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AIR CABOTAGE: HISTORICAL AND MODERN-DAY PERSPECTIVES

DOUGLAS R. LEWIS

HISTORICALLY, nations have protected their domestic trade and commerce from outside competition through the concept of cabotage. The origin of the term is in dispute,¹ but cabotage is generally understood as the carriage of passengers, cargo and mail between two points within the territory of the same nation for compensation or hire.² Such traffic has traditionally been reserved for the state's own carriers.³ Since the advent of modern aviation, the United States, under domestic and international law, has reserved air cabotage to its domestic carriers, affording them broad protection from foreign carrier competition. In February of 1980, however, the International Air Transportation Competition Act of 1979⁴ was passed, section 13 of which creates a narrow exception to United States cabotage law. This comment examines the provision of that statute dealing with cabotage against the historical background which excluded foreign carriers from purely domestic transportation.

CABOTAGE—A HISTORICAL INTERNATIONAL PERSPECTIVE

In maritime law cabotage originally was limited to coastal trade between ports on the same coast of a state.⁵ The state's right

¹ The term "cabotage" may derive from "cabot" or "chabot," French terms for a small vessel. Cooper, *Aviation Cabotage and Territory*, 1952 U.S. AV. REP. 256, 257 [hereinafter cited as Cooper]. Alternatively, it may be derived from the Spanish word "cabo," meaning "cape," which was used to describe navigation proceeding from cape to cape along the coast without going into the open seas. BLACK'S LAW DICTIONARY 254 (4th rev. ed. 1968). Cabotage exists both in aviation and maritime law. Air cabotage refers to cabotage transported by air. Surface cabotage refers to cabotage transported by water.

² Sheehan, *Air Cabotage and the Chicago Convention*, 63 HARV. L. REV. 1157, 1157 (1950) [hereinafter cited as Sheehan].

³ *Id.*

⁴ Pub. L. No. 96-192, 94 Stat. 35 (1980) (to be codified in scattered sections of 49 U.S.C.) [hereinafter cited as International Competition Act].

⁵ Sheehan, *supra* note 2, at 1157; Thomas & Thomas, *Theories of Trade in International Law and their Influence on Air Commerce*, 7 SW. L.J. 219, 237 (1953) [hereinafter cited as Thomas].

to reserve such trade to its own vessels was based on its jurisdiction over territorial waters.⁶ Eventually the concept was broadened to include trade between ports of the same state located on different coasts, for example, trade between Boston and San Francisco, even though it was necessary to traverse the high seas to reach the destination port.⁷ Some countries, notably the United States and Portugal, expanded surface cabotage to include trade between the home state and its overseas possessions. This expansion has never been widely accepted, however, under international maritime law, due to fear of economic reprisals.⁸

It was not until the Convention Relating to the Regulation of Aerial Navigation (Paris Convention of 1919) that a specific air cabotage provision received international support.⁹ Article 16 of the Convention provided in relevant part, "[e]ach contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory."¹⁰ The primary issue raised by this language was the meaning of "territory." Under article 1 of the Convention the contracting states recognized that "every power has complete and exclusive sovereignty over the airspace above its territory." The article defined "territory of a State" as including the home state, colonial territories and adjacent waters. Article 40 provided, in addition, that protectorates and mandates administered under the League of Nations should be assimilated into the territories of the protecting or mandatory state for purposes of the Convention. "Territory" as thus defined in articles 1 and 40 included land areas and their adjacent waters under the sovereignty, protection or mandate of a state.¹¹ This definition was applied to article 16 so that

⁶ Sheehan, *supra* note 2, at 1157; Thomas, *supra* note 5, at 237.

⁷ Sheehan, *supra* note 2, at 1157-58; Thomas, *supra* note 5, at 237. Coastal trade between two points of a single territory along the same coast is called "petit-cabotage." Trade between ports of a single territory on two different seas is termed "grand-cabotage." B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 314 (1962) [hereinafter cited as CHENG].

⁸ Thomas, *supra* note 5, at 237.

⁹ Convention Relating to the Regulation of Aerial Navigation, *signed*, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter cited as Paris Convention].

¹⁰ *Id.* at art. 16.

¹¹ *Id.* at arts. 1, 40; Cooper, *supra* note 1, at 266.

trade between all land areas and territorial waters under a state's political jurisdiction was encompassed within the cabotage restriction and therefore reserved to that state's national carriers.¹²

The present Convention on International Civil Aviation (the Chicago Convention of 1944)¹³ abrogated the Paris Convention of 1919. The purpose of the Chicago Convention was to establish a workable and efficient international aviation system through the establishment of multilateral agreements for the exchange of commercial air rights.¹⁴ The United States initiated the conference and invited discussion on various matters including "the application of cabotage to air traffic." The term "cabotage" as used by the United States did not, however, follow the narrow construction applied in maritime law, namely coastal trade between points in the same national geographic unit. Rather, the United States' construction of cabotage included traffic between a territory and its colonies and possessions.¹⁵ Despite its apparent broadness, the

¹² Cooper, *supra* note 1, at 266-67. Although the United States did not sign the final document, a draft submitted by the United States proved influential in the making of the final draft of the Paris Convention and provided in relevant part:

Article 1—The contracting states recognize the full and absolute sovereignty and jurisdiction of every state in the air space above its territory and territorial waters.

....

Article 3—Each contracting state shall have the right to impose special restrictions by way of reservations or otherwise with respect to the public conveyance of persons and goods between two points on its territory.

Id. at 265.

¹³ Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 [hereinafter cited as Chicago Convention].

¹⁴ Institut du Transport Aerien, *Cabotage in International Air Transport, Historical and Present Day Aspects*, 7-E, 10 (1969) [hereinafter cited as ITA Study].

¹⁵ The United States submitted two similar proposals regarding cabotage. Document No. 16 contained the following "cabotage" article:

Article 21: Air commerce for hire may be reserved as cabotage exclusively to the aircraft of any Contracting State only if it both originates and terminates within the limits of such Contracting State or is between such Contracting State and its colonies and possessions or among such colonies and possessions.

