House Journal of 1969 provides little illumination on the history of H.B. 244, the Bill which amended the statutes in question. There is, however, a most accurate appraisal of what the legislators intended this legislation to accomplish as expressed in the formal name of H.B. 244 which reads:

> "AN ACT AMENDING SECTION 54-2-1, U.C.A., 1933, AS AMENDED BY CHAPTER 106, LAWS OF UTAH 1957, AND CHAPTER 94, LAWS OF UTAH 1959, AND CHAPTER 106, LAWS OF UTAH 1965, AND 54-4-25, U.C.A. 1953, AS AMENDED BY CHAPTER 106, LAWS OF UTAH 1957, AND CHAPTER 106, LAWS OF UTAH 1965, RELATING TO THE PUBLIC SERVICE COMMISSION; PROVIDING FOR DEFINING AIRCRAFT CARRIERS AS PUBLIC UTILITIES AND BRINGING AIRCRAFT OPERATED FOR HIRE UNDER THE JURISDICTION AND REGULATION OF THE PUBLIC SERVICE COMMIS-

SION; REQUIRING THAT AIRCRAFT CARRIERS OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY BEFORE BEGINNING NEW OR ADDITIONAL SERVICES; AND ALLOWING AIRCRAFT CARRIERS TO CONTINUE PRESENT SERVICES UNDER CERTAIN CONDITIONS." p. 380, HOUSE JOURNAL 1969

Nowhere does the word "scheduled" appear in the title.

The courts are quite uniform in holding that the title of an act is to be considered in construing it. *Cline v. Knight* 111 Colo. 8, 137 P.2d 680, 146 A.L.R. 1281 (1943). The rule is well established that, in the case of ambiguity, the title may be resorted to as an aid to the ascertainment of the legislative intent. 82 C.J.S. Sec. 350, p. 731, and cases cited.

It is Basin's position that the legislators had a firm comprehension of the type and nature of the service to be regulated, i.e., precisely the service defined in the title. To consider the effect and purpose of the Act in any other light would be to ask this court to indulge in judicial legislation, and with nothing more than the appearance of one word in one statutory section as a guide, edit the entire balance of the statute to buttress the Commission's position in abdicating jurisdiction.

Basin is not alone in this State; it is one of many flght operations which is non-scheduled and which has submitted to and remained subject to the regulation and control of the Commission in compliance with the

provisions of the above cited statutes. In return for submission to such regulatory authority, including stringent safety standards and financial support to the commission in the form of tariffs and taxes, Basin and its fellow flying services enjoy the privilege of operating without the threat of cut-throat competitors. Now, the Commission would abdicate its regulatory power, thus divesting Basin and other operators of the protection and regulation they have accepted and functioned under since the effective date of said statute. It takes no imagination to picture the loss to the public; for who would be willing to make a substantial financial investment in a remote operation such as Blanding, Utah, unless he can be certain that his investment will be protected from barnstorming competition. Not only will the public be denied flying services in the outlying areas, but in those areas where services do exist, there will be no guarantee of the high safety standards heretofore imposed by the Public Service Commission. Here is laissez fiare with all of the dangers, inequities and waste that could result from Commission non-interference and indifference.

In its Reply Memorandum of February 13, 1974, Dinaland quoted from *Williams v. Public Service Commission*, 21 U.2d 155 (1968), wherein Justice Henriod properly stated that no legislative basis existed for the problem then before the Court. The Court pointed out that:

> "The Legislature shortly will meet. That is the foundation of administrative authority, and we leave it to that body under our tripartite system

> to clarify any obfuscation that seems to exist in the minds of some interested parties. With a few words, the Legislature, with appropriate implementing language, surely could make freight cars and boats, highways and waterways analogous if it intends such a conclusion." 21 U.2d 157

The case at bar is different; the legislature has already met with the specific purpose of placing fixed-based operators under the jurisdiction of the Commission, and the amendments of 1969 clearly place Dinaland, Basin and others like them under the regulation of the Public Service Commission.

For the reasons set forth above, Basin respectfully requests the Court to reverse the April 25, 1974 Order of the Commission.

Respectfully submitted,

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