

SECOND DIVISION

[G.R. No. 119528, March 26, 1997]

**PHILIPPINE AIRLINES, INC., PETITIONER, VS. CIVIL
AERONAUTICS BOARD AND GRAND INTERNATIONAL AIRWAYS,
INC., RESPONDENTS.**

D E C I S I O N

TORRES, JR., J.:

This Special Civil Action for Certiorari and Prohibition under Rule 65 of the Rules of Court seeks to prohibit respondent Civil Aeronautics Board from exercising jurisdiction over private respondent's Application for the issuance of a Certificate of Public Convenience and Necessity, and to annul and set aside a temporary operating permit issued by the Civil Aeronautics Board in favor of Grand International Airways (GrandAir, for brevity) allowing the same to engage in scheduled domestic air transportation services, particularly the Manila-Cebu, Manila-Davao, and converse routes.

The main reason submitted by petitioner Philippine Airlines, Inc. (PAL) to support its petition is the fact that GrandAir does not possess a legislative franchise authorizing it to engage in air transportation service within the Philippines or elsewhere. Such franchise is, allegedly, a requisite for the issuance of a Certificate of Public Convenience or Necessity by the respondent Board, as mandated under Section 11, Article XII of the Constitution.

Respondent GrandAir, on the other hand, posits that a legislative franchise is no longer a requirement for the issuance of a Certificate of Public Convenience and Necessity or a Temporary Operating Permit, following the Court's pronouncements in the case of Albano vs. Reyes,^[1] as restated by the Court of Appeals in Avia Filipinas International vs. Civil Aeronautics Board^[2] and Silangan Airways, Inc. vs. Grand International Airways, Inc., and the Hon. Civil Aeronautics Board.^[3]

On November 24, 1994, private respondent GrandAir applied for a Certificate of Public Convenience and Necessity with the Board, which application was docketed as CAB Case No. EP-12711.^[4] Accordingly, the Chief Hearing Officer of the CAB issued a Notice of Hearing setting the application for initial hearing on December 16, 1994, and directing GrandAir to serve a copy of the application and corresponding notice to all scheduled Philippine Domestic operators. On December 14, 1994, GrandAir filed its Compliance, and requested for the issuance of a Temporary Operating Permit. Petitioner, itself the holder of a legislative franchise to operate air transport services, filed an Opposition to the application for a Certificate of Public Convenience and Necessity on December 16, 1995 on the following grounds:

"A. The CAB has no jurisdiction to hear the petitioner's application until the latter has first obtained a franchise to operate from Congress.

B. The petitioner's application is deficient in form and substance in that:

1. The application does not indicate a route structure including a computation of trunkline, secondary and rural available seat kilometers (ASK) which shall always be maintained at a monthly level at least 5% and 20% of the ASK offered into and out of the proposed base of operations for rural and secondary, respectively.

2. It does not contain a project/feasibility study, projected profit and loss statements, projected balance sheet, insurance coverage, list of personnel, list of spare parts inventory, tariff structure, documents supportive of financial capacity, route flight schedule, contracts on facilities (hangars, maintenance, lot) etc.

C. Approval of petitioner's application would violate the equal protection clause of the constitution.

D. There is no urgent need and demand for the services applied for.

E. To grant petitioner's application would only result in ruinous competition contrary to Section 4(d) of R.A. 776."^[5]

At the initial hearing for the application, petitioner raised the issue of lack of jurisdiction of the Board to hear the application because GrandAir did not possess a legislative franchise.

On December 20, 1994, the Chief Hearing Officer of CAB issued an Order denying petitioner's Opposition. Pertinent portions of the Order read:

"PAL alleges that the CAB has no jurisdiction to hear the petitioner's application until the latter has first obtained a franchise to operate from Congress.

The Civil Aeronautics Board has jurisdiction to hear and resolve the application. In *Avia Filipina vs. CAB*, CA G.R. No. 23365, it has been ruled that under Section 10 (c) (I) of R.A. 776, the Board possesses this specific power and duty.