Proceedings of the International Civil Aviation Conference, Chicago, 1944, U.S. DEPT OF STATE, PUB. NO. 2820, at 561 (1949) [hereinafter cited as *Conference Proceedings*]. Document No. 19, in part, stated:

UNITED STATES PROPOSAL OF AN AGREEMENT RE-

United States' definition met with objection because it excluded "commerce with mandated areas or protectorates as cabotage."¹⁶ The final draft of the Chicago Convention ultimately included such commerce within its definition. The pertinent articles, 7 and 2, provide:

Article 7

Cabotage

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which *specifically* grant any such privilege *on an exclusive basis* to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.¹⁷ (emphasis added).

Article 2

Territory

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.¹⁸

The first sentence of article 7 recognizes a nation's right under the Convention to reserve for its national aircraft all carriage of passengers, mail or cargo transported for compensation between two points within areas under its sovereignty, suzerainty, protection or mandate. A broad, fundamental principle of sovereignty with specific application to cabotage is thereby established for air transportation.¹⁹

GARDING PROVISIONAL ARRANGEMENTS FOR WORLD ROUTES AND SERVICES

(6) Each state signatory hereto reserves the right to reserve as cabotage exclusively to aircraft of its own nationality traffic which both originates and terminates within the limits of such signatory state; provided that for the purposes of this agreement the limits of each state shall include its colonies and possessions.

Id. at 1269.

¹⁶ *Id.* at 651.

¹⁷ Chicago Convention, *supra* note 13, at art. 7.

¹⁸ *Id.* at art. 2.

¹⁹ Robinson, *Changing Concepts of Cabotage: A Challenge to the Status of United States Carriers in International Civil Aviation?*, 34 J. AIR L. & COM. 553, 561 (1968) [hereinafter cited as Robinson]; ITA Study, *supra* note 14, at 13.

The broad definition of air cabotage in article 7 is attributable partially to the circumstances surrounding the Chicago Convention. The wartime environment then existing allowed nationalistic concerns to prevail over international goals.²⁰ It was argued that air transportation must remain totally under domestic control to insure adequate protection of national interests.²¹ Indicative of the general view of most states participating in the Convention is the following explanation of the United States proposal on cabotage:

It is the view of the United States that each country should, as far as possible, come to control and direct its own internal air lines. In the long view, no country will wish to have its essential internal air communications under the domination of any save their own nationals. . . . [This] suggests recognition of the principle that the people of each country must have the dominant voice in their own transport systems. If air transport is not to become an instrument of attempted domination, recognition of this principle seems to be essential.²²

The undeveloped state of the commercial aviation industry further encouraged recognition of extensive cabotage rights as a protective device necessary to insulate carriers from competition and thereby assure their continuing financial viability.²³ Similarly, the nature of air transportation added impetus to vast sovereignty claims over domestic traffic. Unlike sea transportation, which is restricted to coastal trade, air transportation is able to penetrate the major internal centers of commerce and increase their vulnerability to international market forces.²⁴

The second sentence of article 7 employs a reciprocity principle to restrict discriminatory grants of cabotage rights. The nature of this restriction, whether qualified or absolute, has always been a matter of controversy due to the ambiguity attaching to the words "specifically" and "on an exclusive basis." Two interpretations of this language have been postulated by legal scholars. The first, referred to as the strict or restrictive version, de-emphasizes "specifically" and gives effect to the phrase, "on an exclusive basis."²⁵

²⁰ Sheehan, *supra* note 2, at 1160.

²¹ *Conference Proceedings, supra* note 15, at 61.

²² *Id.*

²³ Hesse, *Some Questions on Aviation Cabotage*, 1953 MCGILL L.J. 129, 133.

²⁴ ITA Study, *supra* note 14, at 7, 8.

²⁵ *Id.* at 9.

This construction allows cabotage privileges to be granted only on a nonexclusive basis, thereby creating an absolute prohibition against discriminatory grants.²⁶ Accordingly, if one state is awarded cabotage privileges by another state, any other contracting state may demand corresponding privileges.²⁷ Although this strict approach theoretically bans only exclusive grants of cabotage privileges, in practice it also discourages nonexclusive grants between two contracting states since any such grant would automatically expose the grantor state to unlimited entry by other states demanding similar privileges, a notion which is repugnant to nationalistic doctrines.²⁸ Understandably, the restriction thus imposed against cabotage agreements has been criticized as an undue infringement upon the free exercise of national sovereignty.²⁹

²⁶ This strict interpretation of the second sentence appears to accord with the United States' position at the Convention. A United States draft proposal submitted as part of Document 19 stated:

(7) In order to prevent discriminatory practices and to assure equality of treatment, it is provided that:

(a) Each state shall refrain from granting exclusive rights of air commerce to any nation or its air transport enterprises, or from making any agreement excluding or discriminating against the aircraft of any signatory state, and will terminate any existing exclusive or discriminatory rights as soon as such action can be taken under presently outstanding agreements.

Conference Proceedings, *supra* note 15, at 1269. As 7(a) indicates, the United States sought a prohibition on *all* exclusive agreements, not merely those which were "specifically" made exclusive. That the United States delegation foresaw undesirable possibilities resulting from discriminatory cabotage arrangements is demonstrated by its statement:

[T]he right of reserved cabotage can be exercised by one country only; for if a number of countries were to pool their cabotage as between each other, the results would be merely to exclude nations not parties to the pool; and it is the firm conviction of this Government that discriminatory or exclusive agreements are raw material for future conflict.

Id. at 61-62.

²⁷ *Id.* at 61-62; Robinson, *supra* note 19, at 561.

²⁸ See ITA Study, *supra* note 14, at 15.

