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Donald F. Wiseman

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# THE AIR TERMINAL ZONE: INCONSISTENT REGULATION

DONALD F. WISEMAN\*

IN THE HISTORY of interstate air cargo transportation few areas have presented as significant a problem of jurisdiction and enforcement as the "incidental-to-air" exemption of the Interstate Commerce Act.<sup>1</sup>

## I. HISTORY

As a general rule, the Interstate Commerce Commission (ICC, also referred to as "the Commission") has jurisdiction to engage in economic regulation of interstate motor transportation unless a specific statutory exemption exists.<sup>2</sup> One such exemption is contained in section 10526(a)(8) of the Interstate Commerce Act, which exempts the motor transportation of property and passengers which are "incidental to transportation by aircraft."<sup>3</sup> The exemption was added to the Interstate Commerce Act in 1938 by section 1107(j) of the Civil Aeronautics Act.<sup>4</sup> Since that time, the question of the appropriate scope of incidental motor transportation, and the issue of whether the ICC or the Civil Aeronautics Board (CAB, also referred to as "the Board") is the proper agency

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\* B.A., 1968, University of Virginia, J.D., 1976, Memphis State University School of Law; formerly with the department of Legal and Regulatory Affairs, Federal Express Corporation, Memphis, Tennessee; currently associated with the firm of Waring, Cox, Sklar, Allen, Chafetz and Watson of Memphis, Tennessee, general counsel to Federal Express Corporation.

<sup>1</sup> Interstate Commerce Act, Pub. L. No. 95-473, §§ 10101-11916, 92 Stat. 1337 (1978) (to be codified in 49 U.S.C. §§ 10101-11916).

<sup>2</sup> The ICC has jurisdiction over interstate "transportation by motor carrier and the procurement of that transportation . . ." subject to the exemptions set forth in sections 10522-10526 of the Act. *Id.* at § 10521.

<sup>3</sup> *Id.* at § 10526(a)(8).

<sup>4</sup> Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 1027 (1938) (current version at 49 U.S.C. §§ 1301-1542 (1976)).

to define the scope of the exemption has existed.<sup>5</sup> Administrative cases and regulations adopted by both agencies have repeatedly confused the situation. A recent rulemaking action by the Interstate Commerce Commission and recent legislative amendments to the Federal Aviation Act have exacerbated the problem to the point where a congressional resolution is required.

The root cause of the confusion lies in the failure of the ICC to adopt a *functional*, rather than *geographical* definition of "incidental-to-air." The ICC has failed to recognize the distinction, and as a result, its regulations have resulted in a barrier to efficient air cargo transportation within the United States. Rather than determine what is incidental with reference to *operational* characteristics, the Commission has steadfastly through the years attempted to define the *size* of an air carrier's *terminal* area (the "air terminal zone"), and in doing so, has mistakenly applied traditional standards of motor carrier regulation which are wholly inappropriate to air transportation. In addition, the enactment of two recent pieces of legislation deregulating air transportation has had a profound effect upon the air transportation industry and the scope of the exemption.<sup>6</sup> Not only has the ICC failed to recognize the effect of the legislation, but it is attempting to assert a form of regulation over the incidental transportation activities of air carriers that is inconsistent with the recent legislation and current economic thinking on government regulation of business.

There is little legislative history to determine Congress' intent in enacting the incidental-to-air exemption.<sup>7</sup> It makes sense to infer that by enacting the exemption as a part of the Civil Aeronautics Act, Congress intended but one agency, the CAB, to have

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<sup>5</sup> Section 403 of the Federal Aviation Act of 1958, 72 Stat. 739, as amended, 49 U.S.C. §§ 1301-1542 (1976), required tariffs to be filed with the CAB for all services in connection with air transportation. Section 101(21)(c), to be codified in 49 U.S.C. § 1301(24), of the same act defines "interstate air transportation" as commerce which "moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." The ICC had based its competing claim of jurisdiction on the Interstate Commerce Act, *supra* note 1.

<sup>6</sup> Federal Aviation Act of 1958—Insurance Risks, Pub. L. No. 95-163, §§ 17, 18, 91 Stat. 1284-86 (1977) (to be codified in 49 U.S.C. §§ 1371, 1386, 1388, 1482); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (effective Oct. 24, 1978) (amending 49 U.S.C. §§ 1301-1542 (1976)).

<sup>7</sup> Sky Freight Delivery Serv., Inc.—Common Carrier Application, 47 M.C.C. 229, 239 (1947); Sutherland & Peavy, *The Incidental-to-Air Exemption: Conflict and Confusion*, 1 TRANSP. L.J. 87, 88 (1969).

jurisdiction over such activity. The limited case law that has developed since 1938, however, has held to the contrary. However, the rationale of the early cases used to define the exemption is no longer appropriate, since past circumstances in the field of air freight no longer exist.

