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

Utah Supreme Court

Gary A Frank; Richards and Richards; Attorney for Respondent Dinaland; Robert W. Brandt; Brandt, Miller, Nelson and Christopherson; Attorney for Respondent Flaming; Vernon B. Romney; Attorney General; Attorneys for Appellee Public Service.
Hugh C. Garner; Alan A. Enke; Ray, Quinney and Nebeker; Attorneys for Protestant-Appellant.

STATE OF UTAH

BASIN FLYING SERVICE,
Protestant-Appellant,

vs.

PUBLIC SERVICE COMMISSION, DINALAND AVIATION, INC., and FLAMING GORGE FLYING SERVICE,
Respondents-Appellees.

Case No. 13735

BRIEF OF APPELLEE DINALAND AVIATION, INC.

A Review of the Determination of the Public Service Commission of the State of Utah

Hugh C. Garner and
Alan A. Enke of
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, Utah 84111
Attorneys for Protestant-Appellant

Robert W. Brandt
BRANDT, MILLER, NELSON & CHRISTOPHERSON
716 Newhouse Building
Salt Lake City, Utah
Attorneys for Appellee
Flaming Gorge Flying Service

Vernon B. Romney
Utah Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Appellee
Public Service Commission

RICHARDS & RICHARDS
Gary A. Frank
1515 Walker Bank Building
Salt Lake City, Utah
Attorneys for Appellee
Dinaland Aviation, Inc.

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IN THE

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Case No. 13735

BRIEF OF APPELLEE DINALAND AVIATION, INC.

This brief is submitted on behalf of the appellee Dinaland Aviation, Inc., hereinafter referred to as "Dinaland". The Public Service Commission of the State of Utah shall be referred to as the "Commission", Flaming Gorge Flying Service shall be referred to as "Flaming Gorge" and appellant Basin Flying Service shall be referred to as "Basin".

NATURE OF THE CASE

This proceeding was instituted by appellant to obtain judicial review of the conclusion and Order of the

Commission that it does not have jurisdiction to regulate the nonscheduled air charter service provided by Dinaland.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

On the 13th day of September, 1973, in Investigation Docket No. 151, the Commission caused to have served on John A. Gardner, President of Dinaland, an Order To Show Couse (R. 23-25) relating to the Commission's investigation of Dinaland's operations and practices.

Case No. 6943 involved an application filed on October 23, 1973, to transport passengers and property, serving on-call over irregular routes, from and to all points and places in the State of Utah as well as various points outside of the State of Utah, with fixed base operations at the Vernal, Utah airport (R. 31-41). In it's application, Dinaland also claimed:

> "***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."

A consolidated hearing in Investigation Docket No. 151 and Case No. 6943 was conducted on December 13, 1973. At the hearing, it was established that: (1) on the eighth day of March, 1973, Dinaland provided a nonscheduled charter flight from Vernal, Utah, to Salt

Lake City, Utah (R.14); (2) Dinaland does not provide any scheduled service (R.16); and, (3) Dinaland holds a license from the State Aeronautics Division, State of Utah and a Federal Aviation Administration License authorizing the carriage of passengers and cargo freight to any point in the Continental United States, Canada and Mexico, single and multi engine (R.16).

At the conclusion of the hearing, Dinaland's certification application was continued without date and the Commission took the matter of Dinaland's March 8, 1973 intrastate flight under advisement. The question squarely before the Commission was whether Dinaland's service of March 8, 1973, was illegal because the same was conducted without an intrastate Certificate of Public Convenience and Necessity issued by the Commission.

By it's Report and Order issued April 25, 1974 (R. 105-112), the Commission held:

> "We therefore conclude that this Commission does not have jurisdiction to regulate the service provided by respondent, Dinaland Aviation, Inc., on March 8th, 1973 and that this proceeding should be dismissed with prejudice." (R. 109).

Appellant's Petition for Reconsideration was denied by the Commission's Order of May 30, 1974. (R. 119).