²⁹ At the Sixteenth Session of the Assembly of the International Civil Aviation Organization (ICAO), the delegate from Sweden argued that the second sentence of article 7, construed restrictively, was contrary to the spirit of article 1 of the Chicago Convention. ICAO Doc. 8771, A 16-EX (1968), at 44, ¶¶ 39:2, 39:4. Article 1 states: "The contracting States recognize that every State has the complete and exclusive sovereignty over the airspace above its territory." Chicago Convention, *supra* note 13, at art. 1. One delegate stated that this argument was invalid because the Convention's purpose was to impose limitations upon sovereignty for the common good. ICAO Doc. 8771, A 16-EX (1968), at 44, ¶¶ 39:2, 39:4.

Unlike the strict version, the second interpretation, known as the flexible or liberal version, gives full meaning to "specifically" in article 7.³⁰ This construction allows cabotage rights to be granted on an exclusive basis where it is not stipulated that they are exclusive, without third states having the right to demand corresponding privileges.³¹ The agreement must always leave open the possibility that other states may receive similar cabotage privileges. Hence, states may conclude agreements granting cabotage privileges to other states so long as the agreements do not specify that these rights are exclusive. A tacit agreement to the same effect could then be adhered to by the contracting states.³² If this logic is employed, it is obvious that cabotage rights easily may be exchanged on a discriminatory basis.³³ So long as the agreement does not contain an express provision precluding the grant of cabotage privileges to another state, an excluded state will be hard-pressed to prove that the exclusivity restriction in article 7 is violated. As one writer has noted, "the burden placed upon a complainant State, of proving that certain cabotage rights were given on the basis of 'exclusivity,' would in most, if not all, instances be insuperable."³⁴

UNITED STATES STATUTES ON CABOTAGE

The first United States aviation regulatory statute was the Air Commerce Act of 1926.³⁵ Under that statute, the navigation of foreign-registered aircraft in the United States was prohibited except as authorized by section 6 of the Act. Section 6(c) permitted the Secretary of Commerce to authorize, on a reciprocal basis, foreign-registered aircraft "to be navigated in the United States."³⁶ It contained a prohibition, however, against foreign aircraft en-

³⁰ ITA Study, *supra* note 14, at 9, 14.

³¹ CHENG, *supra* note 7, at 315; ITA Study, *supra* note 14, at 9.

³² Hesse, *Some Questions on Aviation Cabotage*, 1953 MCGILL L.J. 129, 140.

³³ The Scandinavian states have adopted the flexible interpretation of article 7. In agreements granting reciprocal cabotage rights between them, they employ an additional safeguard by including a safety clause which terminates the agreement in the event third states demand cabotage rights by virtue of article 7. ITA Study, *supra* note 14, at 14.

³⁴ Robinson, *supra* note 19, at 562.

³⁵ Pub. L. No. 69-254, 44 Stat. 568 (1926).

³⁶ *Id.* § 6(c), 44 Stat. 572.

gaging in cabotage operations in the following terms: "[N]o foreign aircraft shall engage in interstate or intrastate air commerce."³⁷ This language was technically objectionable because the Air Commerce Act of 1926 failed to define "intrastate commerce."³⁸ To cure this defect, the Civil Aeronautics Act of 1938³⁹ altered section 6(c) to read that "no foreign aircraft shall engage in air commerce otherwise than between any State, Territory, or possession of the United States, or the District of Columbia and a foreign country."⁴⁰ Legislative history indicates the 1938 revision of the section 6 prohibition was not intended to work a substantive change in the former version.⁴¹ This language thus precludes foreign carriers from engaging in air commerce "otherwise than between" a point in the United States and a "foreign country," thereby reserving cabotage traffic for domestic carriers.

In 1953, section 6 of the Air Commerce Act of 1926 was again amended⁴² to transfer the functions authorized under the statute from the Secretary of Commerce to the Civil Aeronautics Board⁴³ (the CAB or the Board). In addition, a language revision was

³⁷ *Id.* It is generally agreed this provision was "designed to reserve to United States registered aircraft the domestic commerce of the United States." S. REP. NO. 1718, 82d Cong., 2d Sess. 11 (1952).

³⁸ The pertinent definitions were:

[A]s used in this Act, the term "air commerce" means transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business. . . . As used in this Act, the term "interstate or foreign air commerce" means air commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through the airspace over any place outside thereof; or wholly within the airspace over any Territory or possession or the District of Columbia.

⁴⁴ Stat. at 568. The term "intrastate air commerce" was not defined except to the extent it was encompassed in the definition of "air commerce." *Id.* See S. REP. NO. 1718, *supra* note 37, at 5-6.

³⁹ ch. 601, 52 Stat. 973 (1938), now codified in Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C.A. §§ 1301-1542 (Supp. 1979) [hereinafter cited as Civil Aeronautics Act of 1938].

⁴⁰ Civil Aeronautics Act of 1938, § 1107(i)(5), 52 Stat. 1028 (1938).

⁴¹ S. REP. NO. 1718, *supra* note 37, at 5. In 1952 the Senate Committee on Interstate and Foreign Commerce indicated that the principal reason for retaining section 6(c) "was the anticabotage provision which prevented intrastate or interstate air commerce by foreign aircraft." *Id.* at 4.

⁴² Act of Aug. 8, 1953, Pub. L. No. 83-225, 67 Stat. 489 (1953).

⁴³ See S. REP. NO. 1718, *supra* note 37, at 4-5.

made to accord more fully with the cabotage prohibition contained in article 7 of the Chicago Convention. This revision was necessary "to leave no doubt that the United States [would] take full advantage of the reservation" there afforded.⁴⁴ The new language vested the CAB with broad powers to permit foreign aircraft to engage in commercial operations within the United States.⁴⁵ Before exercising its authority, however, the Board was required to make a dual finding that: (1) the nation in which the foreign carrier was registered had granted reciprocal privileges to United States carriers; and (2) the foreign carrier's activities would be in the public interest.⁴⁶ When these two standards were satisfied, the Board could authorize a foreign carrier to navigate in the United States, *except* the Board was denied any authority to grant cabotage privileges to foreign carriers.⁴⁷

In 1958, the current Federal Aviation Act⁴⁸ rescinded the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938. Former section 6 was transferred to the Act with only minor re-

⁴⁴ *Id.* at 6. In the "Statement of Purpose" for the proposed legislation, the Senate committee indicated the amendment was directed specifically to the Chicago Convention and the United States' intent to "live up to the letter and spirit of its obligations under that convention." *Id.* at 11.