When the first incidental-to-air cases were decided in the 1940's, air freight was in its infancy. Few, if any, air carriers offered their own incidental pickup and delivery services, instead preferring to rely on local motor carriers, whether regulated or unregulated. Air carriers engaged exclusively in all-cargo operations were the exception rather than the rule, and the Federal Aviation Act did not distinguish between cargo and passenger service for certification purposes.<sup>8</sup> As a result, industry and government (particularly the ICC and the regulated motor carrier industry) failed to properly view incidental-to-air operations as "air transportation." Instead of one true origin-to-destination movement, they envisioned two separate legs with separate regulatory characteristics.

In 1979, the situation is drastically different. All-cargo air transportation is an established and growing segment of the nation's transportation system. The rapid growth of the overnight door-to-door small package air transportation system, pioneered by Federal Express, has established the need for a unitary regulatory scheme instead of an anachronistic two-agency bureaucracy.<sup>9</sup> In addition, all-cargo air carriage has been effectively deregulated, leaving but one loose end in the Interstate Commerce Act: the incidental-to-air exemption.

Although there were at least two prior cases,<sup>10</sup> *Sky Freight Delivery Service, Inc.—Common Carrier Application*<sup>11</sup> was the first complete discussion by the Interstate Commerce Commission of the scope of the incidental-to-air exemption. The Commission

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<sup>8</sup> A separate class of all-cargo carriers was not designated until the passage of Pub. L. No. 95-163, *supra* note 6, although early all-cargo carriers possessed certificates, pursuant to 49 U.S.C. § 1371 (1976), restricting them to transportation of property.

<sup>9</sup> For example, during fiscal year 1974 Federal Express had an average daily package volume of 4,110 pieces. On May 31, 1979, daily volume had approached 60,000 pieces; by October 1, 1979, daily volume approached 70,000 pieces.

<sup>10</sup> *Railway Express Agency, Inc., Extension of Operations—West Warwick, R.I.*, 31 M.C.C. 332 (1941); *Railway Express Agency, Inc., Extension of Operations—Bristol, R.I.*, 31 M.C.C. 385 (1941).

<sup>11</sup> 47 M.C.C. 229 (1947).

noted that "the same factors which prompt the use of air-freight service in the first instance would likewise require that such traffic ordinarily move from and to the nearest airport and will [thus] tend to minimize the distance involved in 'incidental-to-air' motor hauls."<sup>12</sup> Although the Commission would not until later describe these factors as "self-limiting" with respect to the exemption, it recognized that there are certain inherent characteristics of air freight that separate it from traditional motor carriage. The Commission initially defined "incidental" in its generally accepted lay meaning of "occurring in the course of or coming as a result or an adjunct of something else; . . . foreign or subordinate to the general purpose."<sup>13</sup> It said, "Although we are not slavishly bound by dictionary definitions, . . . we find no difficulty in accepting it here."<sup>14</sup> Unfortunately, the Commission never again adhered to this initial line of thinking.

The error begun here by the Commission and compounded through years of decisions is the conclusion that incidental transportation is that which is "collection, delivery, or interline transfer of air freight within what appears to be a *reasonable terminal area* for the line-haul carrier . . ."<sup>15</sup> In arriving at this conclusion, the Commission discussed what it believed to be an appropriate analogy between the incidental-to-air exemption and section 202(c)(1) and (2) [now section 10523(a)] of the Interstate Commerce Act which provided for the exemption of certain incidental transportation of *motor* carriers.<sup>16</sup> In a statement, the philosophy of which has been honored less by its observance than its breach in cases since *Sky Freight*, the Commission stated, "It is readily conceivable, indeed probable, in view of the radical difference in the character of the services involved that a permissible terminal area of an air carrier within which 'incidental' collection, delivery or transfer of services may be performed may be greater than the maximum permissible terminal area of a freight forwarder at the same point."<sup>17</sup>

With the dramatic rise in cargo transportation the Commission

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<sup>12</sup> *Id.* at 240.

<sup>13</sup> *Id.* at 241.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 242.

has tended less often to consider this statement and more often to consider a protectionist philosophy applied in favor of its regulated carriers. As a result, the Commission has found it necessary to impose an artificial mileage limitation by defining the exemption in terms that are not suggested by the language of the exemption.

