DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

7597

FILE: B-191129 DATE: September 8, 1978

MATTER OF: Express Airways, Inc.

DIGEST:

1. Burden of showing that a new company is not mere continuation or reorganization of old company is on corporation seeking to avoid liability for debts of old company.

2. Direct recovery from new corporation upheld where new corporation is in essence a continuation of activities and interests of the old company.

3. There is no evidence in the record of an oral agreement as to the rates applicable between the points involved and question arises as to whether Transportation Officer can negotiate such rates.

4. Where record indicates that cargo door aircraft may have been necessary at higher rates but there is no evidence of that fact, GSA is requested to further develop the record.

Express Airways, Inc. (Express), in its letters of January 17, and January 25, 1978, requests that the Comptroller General of the United States review the General Services Administration's (GSA) action on various bills for transportation charges. See Section 201(3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b) (Supp. V, 1975). GSA, after audit, notified Express of various overcharges totaling $7,562.05. In the absence of refund, the overcharges were deducted from other monies due Express. In addition to the deduction action, GSA has charged Express with additional overcharges of $14,181.60.

Under regulations implementing Section 201(3) of the Act, deduction action and the setting up of Express in debt for the additional overcharges constitutes a reviewable settlement action. 4 C.F.R. 53.1(b)(1)(3) and 53.2 (1977). Express' letters comply with the criteria for requests for review of that action. 4 C.F.R. 53.3 (1977).

The record shows that GSA deducted $7,562.05 in transportation overcharges from monies otherwise due Express to satisfy the debts of Astro Airways, Inc., d/b/a Mission Airlines (Mission) on the basis that Mission is a predecessor company of Express and therefore it is

liable. Express contends that Mission was sold at a Sheriff's Auction in 1975, and that it took over the operating authority of Mission, but not its liabilities.

GSA states that the president of Express was, and is, an officer of both companies and this fact is sustained by a letter from the Clerk-Administrator, East Kern Municipal Court District, Mojave, California. The letter sets forth the details of the Sheriff's Auction sale. GSA further states that the burden of showing that a new company is not a mere continuation or reorganization of an old company is on the corporation seeking to avoid liability for the debts of the old company. Malco-Arkansas Theatres v. Cole, 132 S.W. 2d 174 (Ark. 1939); Wolff v. Shreveport Gas, Electric Light & Power Co., 70 So. 789 (La. 1916). GSA believes that the deduction action should be sustained because Express has not supported its contention of non-liability of Mission's debt with any documentary evidence.

GSA has also charged Express with additional overcharges totaling $14,181.60 because it states the lowest charge available to the Government on shipments between Yuma, Arizona, and Lemoore, California, is found in Express Uniform Tender of Rates and/or Charges for Transportation Services No. 19. However, Express contends that it has an oral agreement to transport Government shipments between those points at a higher rate of $1.17 per mile. The oral agreement was allegedly made with the Transportation Officer at the Naval Air Station (NAS), Lemoore, California

Express is an Air Taxi Commercial Operator (ATCO) and as such is exempt from certain regulatory requirements. 49 U.S.C. 1386 (1970); 14 C.F.R. 298 (1977). Express as an air taxi operator primarily hauls explosives and other hazardous materials for the U.S. Government from points in California over irregular routes to other parts of the country at rates assessed on mileage and the total cube of the freight carried. It operates under a registration authority issued by the Civil Aeronautics Board, 14 C.F.R. 298.3(a)(2) (1977), and an ATCO operating certificate from the Federal Aviation Agency. 14 C.F.R. 135.9 (1977).

Further development of the record by this Office shows that Mission was formed in 1969. In November 1973, all of the stock in Mission was purchased by the current president of Express. On July 15, 1975, the physical assets of Mission were seized and sold at a Constable's Sale in California to satisfy a creditor's judgment against Mission. Prior to this date on June 9, 1975, Express was incorporated in the state of Nevada.

We agree with GSA that the burden of showing that the new company is not a mere continuation or reorganization of an old company is on the

corporation seeking to avoid liability for debts of the old company. 15 Fletcher Cyclopedia Corporations, Section 7329 (1973). The courts have also held that direct recovery for debts from a new corporation will be upheld where the new corporation is in its essence a continuation of the activities and interests of the old company. Okmulgee Window Glass Co. v. Frink, 260 F. 159 (8th Cir. 1919), cert. Den. 251 U.S. 565 (1919); Davis v. Pacific Studios Corp., 258 P. 440 (Ct. App. Cal. 1927). We are of the opinion that the evidence in this case supports the conclusion that Express is merely a continuation of Mission.