RELIEF SOUGHT ON APPEAL

Dinaland seeks an affirmation of the Commissions Report and Order.

STATEMENT OF FACTS

Dinaland conducts a fixed base operation at the Vernal Municipal Airport, Uintah County, Utah pursuant to a five year lease from the City of Vernal and Uintah County with a five year option renewal (R. 11). A 60' by 80' heated metal hanger building that includes an office and pilot's lounges has been constructed by Dinaland (R. 13): Exhibits 1 & 2) and Dinaland's schedule of equipment includes a Cessna 150, Cessna 206 and a leased twin engine Cessna 310 (R. 13).

The services provided by Dinaland include a Federal Aviation Administration approved flight training program, a fuel service, including a line of jet fuel, and a charter air taxi service over irregular routes at irregular times on an on-call basis (R. 15).

Contrary to appellant's assertion that Dinaland conducts a "haphazard" operation, the testimony clearly established that Dinaland conducts it's business pursuant to the highest standards of it's indurstry. A non-scheduled aircraft carrier such as Dinaland operates without established routes or fixed time schedules and may refuse service for various reasons, including adverse weather conditions and unavailability of adequate equipment because of maintenance problems or prior commitments (R. 16-17).

Appellant's contention that the Commission begged the issue by leaving the final resolution of the matter to this Court is an inaccurate characterization of the Commission's Report and Order. As previously noted, the Commission expressly found and concluded that it did not have jurisdiction to regulate the intrastate air charter service rendered by Dinaland (R. 109). The Commission did recognize that the parties represented at the hearing did advise the Commission, "***that regardless of our decision herein, the party against whom we decided adversely would appeal our decision to the Utah Supreme Court for a final determination of this issue." (R. 109). This recognition, however, did not constitute a mere certification of the question to this Court for resolution. Instead, an administratively final order has been entered and the same is now before this Court pursuant to the statutory provisions relating to judicial review.

Dinaland's Motion to Dismiss Appeal was denied by this Court on October 21, 1974.

ARGUMENT

THE COMMISSION PROPERLY CONCLUDED THAT IT DOES NOT HAVE JURISDICTION TO REGULATE THE AIR CHARTER SERVICES PERFORMED BY DINALAND.

POINT I

DINALAND IS NOT A COMMON

CARRIER AS THE TERM IS STATUTORILY DEFINED.

Appellant's initial contention under Point I of its brief that Dinaland is a "common carrier" is rebutted by reference to Section 54-2-1 (14) Utah Code Annotated (1953, as amended). This section, as amended by the Utah State Legislature in 1969, defines "common carrier" as pertinent herein as:

> "***Every railroad corporation; street railroad corporations; automobile corporations; *scheduled aircraft carrier (corporation)*; aerial bucket tramway corporation; express corporation; dispatch sleeping, dining, drawing room, freight, refrigerator, oil, stock and fruit car corporations***" (Emphasis added).

In *Application of Central Airlines, Inc.,* 185 P. 2d 919 (Okla., 1947), the jurisdiction of the Oklahoma Corporation Commission to regulate air transportation was challenged. The Commission contended that the wording, "***The term 'transportation company' shall include ***", did not deprive it of jurisdiction over businesses not expressly specified, but enlarged the definition of the term "transportation company" to include all business dealing with transportation. The court held that the term "transportation company" was general and the categories following the words "shall include" were qualifying and definitive. Because the subsequent categories did not specify air transporation, it was held

that the "Commission did not have authority to regulate the same."

This same reasoning applies in determining the scope of the general classification "common carrier" as qualified by the use of the pharse "scheduled aircraft carrier (corporation)". The definitive use of the term "scheduled aircraft carrier (corporation)" necessarily *excludes* a nonscheduled air carrier from the definition.