In 1948, the Commission decided *Peoples Express Co. Extension of Operation—Air Freight*,<sup>18</sup> which expanded *Sky Freight* to the extent that it attempted to define at least what is *not* incidental-to-air transportation by describing what is thought to be “connecting-carrier line-haul service.”<sup>19</sup> Essentially the case stands for the proposition that motor operations extending so far as to reach into the territory which is adjacent to, and served primarily by, another airport clearly take on the character of inter-terminal line-haul service *in substitution for* rather than incidental to, air transportation. Once again the Commission superimposed a requirement that has no relation to the characteristics of air transportation. It is this mistaken adherence to the idea of “size” that has been the source of all the subsequent problems between the Commission, the motor carriers, the Civil Aeronautics Board, and the air carriers.<sup>20</sup>

In 1953 the Commission concluded a rather extensive investigation which resulted in a lengthy opinion entitled *Hazel Kenny Extension—Air Freight*,<sup>21</sup> which discussed the incidental-to-air exemption in great detail. *Kenny* formed the basis for all subsequent case decisions until its eventual codification into the Commission’s regulations.<sup>22</sup> The *Kenny* case was the first to recognize the corresponding role of the Civil Aeronautics Board in determining the scope of regulations that deal with operations “in connection with air transportation” in accordance with what at that time was the Civil Aeronautics Act.<sup>23</sup> The exemption was defined as

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<sup>18</sup> 48 M.C.C. 393 (1948).

<sup>19</sup> *Id.* at 395.

<sup>20</sup> The Commission’s decision in *Graff Common Carrier Application*, 48 M.C.C. 310 (1948), illustrates the inconsistency. In the *Graff* case, inter-terminal movements were approved under certain conditions. *Id.*

<sup>21</sup> 61 M.C.C. 587 (1953).

<sup>22</sup> See *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964).

<sup>23</sup> 61 M.C.C. at 594.

“that confined to the transportation in bona fide collection, delivery or transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier.”<sup>24</sup> It also reaffirmed the idea that the services would be performed within a “reasonable terminal area of the air carrier” and that they would not have the characteristics of “connecting-carrier line-haul service.”<sup>25</sup> Echoing the previous statements in *Sky Freight*, the Commission thought that such a test would be self-limiting because it would be impossible for carriers or their agents to hold themselves out as offering true air freight service with its attendant necessity for speed, and at the same time engage in otherwise prohibited line-haul service.

The *Kenny* decision recognized that the limits of the air terminal area were defined by the air carriers themselves in tariffs filed with the Civil Aeronautics Board. As long as the Commission believed that the Civil Aeronautics Board would be reasonably restrictive in the acceptance of such tariffs, it was content to assume that the “agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area.”<sup>26</sup>

## II. CAB AND ICC RULEMAKING OF 1964

Cases were considered on an *ad hoc* basis with varying results until the 1960's when air transportation became a more important transportation factor.<sup>27</sup> In 1961, both the ICC and the CAB instituted, on their own motions, rulemaking proceedings to determine the scope of the incidental-to-air exemption.<sup>28</sup>

Although the ICC investigation was instituted on the Commis-

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<sup>24</sup> *Id.* at 595.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 596.

<sup>27</sup> See, e.g., *Commodity Haulage Corp.*, Common Carrier Application, 69 M.C.C. 527 (1947); *Fisher*, Common Carrier Application, 83 M.C.C. 229 (1960).

<sup>28</sup> *Motor Transportation of Property Incidental to Transportation by Aircraft*, ICC Docket No. MC-C-3437, Notice of Proposed Rulemaking, 26 Fed. Reg. 9569 (1961); Part 222—*Tariffs of Air Carriers, Air Cargo Pick-up and Delivery Zones*, CAB Docket No. 12951, Notice of Proposed Rulemaking, 26 Fed. Reg. 8037 (1961).

sion's own motion, it was prompted by the filing of joint petitions by five motor carrier trade associations (including the American Trucking Association) and forty individual carriers.<sup>29</sup> The motor carriers sought to limit the scope of exempt transportation to thwart what they perceived to be a threat to their economic stability. Several positions were put forward by different parties in the case including a "length of line haul" test or a simple "prior or subsequent movement" test, both of which were rejected by the Commission.<sup>30</sup> The Commission reaffirmed its previous *Kenny* holding<sup>31</sup> and proceeded to codify it in regulations which are substantially in existence to date.<sup>32</sup> Although the Commission stated that the "imposition of a definite mileage limitation is unnecessary,"<sup>33</sup> it is clear from subsequent events that the Commission's reliance upon what it believed to be a restrictive practice of the Civil Aeronautics Board did in fact impose an arbitrary mileage limitation. Consequently, incidental-to-air was defined with respect to the size of a terminal area and not to the functional characteristics of the incidental transportation being performed. In addition, the Commission decision established the veto authority of the ICC over the CAB's decision concerning pickup and delivery points.<sup>34</sup>

The CAB's concurrent rulemaking proceeding resulted in the adoption of Part 222 of the Board's regulations.<sup>35</sup> The rules provided for a terminal zone defined by a "rule of thumb" radius of twenty-five miles from either the airport or from the corporate limits of the city served by the airport.<sup>36</sup> In addition, a provision was included for *ad hoc* extensions of the rule upon application to the Board, supported by adequate economic evidence.<sup>37</sup>

The CAB's standards, however, differed somewhat from those of the ICC. The Board thought that true air cargo pickup and delivery service depended upon the type of equipment used, whether

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<sup>29</sup> Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 72 (1964).