⁴⁵ The new language stated, in pertinent part:

(b) Foreign aircraft . . . may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation issued by the Civil Aeronautics Board hereunder, and in accordance with the terms, conditions, and limitations thereof. The Civil Aeronautics Board shall issue permits, orders, or regulations . . . only as the Board shall find such action to be in the interest of the public: *Provided, however,* That in exercising its power hereunder, the Board shall do so consistently with any treaty, convention or agreement which may be in force between the United States and any foreign country or countries. Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States.

⁶⁷ Stat. at 489.

⁴⁶ *Id.*

⁴⁷ *Id.* See S. REP. NO. 1718, *supra* note 37, at 11-12.

⁴⁸ Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C.A. §§ 1301-1542 (Supp. 1979).

drafting.⁴⁹ The legislative background on the new section, redesignated as section 1108,⁵⁰ reveals it is a "reenactment, without substantial change" of the former section 6.⁵¹ The Board's power to authorize foreign carrier operations in the United States under that section is therefore continued under section 1108(b), subject to the specific exception that the Board cannot authorize such aircraft to "take on at any point within the United States persons, property, or mail carried for compensation or hire and destined for another point within the United States."⁵²

In addition to section 1108(b), section 402 of the Federal Aviation Act is generally recognized as a further prohibition against the transportation of cabotage traffic by foreign aircraft.⁵³ Section 402(a) provides that "[n]o foreign air carrier shall engage in foreign air transportation unless there is in force a permit" from the Board authorizing such operations.⁵⁴ Foreign carrier operations must fall within the ambit of section 402 inasmuch as it constitutes the sole authority under which foreign aircraft may conduct services pursuant to a CAB permit.⁵⁵ Under section 402 the Board is empowered to issue permits to foreign carriers, after notice and hearing, authorizing them to engage in foreign air transportation upon findings that the carrier is fit, willing and able, and the transportation will be in the public interest.⁵⁶ "Foreign air transportation" is defined in the Federal Aviation Act as the carriage by aircraft of traffic "in commerce between . . . a place in the United States and any place outside thereof."⁵⁷ Since cabotage is traffic between two points within the United States,⁵⁸ it is not "foreign air transportation" within the meaning of section 402

⁴⁹ 49 U.S.C. § 1508 (1976). See H.R. REP. NO. 2360, 85th Cong., 2d Sess. 19, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 3758.

⁵⁰ 49 U.S.C. § 1508 (1976).

⁵¹ H.R. REP. NO. 2360, *supra* note 49, at 19.

⁵² 49 U.S.C. § 1508 (1976).

⁵³ 49 U.S.C.A. § 1372 (1976 & Supp. 1979). See S. REP. NO. 329, 96th Cong., 1st Sess. 9 (1979).

⁵⁴ 49 U.S.C. § 1372(a) (1976).

⁵⁵ See generally Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C.A. §§ 1301-1542 (Supp. 1979).

⁵⁶ 49 U.S.C. § 1372(b) (1976).

⁵⁷ 49 U.S.C.A. § 1301(24)(c) (Supp. 1979).

⁵⁸ 49 U.S.C. § 1508(b) (1976).

which can be authorized to a foreign carrier.⁵⁹

The preceding analysis is consistent with the CAB's interpretation of section 402 as expressed in a 1959 interpretative ruling on the cabotage clause of section 1108(b).⁶⁰ The issue addressed by the Board was whether foreign aircraft, operating through the United States under foreign carrier permits, could provide transportation only for the United States segment of an international journey. Finding that "section 1108(b) is technically applicable to the foreign civil aircraft utilized by a foreign carrier conducting operations pursuant to a section 402 permit,"⁶¹ the CAB ruled that such operations, referred to as "foreign transfer traffic," constituted cabotage traffic not permitted to foreign carriers.⁶² In a general statement of United States policy regarding cabotage, the CAB remarked:

[C]ommercial transportation wholly between U.S. points of . . . foreign transfer traffic is an internal activity, and its carriage is a normal incident of domestic operations. Moreover, whether by reason of [section 1108(b)] or otherwise, the generally prevailing view . . . appears to have been that transportation may be provided between two U.S. points by a foreign air carrier only where the same air carrier providing a domestic portion of the transportation also provides transportation to or from an unauthorized foreign point, . . . or in circumstances where the carrier is merely transporting across the United States traffic picked up by it at a foreign point and to be discharged by it at yet another foreign point. In other words, under U.S. authorizations permitting commercial access to this Nation, a foreign carrier may incidentally transport within this country only that traffic which it brings in or carries out.⁶³

The foregoing language indicates that foreign carriers operating under foreign carrier permits are restricted to foreign air transportation, although the statutory basis, whether section 1108(b) or section 402, is not made clear. In its holding the Board indicates that sections 402 and 1108 are both violated where foreign carriers carry cabotage traffic, finding:

⁵⁹ 49 U.S.C.A. § 1372 (1976 & Supp. 1979).

⁶⁰ *Qantas Empire Airways Ltd.*, 29 C.A.B. 33 (1959).

⁶¹ *Id.* at 37.

⁶² *Id.*

⁶³ *Id.* at 36.

1. That the restriction contained in section 1108 of the [Federal Aviation Act] that no foreign civil aircraft "shall take on at any point in the United States, persons, property, or mail carried for compensation or hire and destined for another point in the United States" has application to foreign civil aircraft utilized in operations conducted under authority of a foreign air carrier permit issued under [section 402 of the Act].

. . . .