A consistent allegation by appellant is that Dinaland "***persists in attributing ultra special meanings to flight terms such as 'nonscheduled', 'irregular routes' and 'irregular times'." (Brief of Appellant, page 6). These observations merely illustrate appellant's failure to comprehend the distinction between the scheduled airline industry and the nonscheduled charter air service industry. By it's very nature, a scheduled aircraft carrier operates on the basis of established routes, scheduled times, uniform tariffs and the duty to carry any and all for whom it has room. As previously noted, a nonscheduled aircraft carrier operates a charter service without established routes, fixed time schedules or published tariffs and may refuse a requested service for any legal reason.

Terms such as "nonscheduled", "irregular routes", and "irregular times" are not merely "flight terms" but terms that have a particular meaning in the aviation industry. This was recognized by the Legislature of the State of Utah when the hand written interlineation of the word "scheduled" was added to the amendment to

Section 54-2-1 (14) Utah Code Annotated (1953, as amended) prior to it's adoption.

It is this distinction between a scheduled and non-scheduled aircraft carrier that justifies Section 54-1-9 Utah Code Annotated (1953, as amended), wherein the Commission, it's officers and employees, when in the performance of their official duties have the right to travel free of charge on every common carrier. The Commission's boarding of a scheduled flight is certainly distinguishable from a demand directed to a nonscheduled air charter service to fly the Commission, it's officers and employees, to and from any point within the State of Utah, free of charge.

Appellant attempts to expand the clear and unambiguous statutory definition of "common carrier" and relies on cases such as *Alaska Air Transport, Inc. vs. Alaska Airplane Charter Co.,* 72 F. Supp. 609 (Alaska, 1947) *Cushing et al. vs. White* 101 Wash., 172, 172 P. 229 (1918) and *Travis vs. Dickey,* 96 Oklahoma 250, 222 P. 527 (1924). In each case, the court dealt with a regulatory scheme that did *not* statutorily define a common carrier thereby imposing on the court the obligation to render a judicial interpretation. The Legislature of the State of Utah has removed this burden from this court by setting forth a clear legislative definition of the term "common carrier" and reliance on judicial interpretations is completely misplaced.

Dinaland will not belabor this brief with a duplication of the observations and arguments set forth in the

brief of Flaming Gorge, but will merely reiterate the fact that the word "scheduled" was not in the original draft of the 1969 legislative amendment but was added by hand written interliniation prior to the adoption of the amendment. The Commisison properly recognized the clear import of this legislative history by stating:

> "We are of the opinion, however, that the Legislature must have meant something by it's longhand, last minute, addition of the word 'scheduled' in section 54-2-1 (14). A change of language of a bill during the course of its adoption indicates an intention to enact a provision different in effect that that called for by the original language, particularly where there are inconsistencies by amendments of bills during the course of their consideration (citing authority)". (R. 109).

POINT II

DINALAND IS NOT STATUTORILY REQUIRED TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FROM THE COMMISSION PRIOR TO THE RENDITION OF INTRASTATE AIR CHARTER SERVICES.

Section 54-4-1 Utah Code Annotated (1953, as amended), concerning the jurisdiction of the Commission, provides that the Commission is vested with the power to supervise and regulate any "public utility"

within the state. Section 54-2-1 (30) Utah Code Annotated (1953, as amended) provides in part:

> "the term 'public utility' includes every *common carrier,* gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewage corporation, heat corporation***" (Emphasis added).

As previously noted, the term "common carrier" is definitely limited to "scheduled aircraft carrier (corporation)," 54-2-1 (14) Utah Code Annotated (1953, as amended). The inescapable conclusion from this statutory scheme is that unscheduled aircraft carriers are not subject to the jurisdiction of the Commission because they are neither "common carriers" nor "public utilities".