<sup>30</sup> *Id.* at 86.

<sup>31</sup> *Id.* at 94.

<sup>32</sup> 49 C.F.R. § 1047.40 (1978).

<sup>33</sup> 95 M.C.C. at 85.

<sup>34</sup> *Id.* at 87.

<sup>35</sup> 14 C.F.R. § 222 (1979).

<sup>36</sup> *Id.*

<sup>37</sup> 14 C.F.R. § 222.3 (1979).

or not the service was geared to meet airline schedules, and whether or not the service was oriented to customer air transportation needs.<sup>38</sup> The Board believed that:

[T]he full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery service and to test their adequacy and economy is vital to prevent a stifling of the potential of the air cargo transportation.<sup>39</sup>

Although the twenty-five mile "rule of thumb" provided a workable yardstick for day-to-day air carrier operations, Part 222 generally was not applied by the Board in a restrictive fashion.<sup>40</sup> In each order authorizing a carrier to file tariffs with extended pickup and delivery points, the CAB consistently adhered to the functional characteristics first enunciated in the preamble to Part 222: the type of equipment used, compatibility with aircraft schedules, and an orientation to specific air transportation needs. The CAB correctly did not consider any geographical, political, economic or commercial factors which govern the ICC's idea of a motor carrier's "terminal area."<sup>41</sup> Thus, by not trapping itself into a mistaken concept of "reasonable size" the CAB was able to consistently keep its eye on the true functional determinants of the incidental-to-air exemption.

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<sup>38</sup> Part 222—Air Cargo Pick-up and Delivery Zones; Filing of Tariffs: Applications for Authority to File, Preamble to Regulations, CAB Docket No. 12951, 29 Fed. Reg. 6275 (1964).

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g.*, Emery Air Freight Corp., Order Authorizing Filing of Pick-up and Delivery Tariffs, CAB Order No. 78-6-55 (June 8, 1978); Profit-by-Air, Inc., Order Authorizing Filing of Pick-up and Delivery Tariffs, CAB Orders No. 78-9-80 (Sept. 18, 1978) and 78-12-55 (Dec. 7, 1978). The Board has consistently held that public necessity is not a factor, that intermediate points are prima facie includable, and that overlapping terminal areas are not a factor. *Id.*

<sup>41</sup> *See, e.g.*, Emery Air Freight Corp., Order Authorizing Filing of Pick-up and Delivery Tariffs, CAB Order No. 78-6-55 (June 8, 1978); Profit-by-Air, Inc., Order Authorizing Filing of Pick-up and Delivery Tariffs, CAB Orders No. 78-9-80 (Sept. 18, 1978) and 78-12-55 (Dec. 7, 1978). *See also* Sutherland & Peavy, *supra* note 7, at 99 n.60.

## III. POST-1964 ADMINISTRATIVE DECISIONS

Of the ICC decisions after the 1964 rulemaking, two have had particular significance and illustrate the Commission's position from the standpoint of protecting its economically regulated motor carriers. In *Zantop Air Transport, Inc.—Investigation of Operations*,<sup>43</sup> the ICC investigated the operations of Zantop Air Transport, an all-cargo direct air carrier. Zantop was using its own trucks to transport the shipments of its customers between Wilmington, Delaware and the Baltimore, Maryland airport, a distance well in excess of the twenty-five mile rule of thumb. Each shipment had a prior or subsequent movement by air. Instead of examining the functional characteristics of the motor leg, the ICC held that Baltimore was not the airport "designated by the CAB to serve Wilmington." Thus, Zantop was found to have engaged in "inter-community line-haul service" and the services of a certificated motor carrier were required.<sup>43</sup> Although the Commission did not explain what "designated" meant, it did cite its own *Commercial Zones and Terminal Areas*<sup>44</sup> case as being a "kindred" concept and authority for the (unstated) proposition that an air carrier's terminal area must be determined with reference to the same factors that are determinative of a motor carrier's terminal area.<sup>45</sup> The Commission seemed confused that Zantop did not file tariffs with the CAB, but that confusion did not deter its "apples and oranges" comparison. In a well-reasoned dissent, Chairman Bush recognized the factors peculiar to air transportation. He expressed his belief that any motor movement with such characteristics was not only truly incidental, but when such transportation is performed by *the carrier*, it is exempt as a matter of law.<sup>46</sup>

Zantop appealed,<sup>47</sup> and in an opinion substantially devoid of citations, the ICC's order was affirmed as being supported by substantial evidence.<sup>48</sup> The "substantial" evidence consisted of a letter

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<sup>43</sup> 102 M.C.C. 457 (1966).