3. That the term "foreign air transportation" as it appears in foreign carrier permits does not permit the initial taking on by a foreign air carrier at one U.S. point of traffic carried for compensation or hire and destined to another U.S. point for final discharge by that carrier.⁶⁴

The foregoing reveals that the United States consistently has reserved cabotage traffic for domestic carriers, thus protecting domestic airlines, workers and markets from the rigors of foreign competition. Whether current United States law continues that policy must be determined from the 1979 congressional act.

THE INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979

The International Air Transportation Competition Act of 1979⁶⁵ (hereinafter referred to as the International Competition Act) became law on February 15, 1980. The International Competition Act amends the Federal Aviation Act in an effort to encourage competition in international air transportation, afford greater opportunities for domestic air carriers and establish goals for developing United States international aviation negotiating policy.⁶⁶ Of central importance here is section 13 which permits the Board, in emergency circumstances, to exempt foreign air carriers from the restrictions of the Federal Aviation Act to the extent necessary to authorize such carriers to transport cabotage traffic.⁶⁷ Section 13, in substance, provides that an exemption may be granted only to the extent that it is in the public interest, for a period not ex-

⁶⁴ *Id.* at 47.

⁶⁵ International Competition Act, Pub. L. No. 96-192, 94 Stat. 35 (1980) (to be codified in scattered sections of 49 U.S.C.).

⁶⁶ H. CONF. REP. NO. 716, 96th Cong., 1st Sess. 1 (1979).

⁶⁷ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

ceeding thirty days, if the Board, after consultation with the Secretary of Transportation, finds that: (a) traffic in affected markets cannot be accommodated by United States carriers because of an emergency created by unusual circumstances not arising in the normal course of business;⁶⁸ (b) all possible efforts have been made to accommodate the traffic on United States carriers;⁶⁹ and (c) the exemption is necessary to avoid undue hardship to such traffic.⁷⁰ An additional finding is required where the inability to accommodate traffic in a market results from a labor dispute, in which case, granting the exemption must not result in an undue advantage to any party to such dispute.⁷¹ When these criteria are satisfied and the Board exercises its exemption authority, section 13 further provides that the Board must: assure that the foreign carrier provides air transportation upon fair and reasonable terms; continuously monitor the passenger load factor of United States aircraft serving the market; and review the conditions in the affected market at least once every thirty days to determine if the emergency still exists.⁷² Thirty-day renewals may be issued by the Board, provided that authorization to foreign carriers under section 13 shall be ineffective within five days after the emergency conditions have ceased.⁷³

The International Competition Act and the Chicago Convention

An examination of section 13 raises the issue of whether it can be enforced consistently with article 7 of the Chicago Convention.⁷⁴ As has been discussed, article 7 is subject to two interpretations. The "rigid" interpretation requires that cabotage rights be granted on a nonexclusive basis only.⁷⁵ If one state is granted cabotage privileges, any other state which participated in the Chicago Convention may demand corresponding privileges.⁷⁶ Therefore, under this inter-

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ The Federal Aviation Act requires the Board to perform its duties in accordance with any treaties, conventions, or agreements which may be in force between the United States and any foreign country. 49 U.S.C. § 1502 (1976).

⁷⁵ See notes 25-27 *supra*, and accompanying text.

⁷⁶ ITA Study, *supra* note 14, at 9; Robinson, *supra* note 19, at 561.

pretation, if the Board finds that an exemption may properly be granted pursuant to section 13, the Board theoretically must grant every requesting state the right to transport cabotage during the exemption period. This result is totally impractical since it contravenes the national sovereignty which the United States exercises over its territory.⁷⁷ Conversely, the second and more liberal interpretation allows cabotage rights to be granted on a discriminatory basis.⁷⁸ One state may award another state or its carriers exclusive cabotage rights provided that those rights are not specified as exclusive. This interpretation has been accepted by the Department of State which explained its interpretation of article 7 to the Senate Subcommittee on Aviation as follows:

Article 7 of the Chicago Convention contains a commitment that a state will not "enter into any arrangements [which] specifically grant any—cabotage—privilege on an exclusive basis to any other state." Some have claimed that this provision would require a state granting any cabotage rights to open automatically its doors to all other foreign airlines interested in cabotage. We strongly disagree with that interpretation. In our view, the clear meaning of this provision . . . is that two states may not conclude explicit agreements that particular cabotage grants are to be exclusive. But the provision does not intrude on the rights of a state that makes a cabotage grant to exercise its sovereign, unilateral judgment whether, and under what circumstances it will make additional grants.⁷⁹

Hence, under this liberal interpretation, the CAB may issue an exemption order under section 13 stating simply that a foreign airline may transport cabotage during an emergency. So long as the order does not state "specifically" that the airline has exclusive rights, article 7 would not be violated.⁸⁰ That the privilege is not granted specifically in such a case is, of course, a fiction. Even though the language does not expressly state that the grant is exclusive, it would in fact be exclusive since other airlines would still be under the proscriptions of section 1108(b) and 402 of

⁷⁷ See note 29 *supra*, and accompanying text.

⁷⁸ See notes 30-33 *supra*, and accompanying text.

⁷⁹ *International Air Transportation Competition Act of 1979: Hearings on S. 1300 Before the Subcomm. on Aviation, 96th Cong., 1st Sess. 90-91 (1979)* [hereinafter cited as *Hearings on S. 1300*].

⁸⁰ See notes 30-34 *supra*, and accompanying text.

the Federal Aviation Act.⁸¹ Nonetheless, without a written text granting exclusive cabotage rights, article 7 is not violated since other states theoretically may receive similar privileges.⁸²

The International Competition Act—An Analysis

In granting an exemption from the cabotage prohibitions of the Federal Aviation Act, section 13 is designed to prevent hardship to the public in emergency situations in which domestic carriers are unable to accommodate the traffic.⁸³ To the extent which it accomplishes this purpose, section 13 properly recognizes the valid public interest in an efficient and dependable air transport system. When severe disruptions of domestic air transportation occur, thousands of passengers may be stranded or have their vacation or business plans disrupted.⁸⁴ Similarly, perishable goods may remain unshipped and business may be seriously hampered due to the lack of air freight capacity.⁸⁵ Section 13, however, largely fails to protect the legitimate public interest involved. In an effort to assure maximum protection of labor and airline interests, Congress accorded those interests predominant consideration over the public's interests.