In view thereof, the opposition of PAL on this ground is hereby denied.

SO ORDERED."

Meantime, on December 22, 1994, petitioner this time, opposed private respondent's application for a temporary permit maintaining that:

"1. The applicant does not possess the required fitness and capability of operating the services applied for under RA 776; and,

2. Applicant has failed to prove that there is clear and urgent public need for the services applied for."^[6]

On December 23, 1994, the Board promulgated Resolution No. 119(92) approving the issuance of a Temporary Operating Permit in favor of Grand Air^[7] for a period of three months, i.e., from December 22, 1994 to March 22, 1994. Petitioner moved

for the reconsideration of the issuance of the Temporary Operating Permit on January 11, 1995, but the same was denied in CAB Resolution No. 02 (95) on February 2, 1995.^[8] In the said Resolution, the Board justified its assumption of jurisdiction over GrandAir's application.

"WHEREAS, the CAB is specifically authorized under Section 10-C (1) of Republic Act No. 776 as follows:

'(c) The Board shall have the following specific powers and duties:

(1) In accordance with the provision of Chapter IV of this Act, to issue, deny, amend, revise, alter, modify, cancel, suspend or revoke, in whole or in part, upon petitioner-complaint, or upon its own initiative, any temporary operating permit or Certificate of Public Convenience and Necessity; Provided, however; that in the case of foreign air carriers, the permit shall be issued with the approval of the President of the Republic of the Philippines."

WHEREAS, such authority was affirmed in *PAL vs. CAB*, (23 SCRA 992), wherein the Supreme Court held that the CAB can even on its own initiative, grant a TOP even before the presentation of evidence;

WHEREAS, more recently, *Avia Filipinas vs. CAB*, (CA-GR No. 23365), promulgated on October 30, 1991, held that in accordance with its mandate, the CAB can issue not only a TOP but also a Certificate of Public Convenience and Necessity (CPCN) to a qualified applicant therefor in the absence of a legislative franchise, citing therein as basis the decision of *Albano vs. Reyes* (175 SCRA 264) which provides (inter alia) that:

a) Franchises by Congress are not required before each and every public utility may operate when the law has granted certain administrative agencies the power to grant licenses for or to authorize the operation of certain public utilities;

b) The Constitutional provision in Article XII, Section 11 that the issuance of a franchise, certificate or other form of authorization for the operation of a public utility does not necessarily imply that only Congress has the power to grant such authorization since our statute books are replete with laws granting specified agencies in the Executive Branch the power to issue such authorization for certain classes of public utilities.

WHEREAS, Executive Order No. 219 which took effect on 22 January 1995, provides in Section 2.1 that a minimum of two (2) operators in each route/link shall be encouraged and that routes/links presently serviced by only one (1) operator shall be open for entry to additional operators.

RESOLVED, (T)HEREFORE, that the Motion for Reconsideration filed by Philippine Airlines on January 05, 1995 on the Grant by this Board of a Temporary Operating Permit (TOP) to Grand International Airways, Inc. alleging among others that the CAB has no such jurisdiction, is hereby DENIED, as it hereby denied, in view of the foregoing and considering that the grounds relied upon by the movant are not indubitable."

On March 21, 1995, upon motion by private respondent, the temporary permit was extended for a period of six (6) months or up to September 22, 1995.

Hence this petition, filed on April 3, 1995.

Petitioners argue that the respondent Board acted beyond its powers and jurisdiction in taking cognizance of GrandAir's application for the issuance of a Certificate of Public Convenience and Necessity, and in issuing a temporary operating permit in the meantime, since GrandAir has not been granted and does not possess a legislative franchise to engage in scheduled domestic air transportation. A legislative franchise is necessary before anyone may engage in air transport services, and a franchise may only be granted by Congress. This is the meaning given by the petitioner upon a reading of Section 11, Article XII,^[9] and Section 1, Article VI,^[10] of the Constitution.