<sup>43</sup> *Id.* at 462.

<sup>44</sup> 54 M.C.C. 21 (1952).

<sup>45</sup> 102 M.C.C. at 461.

<sup>46</sup> *Id.* at 467.

<sup>47</sup> *Zantop Air Transp., Inc. v. United States*, 272 F. Supp. 265 (E.D. Mich. 1967).

<sup>48</sup> *Id.* at 267.

from the ICC's assistant general counsel to the court describing the Commission's findings.<sup>49</sup> Although the ICC had once again applied the inappropriate motor carrier commercial zone and terminal area standard, the Michigan district court affirmed the order.<sup>50</sup>

The second significant post-1964 decision was the second *Incidental-to-Air* investigation of 1970.<sup>51</sup> At the insistence of several regulated motor carriers, the ICC undertook an investigation of the air terminal zones at Indianapolis, Indiana and Atlanta, Georgia, after the CAB had authorized the filing of tariffs with it that effectively expanded both of those zones. The Commission once again considered the terminal areas of other modes of transportation to be analogous, including the concept of "community homogeneity."<sup>52</sup> The ICC effectively overruled the CAB and returned the terminal zones of the two cities to a smaller area.<sup>53</sup>

The reason for the decision was, as might be expected, the protection of existing regulated motor carriers.<sup>54</sup> The sentiment was certainly not new, but, as noted before, there had previously been little alarm when the CAB had consistently adhered to the twenty-five mile rule of thumb. It was only when the Commission's regulated motor carriers were faced with a possible "unbridled expansion" of exempt transportation that the ICC vigorously asserted its claim to primary jurisdiction.<sup>55</sup> Adequacy of existing service, however, has little, if any, relevance to the determination of what is incidental-to-air transportation.

#### IV. JUDICIAL REVIEW

As noted, the CAB is authorized to determine what is "in connection with air transportation."<sup>56</sup> Prior to the 1964 rulemaking by both agencies, the CAB's authority in this regard was affirmed

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<sup>49</sup> *Id.* at 266, 267-68.

<sup>50</sup> *Id.* at 267.

<sup>51</sup> Motor Transportation of Property Incidental to Transportation by Aircraft, 112 M.C.C. 1 (1970).

<sup>52</sup> *Id.* at 14, 17-22.

<sup>53</sup> *Id.* at 16-17, 22.

<sup>54</sup> *Id.* at 16. See also Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 86 (1964).

<sup>55</sup> 112 M.C.C. at 16.

<sup>56</sup> See note 5 *supra*.

in *City of Philadelphia v. Civil Aeronautics Board*.<sup>57</sup> This seminal case distinguishes the authority available to both the ICC and the CAB, although it upholds the principle that "air transportation" includes not only aircraft flights but also incidental motor transportation.<sup>58</sup>

After the 1964 rulemaking, the ICC's action was challenged in *Air Dispatch, Inc. v. United States*<sup>59</sup> with the petitioners relying on *City of Philadelphia* for the proposition that the ICC did not have the authority to promulgate regulations concerning the reasonableness of an air carrier's terminal area.<sup>60</sup> The court held that the ICC has the jurisdiction to define the scope of the exemption granted in section 203(b)(7a) [now section 10526(a)(8)] of the Interstate Commerce Act.<sup>61</sup> In distinguishing *City of Philadelphia*, the court noted that the CAB had "disclaimed" jurisdiction in favor of the ICC.<sup>62</sup> Two factors led to the judicial approval of a regulatory system that is no longer appropriate: 1) the court's view that there are air carriers with their regulatory scheme on the one hand, and motor carriers performing the incidental service with their regulatory scheme on the other hand; and 2) the CAB's disclaimer of jurisdiction. Today, neither of these factors exists. No one, except the regulated motor carriers, can now argue that air transportation involving a subordinate incidental pickup and delivery operation is separate line-haul motor transportation. Additionally, in documents recently filed with the ICC, the CAB has disclaimed its previous disclaimer of jurisdiction.<sup>63</sup>

Two other cases on the same issue followed shortly, both holding in favor of the ICC's jurisdiction and relying entirely on *Air*

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<sup>57</sup> 289 F.2d 770 (D.C. Cir. 1961). In this case the motor leg was between Philadelphia, Pa. and Newark, N.J., a distance of 90 miles. *Id.* at 771.

<sup>58</sup> *Id.* at 774.

<sup>59</sup> 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd per curiam*, 381 U.S. 412 (1965).

<sup>60</sup> *Id.* at 453.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* CAB orders granting authority to file pickup and delivery tariffs to points beyond the 25-mile rule of thumb have routinely stated that the order is not to reflect on whether the applicant may require further authority from the ICC or any other agency. See note 40 *supra*.