Section 13 states that the Board may grant the exemption only to the extent that it is in the public interest.⁸⁶ The Federal Aviation Act provides that in exercising its duties, the Board must consider the following policies, among others, as being in the public interest and in accordance with public convenience and necessity:

1. The maintenance of safety in air commerce.⁸⁷
2. The availability of sufficient, low-price services by domestic and foreign carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices.⁸⁸

⁸¹ See notes 52-59 *supra*, and accompanying text.

⁸² See ITA Study, *supra* note 14, at 14.

⁸³ S. REP. No. 329, *supra* note 53, at 9-10.

⁸⁴ *Id.*

⁸⁵ *Id.* at 10.

⁸⁶ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

⁸⁷ "(1) The assignment and maintenance of safety as the highest priority in air commerce," Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 3(a), 92 Stat. 1706 (1978) (codified in 49 U.S.C.A. § 1302(a)(1) (Supp. 1979)).

⁸⁸ "(3) The availability of a variety of adequate, economic, efficient, and low-

3. Maximum reliance on competition to provide necessary air transportation service and to insure the continued financial viability of domestic carriers.⁸⁹

4. The availability of a sound regulatory environment which is responsive to the public's needs and which allows prompt decision-making in order to promote adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.⁹⁰

5. The elimination of unfair and anti-competitive practices in air transportation.⁹¹

6. The promotion of civil aeronautics and a viable, privately-owned domestic aviation industry.⁹²

7. Strengthening of the competitive position of domestic carriers to at least guarantee equality with foreign air carriers.⁹³

price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers. . . ." 92 Stat. at 1706 (codified in 49 U.S.C.A. § 1302(a)(3) (Supp. 1979)).

⁸⁹ "(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital. . . ." 92 Stat. at 1706 (codified in 49 U.S.C.A. § 1302(a)(4) (Supp. 1979)).

⁹⁰ (5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.
92 Stat. at 1706 (codified in 49 U.S.C.A. § 1302(a)(5) (Supp. 1979)).

⁹¹ (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of
(A) unreasonable industry concentration, excessive market domination, and monopoly power; and
(B) other conditions;
that would tend to allow one or more air carriers or foreign air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.
92 Stat. at 1706 (codified in 49 U.S.C.A. § 1302(a)(5) (Supp. 1979)).

⁹² "(11) The promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry." International Competition Act, § 2, 94 Stat. 35-36 (to be codified in 49 U.S.C. § 1302(a)(11)).

⁹³ "(12) The strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation." *Id.* (to be codified in 49 U.S.C. § 1302(a)(12)).

These guidelines require the Board to consider the interests of the United States public generally as well as those of domestic air carriers, foreign carriers, private shippers and consignees.⁹⁴ As such, the public interest standard does not accord undue consideration to the interests of any one group. However, the achievement of one of these goals, such as a sound regulatory environment responsive to the public's needs, may conflict directly with another goal, such as the strengthening of the competitive position of United States carriers.⁹⁵

Before granting an exemption, section 13 requires the Board to consult with the Secretary of Transportation who must make findings concerning the existence of an emergency, the exhaustion of domestic carrier resources, and an exemption's potential effect upon related labor disputes and the general public.⁹⁶ The Secretary of Transportation, however, advocates an extremely limited use of section 13.⁹⁷ Therefore, by subjecting the decision-making process to his scrutiny, this provision implements a potentially significant check upon the Board's exemption authority. This requirement is subject to criticism. Under the Federal Aviation Act, the Secretary of Transportation has primary responsibility for the promotion of safety in air commerce.⁹⁸ The findings which the Secretary and the CAB must make before granting an exemption do not directly involve safety concerns and hence are not within the special purview of the Secretary's power. The CAB has noted that a coordinated effort between it and the Secretary may create substantial administrative delay in an emergency situation requiring immediate corrective action.⁹⁹ This is particularly true because the Secretary lacks the investigative powers possessed by the CAB to monitor the situation and thereby make an accurate evaluation.¹⁰⁰

⁹⁴ S. REP. NO. 1718, *supra* note 37, at 8.

⁹⁵ See R. CAVES, AIR TRANSPORT AND ITS REGULATORS 126-27 (1962).

⁹⁶ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

⁹⁷ The Department of Transportation favors limiting the emergency cabotage provisions to only those passengers holding confirmed reservations who are stranded without means of transportation. *Hearings on S. 1300, supra* note 79, at 117.

⁹⁸ 49 U.S.C.A. § 1421 (1976 & Supp. 1979).

⁹⁹ *Hearings on S. 1300, supra* note 79, at 46.

¹⁰⁰ *Id.* For example, the Bureau of Consumer Protection, an agency within

Requiring the Board to confer with the Secretary before exercising its exemption authority thus seems to impair the prompt issuance of an exemption without any reciprocal benefit in terms of special expertise from the Secretary.¹⁰¹ Fortunately, section 13 provides that the Board need consult with the Secretary prior to the initial thirty-day period only.¹⁰² Consequently, the Board may act unilaterally in granting exemption renewals.¹⁰³

Subsection 7(A) of section 13 requires that an "emergency" exist to invoke the exemption.¹⁰⁴ "Emergency" is not defined, but the term is qualified by the requirement that it result from "unusual circumstances not arising in the normal course of business."¹⁰⁵ A Senate committee report indicates that this language prohibits the Board from employing the exemption in markets where demand occasionally exceeds supply during routine operations.¹⁰⁶ The report explains that a shortage of seats on domestic carriers during a peak season therefore does not constitute an emergency if the incumbent carriers are operating in a normal manner.¹⁰⁷ The legislative background further reveals that the 1979 United Airlines strike, or grounding of the DC-10 aircraft, described as "severe disruptions of the domestic and international air transportation system,"¹⁰⁸ would be considered "emergencies" sufficient to warrant use of the exemption.¹⁰⁹ A proposed amendment submitted by the Air Transport Association to the Senate Subcommittee on

the CAB, may issue orders requiring air carriers to submit within a specified period special reports, accounts, and documents whereby the CAB can determine the potential traffic in a market and the carriers' ability to accommodate it. 14 C.F.R. § 385.22 (1979).