Appellant relies on Section 54-2-1 (29) Utah Code Annotated (1953, as amended), which defines aircraft carriers to include every corporation and person, leassee and trustee, "***operating for *public service* for hire engaged in intrastate transportation of persons or property***", and Section 54-4-25 (1) and (6) Utah Code Annotated (1953, as amended), the pertinent portions of which provide:

> (1) No railroad corporation, ***aircraft carrier (corporation) ***shall henceforth establish or begin construction or operation of a ***line, route, plant, or system without having first obtained from the Commission a certificate that present or future public con-

> venience and necessity does or will require such construction; provided that this section shall not be construed to require any such corporation to secure such certificate for an extension within any city or town within which it shall have heretofore lawfully commenced operations, or for an extension in a territory, either within or without a city, or town, contiguous to it's railroad,***not therefore served by a public utility of like character***that if any public utility in constructing or extending it's line, plant or system shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the Commission on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable."

A contention that an intrastate air charter service that is neither a "common carrier" nor a "public utility" must obtain a Certificate of Public Convenience and Necessity predicated on these statutes is charged with several noticeable flaws in logic. First, the statute prohibits the establishment, construction, or operation of a, "***line, route, plant or system***". An air charter service such as that rendered by Dinaland does not operate on established lines, routes, or systems but, rather, operates pursuant to the requests of a paying customer. For example, an air carrier may be said to establish a "route" when it flies a daily schedule at fixed

times under published tariffs of rates and charges, from Salt Lake City, Utah to Vernal, Utah. However, an air charter service may make five flights in one day from Salt Lake City to Vernal or it may never fly between those points, the destination being governed solely by the requirements of it's customers .Therefore, an air charter service does not operate or establish lines, routes or systems within the meaning of 54-4-25 (1) Utah Code Annotated (1953, as amended).

Secondly, said section consistantly uses the term "public utility" throughout it's content in referring to the corporations mentioned thereunder. Because an unscheduled air charter service is not a "public utility", the conclusion is inescapable that this section pertains only to those aircraft carriers operating as "common carriers" so as to be within the definition of "public utilities".

By defining a public utility to include common carriers and by limiting common carriers to only scheduled aircraft carriers, the 1969 legislative amendment recognized the principle set forth in *the State ex rel. Public Utilities Commission of Utah v. Nelson,* 65 Utah 457, 238 P. 237 (1925) wherein this Court stated at 65 Utah 462:

> Public service, as distinguished from mere private service, is thus a necessary factor to constitute a common carrier. Such element, in portions of the act, is not as clearly expressed as might be. Nevertheless, it necessarily is implied. It is only by the presence of such factor

> or element that the commission has power or authority to regulate or control such business. Eliminating it, its power and jurisdiction are gone. No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be a public service or a public utility. In other words, the state may not, by mere legislative fiat or edict or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. (citing cases) So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission.

An air charter or taxi service such as that performed by Dinaland is not open to an indefinite public as is the service rendered by a scheduled aircraft carrier. Air charter services are not obligated to provide a particular requested flight and may refuse to do for various reasons including adverse weather conditions and unavailability of particular equipment. The service is strictly private in nature.

A further illustration of the distinctions between a public and private service and a public utility as against a private industry is the statutory authority of the Commission to supervise and regulate rates and charges where the activities are within the definition of

a common carrier and/or public utility. For example, Section 54-3-2 *Utah Code Annotated* (1953), as amended), provides in part:

> "Every common carrier shall file with the Commission, and shall print and keep open to the public inspection, schedules showing the rates, fares, charges, and classifications for the transportation***of persons and property...."

This same basic requirement relating to public utilities other than common carriers is set forth in subsection (2) of said section. In addition, Section 54-3-3 *Utah Code Annotated* (1953, as amended) prohibits a public utility from changing or altering it's published schedule without Commission approval and Section 54-3-6 *Utah Code Annotated* (1953, as amended), prohibits deviation by common carriers from their published schedules. A determination by this Court that the Commission could exercise jurisdiction over nonscheduled air charter carrier would create a situation whereby the Commission would have to approve a certificate of convenience and necessity but would not have authority to supervise and regulate schedules of rates, fares, charges and classifications. This was clearly not the purpose or intent of the statutory scheme relating to the Commission's authority.