<sup>63</sup> Initial Comments of the Civil Aeronautics Board filed in ICC Docket No. MC-C-3437 (Sept. 1977) suggested that all such authority be returned to the CAB. In addition the CAB filed a Petition for Reconsideration in the same docket which objected to the ICC's assertion of authority.

*Dispatch* with little discussion.<sup>64</sup> Subsequent cases have dealt with more limited issues concerning particular carriers. These administrative decisions have been routinely affirmed.<sup>65</sup>

#### V. THE ICC'S RECENT RULEMAKING AND THE EFFECT OF AIR CARRIER DEREGULATION LEGISLATION

Until the ICC instituted its recent rulemaking proceeding, the state of regulatory affairs was that motor transportation of property would be found to be exempt when the following conditions were met:

1. The transportation must be within the terminal area of an air carrier (generally twenty-five miles from the airport or airport city limits or approved extensions).
2. The transportation must be described in a tariff on file with the CAB.
3. The goods must move on a through air bill of lading covering the line-haul by air and the incidental collection, delivery or transfer service.
4. Points beyond twenty-five miles must have been approved by the CAB.

In addition, the terminal area must be "reasonable" as tested by the twenty-five mile rule of thumb and the "community homogeneity" standard with the ICC asserting a veto power.

On May 25, 1977, the ICC instituted a proceeding to determine "whether the area (the 'air terminal area') within which motor transportation of property and passengers incidental to transportation by aircraft is exempt from economic regulation under the Interstate Commerce Act should be redefined and expanded."<sup>66</sup> The Commission initially proposed consideration of a radius of up to one hundred miles from the airport and retention of the reference to air carrier tariffs on file with the CAB.<sup>67</sup> Comments were received from numerous interested parties, and an informal conference was held on December 14, 1977, with more

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<sup>64</sup> *Wycoff Co. v. United States*, 240 F. Supp. 304, 309 (D. Utah 1965); *National Bus Traffic Ass'n v. United States*, 249 F. Supp. 869, 871 (N.D. Ill. 1965).

<sup>65</sup> *See, e.g., Zantop Air Transp., Inc. v. United States*, 272 F. Supp. 265 (E.D. Mich. 1967); *ICC v. Howard*, 342 F. Supp. 1112 (W.D. Mich. 1972), *aff'd*, 477 F.2d 599 (6th Cir. 1973).

<sup>66</sup> 42 Fed. Reg. 26,667 (1977).

<sup>67</sup> *Id.*

than a hundred participants. The two rounds of comments that were eventually received by the Commission ranged from proposals for a roll-back of the exempt zone (by the regulated carriers) to proposals for relatively unlimited exempt transportation (by the all-cargo air carriers, air freight forwarders, Department of Transportation, and Department of Justice). In order to further develop the record, the ICC's Bureau of Economics was directed to develop a study of incidental-to-air transportation. Its report concluded that the terminal zones should be a thirty-five mile radius measured from the airport or the airport city, but that a one hundred mile radius was too broad.<sup>68</sup>

The comments filed by the CAB are extremely significant from a jurisdictional point of view because they represent a reassertion of its previously "disclaimed" jurisdiction.<sup>69</sup> In reasserting its belief that it should be the proper arbiter of incidental-to-air questions, the CAB removed one of the bases upon which *Air Dispatch*<sup>70</sup> was decided.

On January 11, 1979, the ICC released its Final Decision and Rules, to become effective May 16, 1979.<sup>71</sup> It found that a reasonable air terminal area was one that extended thirty-five miles from the airport and thirty-five miles from the corporate limits of any municipality, any part of whose commercial zone intersected the radius drawn from the airport. In other words, a minimum seventy-mile radius was described for the majority of points in the United States. More importantly, the new rule provided that extensions of the zone would be granted only after application to the ICC rather than the CAB. This effectively repealed the operation of the CAB's fifteen-year-old Part 222 without any action by that agency.<sup>72</sup> All references to CAB tariffs were also deleted.<sup>73</sup> The Commission reaffirmed the principles contained in *Kenny* and the earlier *Inci-*

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<sup>68</sup> *Interstate Commerce Commission, Bureau of Economics, Air Terminal Exempt Zones and the Intermodal Movement of Air Cargo* 40-41 (1978).

<sup>69</sup> Initial Comments of the CAB, *supra* note 63, at 3.

<sup>70</sup> 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd per curiam*, 381 U.S. 412 (1965).

<sup>71</sup> Motor Transportation of Property Incidental to Transportation by Aircraft, 131 M.C.C. 87 (1979), 44 Fed. Reg. 3295 (1979), reissued, 44 Fed. Reg. 6102 (1979).

<sup>72</sup> 131 M.C.C. at 97-98.