¹⁰¹ The CAB has also expressed its apprehension that the Secretary would be "subject to the various political pressures of public office" which might interfere with his ability to make a prompt determination. *Hearings on S. 1300*, *supra* note 79, at 46.

¹⁰² International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁰³ *Id.*

¹⁰⁴ *Id.* Earlier versions of section 13 required only that "unusual circumstances" exist. S. REP. NO. 329, *supra* note 53, at 9-10.

¹⁰⁵ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁰⁶ S. REP. NO. 329, *supra* note 53, at 10.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.*

Aviation provided that an emergency exists only "as a result of a sudden and critical reduction in capacity by one or more U.S. air carriers which interrupts interstate [*sic*] commerce to a degree that deprives any section of the United States . . . of essential air transportation service."¹¹⁰ This language defines "emergency" very narrowly and typifies the position of the air carriers and labor unions, which uniformly sought to impose strict limitations upon the Board's exemption authority.¹¹¹ Whether Congress intended such a limited definition or whether less critical interruptions of air service would also qualify as emergencies in this context is not clear.¹¹² Instructive perhaps is Congress' failure to enumerate a specific list of "emergencies," thereby granting the Board some latitude in determining whether an emergency exists in a particular circumstance.¹¹³

Subsection 7(B) of section 13 provides that "all possible efforts" must have been made to accommodate the excess traffic on United States carriers.¹¹⁴ This language is in contrast to an earlier draft which required only that "all reasonable" efforts be made to re-route traffic on domestic aircraft.¹¹⁵ Subsection 7(B) thus contemplates that foreign carriers are to be granted cabotage privileges only after domestic carrier resources have been totally exhausted. A specific avenue which the CAB must pursue before granting the

¹¹⁰ *Hearings on S. 1300, supra* note 79, at 208.

¹¹¹ *Id.* at 191, 206, 217, 224. While the air carriers sought a very narrow use of the emergency exemption, nevertheless they all conceded the validity of the provision in order to protect the public from needless hardship when domestic carriers are unavailable. Conversely, the Transport Workers Union, speaking on behalf of the AFL-CIO Executive Council, totally rejected any emergency exemption proposal. *Id.* at 231, 236. The AFL-CIO contended that any carriage of cabotage by foreign aircraft "would jeopardize the job security of U.S. airline workers, would threaten the stability and security of the international air transportation system, would further erode this nation's balance of payments position and would introduce wasteful and unnecessary flight operations in major domestic air transport markets." *Id.* at 231.

¹¹² Both the 1979 United Airlines strike and the DC-10 grounding would certainly fit within this definition. The United Airlines strike resulted in the grounding of twenty-four percent of the United States air fleet for eight weeks while the DC-10 incident grounded fourteen percent of the domestic carriers for five weeks. *Id.* at 40.

¹¹³ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹¹⁴ *Id.*

¹¹⁵ S. 329, *supra* note 53, § 13.

exemption includes the leasing of foreign aircraft, or sections of foreign aircraft, by United States carriers, a procedure formerly prohibited by section 1108(b) of the Federal Aviation Act¹¹⁶ since leasing effectively allowed foreign carriers to transport cabotage traffic.¹¹⁷

Subsection 7(C) of section 13 allows the exemption authority to be used only where "undue hardship" will result for the traffic in the affected market.¹¹⁸ Neither section 13, nor congressional reports define "undue hardship." Under the plain meaning of the term, a finding that the traffic will suffer a hardship *only* is insufficient to invoke the exemption.¹¹⁹ It must be an *undue* hardship, one which is unnecessary or improper under the circumstances.¹²⁰

¹¹⁶ 49 U.S.C. § 1508(b) (1976).

¹¹⁷ The manner in which a leasing arrangement works under section 13 may be illustrated by the following fact situation. During the DC-10 grounding, Continental Airlines, which operated between American Samoa and Honolulu, was unable to operate over the route because the rest of its fleet was not suited for overseas transportation. Qantas Airways, which flew directly over American Samoa on its route between Australia and Honolulu, had available space on its carriers but was unable to accommodate any traffic because it had no cabotage rights. Under section 13, Continental could enter into an agreement with Qantas to lease the available space. Qantas could then carry cabotage traffic for Continental, and Continental would be responsible for the transportation of it. *Hearings on S. 1300, supra* note 79, at 247. Although it appears that leasing arrangements such as the one outlined above would obviate the necessity for using the section 13 exemption (since a United States carrier could simply lease all the space it needs from foreign carriers), in reality this would not be the case. First, in instances of a severe disruption, foreign carriers would be unable to provide sufficient capacity for transportation (lift) to accommodate all the excess traffic. *Id.* at 37. Second, even where foreign lift is available, it must be remembered that a leasing agreement of this type is essentially a private contract between two carriers in direct competition with each other. Telephone interview with David Kirstein, Executive Assistant to the Chairman of the Civil Aeronautics Board (February 3, 1980). If a United States carrier leases available capacity from a foreign carrier, the foreign carrier is able to transport cabotage within the meaning of section 1108 of the Federal Aviation Act, 49 U.S.C. § 1508 (1976). The result is an increase in the profitability of the foreign carrier's international routes with little corresponding benefit to the domestic carrier. Telephone interview with David Kirstein, Executive Assistant to the Chairman of the Civil Aeronautics Board (February 3, 1980). It is thus apparent that United States carriers lack incentive to make any such leasing arrangements and will generally resist entering into them. *Id.* Finally, leasing arrangements between foreign and domestic carriers frequently will take too long to negotiate and will therefore fail to provide prompt relief in an emergency. *Id.*

¹¹⁸ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹¹⁹ *Id.*

¹²⁰ *Id.* BLACK'S LAW DICTIONARY 1697 (4th rev. ed. 1968).