POINT III

COMMISSION JURISDICTION MUST BE CREATED BY EXPRESS STATU-

TORY DELEGATION AND THE SAME MAY NOT BE INFERRED OR IMPLIED.

As stated in *Public Utilities Commission vs. Colorado Motor Way, Inc.,* 165 Colo. 1, 437 P.2d 44 (1968), at 437 P.2d 46:

> "The Commission is a creature of statute. Both the power and scope of this authority and it's procedures are necessarily controlled by the Act upon which it relies."

Additionally, in *State ex rel. Public Utility Dist. No. 1 of Okanogan County vs. Department of Public Service et al.,* 21 Wash, 2d 201, 150 P.2d 709 (1944), the Court stated at 150 P.2d 713:

> "It is well settled in this state, as elsewhere, that a public service commission, such as the Department of Public Service in this state, is an administrative agency created by statute and as such has no inherent powers, but only such as have been espressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted."
>
> See also 64 Am.Jur.2d Public Utilities, Section 232.

In South Mississippi Airways et al. vs. Chicago and Southern Airlines et al., 26 So 2d 455, 165 A.L.R. 906 (1946), three applications were filed by separate

airlines seeking certificates of public convenience and necessity for operation along certain designated intrastate routes. The Court determined that a motor driven airplane is a motor vehicle capable of operating as a common carrier. "***[a]s the term 'common carrier' is defined." (26 So 2d 461). The Court further determined that the statutory regulation was limited to common carriers by land or water and did not include air carriers. In doing so, the Court observed at 26 So 2d 462:

> "There is nothing in our statutes wherein regulation of airplanes as common carriers can be made to fit. Certainly, any public service commission to whom such regulations were committed would be required to follow rules dealing with landing fields, runways, control towers, beams, hangers, radio communications, clearances, types, sizes and capacities of airplanes, restrictions on safety of flights by ceilings, qualifications of pilots, and other matters pertaining particularly to airplane operations. These and many other essentials and incidents of aeronautical operations do not fit existing legislation regulating facilities and operation of common carriers by land and water even where motor driven. Only over such common carriers has jurisdiction been expressly committed to the Public Service Commission by the Legislature, the sole source of it's powers."

As previously noted, the Utah regulatory scheme does not include nonscheduled air charter carriers within

the definition of a common carrier. Even if this was the case, the statutes are completely devoid of any delegatiion of regulatory powers to the Commission relating to matters peculiar to the aircraft industry. The failure of the legislature to so provide is further evidence of a legislative intent to exclude nonscheduled air charter carriers from Commission regulation.

This is not to say that carriers such as Dinaland are completely free from regulation. Minimum requirements have been adopted by the Utah State Aeronautics Commission pursuant to the Utah Aeronuatical Regulatory Act (Title No. 2, Charter 4, Utah Code Annotated, 1953, as amended). The Board has adopted requirements that adequately provide for the welfare and safety of those utilizing nonscheduled air charter services and Dinaland has complied with these standards and has been granted the appropriate license.

The Commission's jurisdiction and authority to regulate and control the activities of nonscheduled air charter carriers such as Dinaland should be the result of a clear expression of a legislative intent. As stated by this court in *Williams vs. Public Service Commission,* 21 Utah 2nd 155, 442 P.2d 920 (1968) at 21 Utah 2nd 156:

> "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 analagous if it intents such a conclusion."

CONCLUSION

Dinaland respectfully submits that the Report and Order of the Commission under date of April 25, 1974, wherein the Commission concluded that the present statutory scheme did not confer in the Commission jurisdiction to supervise and regulate nonscheduled air charter and taxi services such as those performed by Dinaland, should be affirmed.

Respectfully submitted

RICHARDS & RICHARDS
By: Gary A. Frank
Attorneys for Appellee
Dinaland Aviation, Inc.
1515 Walker Bank Building
Salt Lake City, Utah 84110