<sup>73</sup> *Id.* The CAB had recently issued Part 291 of its Regulations, exempting cargo carriers from filing tariffs. Regulation ER-1080, 42 Fed. Reg. 65,139 (1978), reissued, 43 Fed. Reg. 53,628 (1978).

*dental-to-Air* decisions, even though the application of those principles was substantially changed. The primary difference, and one which was not discussed by the Commission, was that the ICC was now relying on an arbitrary mileage factor whereas all previous cases had at least paid lip service to the view that no mileage limitation was necessary.

In the year and a half between the Notice of Proposed Rule-making and the issuance of the Final Rule, two extremely important legislative changes were made to the Federal Aviation Act. The first enactment removed almost all traditional economic regulation from all-cargo air carriers, including all route and most rate regulation.<sup>74</sup> The second was the Airline Deregulation Act of 1978, which partially deregulated the air transportation of passengers, and provided for the eventual phasing out of the CAB entirely by 1985.<sup>75</sup>

The policy sections of these statutes represent clear expressions by Congress that air transportation in general, and all-cargo air transportation in particular, are to be removed from all forms of economic regulation and that free market forces are to be the determinant of the "where, when and how much" of service. Section 101(21)(c) of the Federal Aviation Act, which defines "interstate air transportation" as commerce which moves "partly by aircraft and partly by other forms of air transportation,"<sup>76</sup> makes it clear that incidental motor transportation of property is as much a part of air transportation as the line-haul by air.

The greatest effect of cargo deregulation is to vitiate the ICC's reliance on the concept of a "reasonable terminal area measured from designated airports" by removing all air carrier route restrictions. An air carrier may now serve any community from any airport it chooses. Any concept based on "community homogeneity," therefore, is no longer appropriate. The ICC's arbitrary restriction based on geographic size instead of functional character-

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<sup>74</sup> Federal Aviation Act of 1958—Insurance Risks, Pub. L. No. 95-163, § 18, 91 Stat. 1286 (1977) (to be codified in 49 U.S.C. § 1002).

<sup>75</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1542 (1976)).

<sup>76</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(21)(c), 72 Stat. 739 (1958) (current version at 49 U.S.C.A. § 1301 (24) (Supp. 1979)); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (to be codified in 49 U.S.C. § 1302).

istics is directly at odds with this statutory scheme.

Unfortunately, in its 1979 rule, the ICC failed to recognize the effect of all-cargo deregulation. It saw in deregulation, not a directive to cease regulation, but "a good deal of uncertainty" that required that its regulations "set forth on their face the exact scope of the exemption."<sup>77</sup> It found itself unable to abandon traditional notions of protection of economic monopoly when it stated: "[W]e have afforded regulated carriers a certain measure of economic protection by insuring that exempt operations do not assume the character of connecting carrier line-haul service."<sup>78</sup>

The CAB filed a Petition for Reconsideration, along with others, pointing out to the ICC that it had failed to consider these legislative pronouncements and that in doing so, it was acting in direct conflict with congressional policy prescriptions. In addition, the CAB objected to the ICC's apparent attempt to prescribe the jurisdiction of the CAB:

In attempting to remove the CAB from the decisional process, we believe that the ICC may have overstepped its statutory authority, and we regret the uncertainty that such action may create. The Commission offers no justification and cites no authority to support its allegation, . . . that 'of the several governmental entities involved in the regulation of transportation this Commission alone is charged with the duty to consider all modes in the exercise of its regulatory functions and not only those modes subject to the express provisions of the Interstate Commerce Act.'<sup>79</sup>

Thus, the CAB's views on jurisdiction and the definition of exempt incidental-to-air transportation have changed since its "disclaimers" of 1961 and 1964.

At literally the eleventh hour before the ICC's rules were to become effective, they were stayed by order of the Commission.<sup>80</sup> Two weeks later, however, the Commission lifted its stay, ordered the rules effective June 26, 1979, and denied all petitions for reconsideration.<sup>81</sup>

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<sup>77</sup> 131 M.C.C. at 97.

<sup>78</sup> *Id.*

<sup>79</sup> Civil Aeronautics Board, Petition for Reconsideration, at 3 n.9, MC-C-3437, filed with the ICC on February 9, 1979.

<sup>80</sup> ICC Order, Docket No. MC-C-3437 (May 15, 1979), 44 Fed. Reg. 33,684 (1979).