To support its theory, PAL submits Opinion No. 163, S. 1989 of the Department of Justice, which reads:

"Dr. Arturo C. Corona

Executive Director

Civil Aeronautics Board

PPL Building, 1000 U.N. Avenue

Ermita, Manila

Sir:

This has reference to your request for opinion on the necessity of a legislative franchise before the Civil Aeronautics Board ("CAB") may issue a Certificate of Public Convenience and Necessity and/or permit to engage in air commerce or air transportation to an individual or entity.

You state that during the hearing on the application of Cebu Air for a congressional franchise, the House Committee on Corporations and Franchises contended that under the present Constitution, the CAB may not issue the abovestated certificate or permit, unless the individual or entity concerned possesses a legislative franchise. You believe otherwise, however, for the reason that under R.A. No. 776, as amended, the CAB is explicitly empowered to issue operating permits or certificates of public convenience and necessity and that this statutory provision is not inconsistent with the current charter.

We concur with the view expressed by the House Committee on Corporations and Franchises. In an opinion rendered in favor of your predecessor-in-office, this Department observed that,-

"xxx it is useful to note the distinction between the franchise to operate and a permit to commence operation. The former is sovereign and

legislative in nature; it can be conferred only by the lawmaking authority (17 W and P, pp. 691-697). The latter is administrative and regulatory in character (In re Application of Fort Crook-Bellevue Boulevard Line, 283 NW 223); it is granted by an administrative agency, such as the Public Service Commission [now Board of Transportation], in the case of land transportation, and the Civil Aeronautics Board, in case of air services. While a legislative franchise is a pre-requisite to a grant of a certificate of public convenience and necessity to an airline company, such franchise alone cannot constitute the authority to commence operations, inasmuch as there are still matters relevant to such operations which are not determined in the franchise, like rates, schedules and routes, and which matters are resolved in the process of issuance of permit by the administrative. (Secretary of Justice opn No. 45, s. 1981)

Indeed, authorities are agreed that a certificate of public convenience and necessity is an authorization issued by the appropriate governmental agency for the operation of public services for which a franchise is required by law (Almario, Transportation and Public Service Law, 1977 Ed., p. 293; Agbayani, Commercial Law of the Phil., Vol. 4, 1979 Ed., pp. 380-381).

Based on the foregoing, it is clear that a franchise is the legislative authorization to engage in a business activity or enterprise of a public nature, whereas a certificate of public convenience and necessity is a regulatory measure which constitutes the franchise's authority to commence operations. It is thus logical that the grant of the former should precede the latter.

Please be guided accordingly.

(SGD.) SEDFREY A. ORDOÑEZ

Secretary of Justice"

Respondent GrandAir, on the other hand, relies on its interpretation of the provisions of Republic Act 776, which follows the pronouncements of the Court of Appeals in the cases of Avia Filipinas vs. Civil Aeronautics Board, and Silangan Airways, Inc. vs. Grand International Airways (supra).

In both cases, the issue resolved was whether or not the Civil Aeronautics Board can issue the Certificate of Public Convenience and Necessity or Temporary Operating Permit to a prospective domestic air transport operator who does not possess a legislative franchise to operate as such. Relying on the Court's pronouncement in Albano vs. Reyes (supra), the Court of Appeals upheld the authority of the Board to issue such authority, even in the absence of a legislative franchise, which authority is derived from Section 10 of Republic Act 776, as amended by P.D. 1462.^[11]

The Civil Aeronautics Board has jurisdiction over GrandAir's Application for a Temporary Operating Permit. This rule has been established in the case of Philippine Air Lines Inc., vs. Civil Aeronautics Board, promulgated on June 13, 1968.^[12] The Board is expressly authorized by Republic Act 776 to issue a temporary operating permit or Certificate of Public Convenience and Necessity, and nothing contained in