GSA in support of its overcharges against Express for $7,562.05 has furnished this Office a Certificate of Indebtedness dated September 8, 1977. The Certificate contains, among other things, the date and the amount paid, and the amount of the overcharge. The Certificate shows that a total of $23,721.29 was paid by the Government for transportation charges for 14 shipments moving under Government bills of lading (GBL) contracts. An analysis of the date paid indicates that eight shipments consisting of transportation charges in the total amount of $12,805.16 were paid, presumably to Express, prior to July 15, 1975, the date of the Constable's Sale and the date it is alleged that Mission ceased doing business. The remaining shipments (six) were paid after July 15, 1975, and after the incorporation by Express in Nevada on June 9, 1975.

GSA did not furnish this Office with any additional evidence in the form of GBL's or payment vouchers as to these shipments. Thus, we do not know the parties to the GBL contract, or the party billing for the transportation charges. Nor do we have any record from the Finance Center as to the payee corporation. However, Mission's Tender No. 18 was effective April 16, 1975, with an expiration date of April 15, 1976, and Express Tender No. 19 was not issued until September 10, 1975, with an effective date of October 16, 1975. Thus, the only tender presumably in effect during the period the shipments moved was Mission's No. 18. There is also evidence in the record that the president of Mission/Express petitioned the FAA for a change of name on its operating certificate rather than requesting a new certificate. And we were informally advised by the CAB that Express had insurance in the name of Mission from June 30, 1975, to June 30, 1976.

Thus, the record indicates that Express was incorporated in Nevada prior to the dissolution of the assets of Mission in California, and that the business was carried on in the same manner, under the authority of the same tender, and with the same personnel as before. Further, the record indicates that payment for transportation charges was made to Express on behalf of Mission.

Accordingly, GSA's action in deducting $7,562.05 from monies due Express to liquidate the overcharges of Mission is correct and is sustained.

Express alleges that it had an oral contract to transport Government shipments between the Marine Corps Air Station, Yuma, Arizona, and NAS Lemoore, California, at a rate of $1.17 per mile. The oral agreement was allegedly made with the Transportation Officer at NAS Lemoore, California. This Office interviewed the former Transportation Officer and was unable to obtain evidence of an oral agreement as to the rates to be charged for the transportation services between the points mentioned. However, the former Transportation Officer did recall an oral agreement for shipments between NAS Lemoore and NAS Fallon, Nevada, points which are not in contention here. Therefore, Express may have confused the rates between the points, if in fact an oral agreement was in effect.

Western Area Military Traffic Management Command on the other hand indicated that a Transportation Officer would not be authorized to negotiate a rate with a carrier (rates are negotiated in Washington, D.C.) except in an emergency situation where the freight must go at any cost. In all other cases, the published tender would apply.

Express has issued its written Tender No. 19 which applies between the points involved, and it was this tender that GSA used as the basis for its overcharges. GSA in its audit used the lowest charge or rate available based on the mileage and cube of the article as shown on the GBL for each shipment. However, Express contends that the shipments transported were too large for regular door aircraft and the shipments required a cargo door aircraft. Tender No. 19 provides for much higher rates where the dimensions of the cargo necessitate the use of an aircraft equipped with a cargo door.

There is evidence that Express may be correct in its contention. For example, a shipment on a pallet having a normal size of 40 inches x 48 inches would not fit through a regular door aircraft according to the dimensions of Express' aircraft furnished this Office. Thus, a shipment would have to be removed from the pallet, or in the alternative, a cargo door aircraft utilized. We have also obtained a copy of a routing request issued by the Transportation Officer, NAS Lemoore requesting the use of an air taxi operator other than Express. The routing request contains the following statement as to the aircraft utilized in furnishing the involved air taxi service:

> "The aircraft has a cargo loading opening of four feet wide and four feet three inches high. This opening will accommodate our largest pack. In the past, delicate

and fragile electronic instruments had to be removed from their cases to be placed aboard the aircraft because of restricted door openings. The alternative was to order an aircraft with a so called 'Cargo Door,' which considerably elevated the cost of air taxi service."

However, in spite of the fact that a cargo door aircraft may have been ordered and utilized, neither GSA nor Express have provided us with any evidence to this effect. Since this is a factual matter, we request that GSA further develop the record to obtain more information about the dimensions of the shipments involved to determine the correct rates and proper charges.

GSA should take action in accordance with this decision.

Deputy Comptroller General
of the United States