

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EVERETT AIRPORTER SERVICES)	
ENTERPRISES, INC.,)	
)	
Complainant,)	DOCKET NO. TC-910789
)	
v.)	
)	COMMISSION DECISION AND
SAN JUAN AIRLINES, INC., d/b/a)	ORDER ON RECONSIDERATION;
SHUTTLE EXPRESS,)	GRANTING RECONSIDERATION
)	IN PART
Respondent.)	
.....))	

PROCEDURAL STATUS: This is a private complaint by Everett Airporter Service Enterprises, Inc. (E.A.S.E.), against San Juan Airlines, Inc., doing business as Shuttle Express (Shuttle).¹ An initial order² recommended sustaining the complaint on an issue of illegal operations and rejecting it on issues of predatory or discriminatory rates and rebates to third parties. On complainant's petition for administrative review, the Commission reversed the proposed result as to rebates, finding a violation but assessing no penalty. The order adopted the proposed rejection of the complaint as to discriminatory rates; and adopted the proposed result as to illegal operations, but increased the penalty for violations from \$100 to \$500 per occurrence.

PETITION FOR RECONSIDERATION: Respondent petitions for reconsideration, contending that the Commission erred in its view of the evidence and in increasing the penalty for violation of respondent's certificate. Respondent repeated its challenges to the initial order and its plea to dismiss the complaint.

COMMISSION: The Commission reconsiders its decision and reaffirms the final order, but suspends the assessed penalty on condition respondent seeks amendment of its permit regarding authority it has acquired, and is free of similar violations for two years.

¹While the complaint was pending, Shuttle purchased E.A.S.E. The Commission denied their motion to dismiss the complaint, finding that the issues were of sufficient public interest that they should be decided and that allowing dismissal of a complaint upon the respondent's purchase of the complainant could be contrary to the public interest.

²Presiding officer at the hearing and author of the initial order was administrative law judge Lisa Anderl.

APPEARANCES: Jimmy Sherrell represented respondent on its petition for reconsideration. In earlier phases of the proceeding, Kirk Griffin, attorney, Seattle, represented complainant and Robert E. Simpson, assistant attorney general, represented the Commission.

MEMORANDUM

This is a private complaint by one airporter bus service against another.³ As relevant here, the complaint alleged that shuttle, the respondent, transported passengers between the airport and certain hotels which its certificate forbade it from serving.

The complainant submitted evidence of more than twenty such instances of service. Respondent presented witnesses who spoke to each of those instances, admitting that it provided service illegally in four instances, contending that it dismissed the drivers in three of the four instances, and offering explanations for the other allegations that, it contended, precluded finding violations.

The initial order disagreed, finding violations on each of at least twenty instances. The order did not make a specific credibility finding,⁴ nor did it discuss the testimony of each witness or a specific finding of violation as to each allegation. The order's finding that violations did occur, however, required that the presiding officer disbelieved testimony submitted by and for the respondent. She could not have found that the violations occurred if she had believed that testimony.

The final order affirmed the finding of violations but increased the penalty from \$100 to \$500 for each of the 20 violations because the record demonstrated a continuing pattern of violations and the increased penalty would provide greater incentive to comply with law.

Respondent contends on reconsideration that the Commission should reverse the result of its order because the Commission has acknowledged that the restriction against hotel service is difficult for the public to understand and difficult for the Commission to enforce. Respondent's quotation is correct, but its context is incomplete.

³Respondent purchased the complainant after entry of the initial order but before entry of the final order.

⁴See, RCW 34.05.461(3) regarding findings based substantially on the credibility of a witness.

The quotation is from a final order granting Shuttle authority. In that order, the Commission refused to impose the service restrictions in question.⁵ Protestant appealed that order to Superior Court. Shuttle then joined in petitioning the court to impose restrictions upon its own permit. As a consequence of Shuttle's action, the court ordered the Commission to impose the restriction on the permit.

The Commission agrees that the restriction is difficult for the public to understand and difficult to enforce. The remedy is not, as respondent apparently argues, to ignore the restriction. Instead, the remedy is to remove the restriction through an application for the expansion of service and by proof that the expanded service is both needed and consistent with the public interest. Now that Shuttle has purchased EASE, the argument for the restrictions would appear to be substantially weaker.

The Commission will suspend the penalty imposed in the final order, and will then dismiss it, on condition that Shuttle apply promptly to eliminate the restriction against service to facilities that had been otherwise served exclusively by EASE, and that it commit no similar violation of its permit, by serving any facility against which it is restricted, in any territory it is otherwise authorized to serve, within 24 months after the date of this order.

Respondent failed to file its post-hearing briefs with the Commission at the time it served them on other parties. The presiding officer noted the failure, and advised respondent of the failure by letter. The Commission commented on that failure in the final order, noting that the brief was absent from the record and that failure to file deprived the Commission of reading whatever argument the brief contained. Respondent has now filed its briefs with the Commission and asks that they be received.

As relevant here, the briefs⁶ summarize respondent's witnesses' denial of specific allegations of violation, contending that in light of the testimony the violations did not occur. The Commission accepts the briefs. The fact remains, however, that the presiding officer considered the testimony and the briefs, did not find the testimony credible, and found that violations occurred.

⁵The restriction forbids Shuttle from providing service to specified locations. It was requested by protestants in the application proceeding.

⁶They consist of a timely-filed brief and an untimely supplement, that was accepted by the presiding officer and considered in the initial order.

The Commission reaffirms its order and the penalty imposed. The issue comes down to one of credibility; the Commission adopted the findings of the administrative law judge who was present to hear the witnesses and view their presentation of the evidence, and who did not find the witness' testimony credible.

O R D E R

THE COMMISSION ORDERS That respondent's petition for reconsideration of the Commission order of January 6, 1993 in this proceeding is granted. On reconsideration, the Commission modifies its final order, as follows:

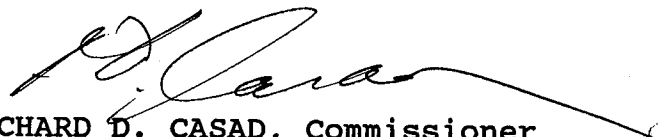
The penalty assessed in the final order is suspended for a period of two years from the date of this order. If the respondent does not during that period violate restrictions in its permit against service to specific locations or facilities, and if the respondent also applies within 90 days of the date of this order for an extension of authority seeking removal of all such restrictions in territory served only by itself and EASE.

DATED at Olympia, Washington and effective this 23rd day of March 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD D. CASAD, Commissioner



A. J. PARDINI, Commissioner