<sup>81</sup> ICC Order, Docket No. MC-C-3437, decision and order filed May 30,

The final ICC decision was important in three respects: it affirmed its previous assertion of supreme authority over incidental-to-air questions;<sup>82</sup> it admitted that the decision was partly based upon a desire to protect economically regulated motor carriers;<sup>83</sup> and it took the last step in the transition from the functional definition in the early cases to an arbitrary, and unsupportable, standard based on geographic size. Evidence of the Commission's continued insistence on such an arbitrary standard is contained in its statement concerning the hypothetical case at the outer edge of the air terminal zone where it bisects a municipality. In its Petition for Reconsideration, Federal Express noted that in such a circumstance shippers on one side of a street could receive service, while a shipper on the other side of the street could not. In its final decision, the Commission brushed aside this point by saying that service to any portion of such a municipality was "simply a fortuitous circumstance."<sup>84</sup> Such a statement clearly indicates the final abandonment of any attempt to define "incidental" by its functional characteristics and further indicates failure by the Commission to consider the economically discriminatory effect of such an arbitrary position. Although an optimistic reading of the decision indicates that the Commission will continue to reassess the 35-35 formula with a view toward broadening it, no assurances as to that possibility can be given.

## VI. THE NEED FOR CONGRESSIONAL ACTION

The ICC has now cemented its idea of geographic size and supreme agency authority into regulations. The CAB has effectively been removed from the regulatory decision-making process, and the cooperative effort that had existed between the two agencies since 1964 has been extinguished. This regulatory anomaly has created a pressing need for congressional action. It is clear that the ICC intends to impose a form of regulation over bona fide incidental pickup and delivery operations of air carriers. The Com-

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1979 (unreported). A Petition for Review is pending in the Circuit Court of Appeals for the D.C. Circuit. *Air Delivery Serv. v. ICC*, No. 79-1253 (D.C. Cir., filed Mar. 6, 1979).

<sup>82</sup> ICC Order, Docket No. MC-C-3437, *supra* note 81, at 5.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *Id.*

mission's decision makes it clear that one of its aims is to protect its regulated motor carriers, an aim that is inconsistent with congressionally mandated air carrier deregulation. If adequacy of existing service was ever a proper determinant of incidental-to-air transportation, there can be no doubt but that the recent deregulation statute has effectively removed it from consideration.

Although the legislative amendments to the Federal Aviation Act and the CAB's objection to the ICC's unilateral action have removed the underlying principles of the *Air Dispatch* case and the *Incidental-to-Air* case, the Commission has failed to reconsider its decision. An amendment to the Interstate Commerce Act, clearly defining the exemption *in terms of the service being provided*, not in terms of geographic size, is clearly needed. Such an amendment should provide that any property moving on a through air bill of lading issued by an air carrier is exempt from ICC regulation when the transportation is being performed by the air carrier, as long as it has a prior or subsequent movement by air, regardless of the type or size vehicle used, the type or weight of commodities carried, or the distance from the origin or destination to the point where the aircraft is met.

On June 21, 1979, the President transmitted to Congress a package of legislation designed to substantially reduce government economic regulation of the trucking industry.<sup>85</sup> In addition to a number of other badly-needed reforms, the proposed Trucking Competition and Safety Act of 1979 would amend the present air cargo exemption to read as follows:

(8) transportation by motor vehicle of property as part of a continuous movement which, prior or subsequent thereto, has been or will be transported by an air carrier subject to regulation under the Federal Aviation Act of 1958; or, to the extent so agreed by the United States, by a foreign air carrier subject to regulation under the Federal Aviation Act of 1958.<sup>86</sup>

This amendment adopts the simple "prior or subsequent" test to determine eligibility for the exemption. It is a pure functional test

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<sup>85</sup> S. 1400, 96th Cong., 1st Sess. (1979); H.R. 4586, 96th Cong., 1st Sess. (1979); H.R. 4549, 96th Cong., 1st Sess. (1979); H.R. 4550, 96th Cong., 1st Sess. (1979).

<sup>86</sup> S. 1400, 96th Cong., 1st Sess. 112, 125 CONG. REC. S8,420 (daily ed. June 25, 1979).

that recognizes the purpose and intent of previous air cargo deregulation policy and satisfies the needs identified above.

There can be little doubt of the need for such legislation. Present regulations discriminate against a shipper unfortunate enough to be located outside the ICC's idea of a "reasonable" terminal area. They impose an additional cost on the shipper in terms of convenience and cause the transportation rates to be higher than necessary. The chance of loss or damage is also increased since the air carrier must relinquish possession of the property to a motor carrier for a portion of its journey. More importantly, the rules are out of step with current concepts of economic regulation and are inconsistent with the recent policy statements of Congress as expressed in the 1977 amendment to the Federal Aviation Act and the Airline Deregulation Act of 1978.

Only through the enactment of such an amendment to the Interstate Commerce Act can the full promise of air transportation be fulfilled. As the ICC said years ago in *Kenny*, the concept really is "self-limiting."<sup>87</sup> True incidental pickup and delivery can never be a substitute for air transportation because such a substitution violates the very premise upon which air transportation is based—speed.

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<sup>87</sup> Hazel Kenny Extension—Air Freight, 61 M.C.C. 587, 595 (1953).