Although the phrase "undue hardship" is vague, it suggests that the affected traffic must be threatened with a substantial burden before the standard is satisfied. Logically, an undue hardship would apparently exist if shippers of perishable commodities were faced with significant losses due to a shortage of domestic carriers.¹²¹ Conversely, the phrase connotes more than a mere passenger delay or inconvenience due to a seasonal increase in traffic even though substantial in character. Such fluctuations generally are not considered unreasonable burdens on traffic, but rather are recognized as unavoidable disruptions which can be foreseen and which, thus, allow travel and shipping arrangements to be made accordingly.¹²² Hence, what constitutes an "undue hardship" may have reference to the normal expectations and patterns of air traffic. This construction appears reasonable when read in light of the language in section 13 requiring, before an exemption may be granted, that the emergency originate from "unusual circumstances not arising in the normal course of business."¹²³ By requiring that traffic be threatened with an "undue hardship" before relief may be afforded, subsection 7(C) appears to impose an unnecessarily stringent requirement which over-protects the interests of domestic carriers and labor groups without giving adequate weight to the interests of the public generally.¹²⁴ If traffic unaccommodated by domestic carriers is exposed to a hardship which is something slightly less than "undue," the Board cannot grant an exemption, and it becomes irrelevant under this standard that a substantial public benefit might result if the exemption is employed.¹²⁵ This prohibition remains even though the air carriers will sustain no perceptible injury if an exemption is authorized.¹²⁶

Subsection 7(D) of section 13 provides that if adequate carrier

¹²¹ See S. REP. NO. 329, *supra* note 53, at 10.

¹²² *Id.*

¹²³ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386). Thus, the frequency and predictability of the transportation disruption, as well as the degree to which hardship can be foreseen and avoided, may determine whether a hardship is an "undue hardship" within the statute's meaning or only something less. *Id.*

¹²⁴ See generally International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹²⁵ *Id.*

¹²⁶ *Id.*

service is not available in a market due to a labor dispute, an exemption may not be granted when an "undue advantage to any party to such dispute" will result.¹²⁷ It is submitted that the foregoing provision is totally irreconcilable with the purpose of a section 13 exemption (protection of the public)¹²⁸ and, if enforced in accordance with these provisions, may render the section a nullity when a labor dispute creates the emergency giving rise to the exemption question.

Initially it is important to determine what constitutes an "undue advantage."¹²⁹ The congressional conference reports indicate only that the term includes actions such as strike-breaking.¹³⁰ A broad reading of "undue advantage" in this context would include any action which materially and improperly alters the relative negotiating positions of labor and management.¹³¹ Arguably, an undue advantage may result in every instance in which foreign carriers transport a significant portion of the traffic normally handled by the striking labor group. Allowing foreign aircraft to provide needed services during a strike reduces its hardship effect upon the public, lessens public pressure upon the labor union or airline to settle the strike quickly and, consequently, allows the party with the upper hand to adopt a "wait and see" attitude in its negotiations.¹³²

¹²⁷ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386). The conference reports indicate that "any party" refers to either labor or management. H. CONF. REP. NO. 716, 96th Cong., 1st Sess. 20 (1979); S. CONF. REP. NO. 531, 96th Cong., 1st Sess. 20 (1979).

¹²⁸ See notes 83-85 *supra*, and accompanying text.

¹²⁹ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹³⁰ H. CONF. REP. NO. 716, *supra* note 127, at 20; S. CONF. REP. NO. 531, *supra* note 127, at 20.

¹³¹ See BLACK'S LAW DICTIONARY 1697 (4th rev. ed. 1968).

¹³² See *Hearings on S. 1300*, *supra* note 79, at 198. In April of 1979, the United Airlines strike threatened a major disruption of air travel in the Hawaii-mainland market. The Bureau of Consumer Protection (Bureau), the agency within the CAB charged with enforcement of the Federal Aviation Act, was informed that United States carriers were unable to accommodate passengers booked on United's flights between Hawaii and the west coast. Since traffic moving between Hawaii and the west coast constitutes cabotage within the meaning of 1108(b), 49 U.S.C. § 1508(b) (1976), the Bureau lacked the affirmative authority to authorize foreign aircraft to transport the excess traffic. See notes 47, 53-59 *supra*, and accompanying text. However, the Bureau has broad discretion in enforcing the Federal Aviation Act. The Code of Federal Regulations

Regardless of whether or not an undue advantage will, in fact, result in a particular situation, it is apparent that an undue advantage is more likely to result in the case of a massive crippling strike than one which is of smaller dimensions. Recognizing that the need for alternate carrier service increases with the magnitude of the strike,¹³³ use of the section 13 exemption during a massive, nationwide strike will produce the greatest possible interference in the ongoing labor dispute because foreign carriers will be transporting traffic at a maximum volume level.¹³⁴ The more extensive the strike, the greater is the resulting interference if the exemption is granted and, therefore, greater is the likelihood of an undue advantage accruing to labor or management. The less severe the strike, the smaller will be its effect upon the air transportation system. The subsequent need for foreign carriers to institute alternate service will therefore be less, and the interference to the labor dispute will be minimized. Consequently, the likelihood of an undue advantage resulting to labor or management will be minimal.¹³⁵ By way of illustration, consider the following hypotheticals.

provides that whenever the Bureau's Director reasonably believes that the statute is being violated, *and* when it is in the public interest, the Director *may* institute formal enforcement proceedings. 14 C.F.R. § 302.206 (1979). Acting under this guideline, the Director of the Bureau, Reuben B. Robertson, announced on April 3, 1979 the Bureau's finding that it would not be in the public interest to commence enforcement proceedings against foreign carriers which accommodated stranded airline passengers.

The Bureau's non-enforcement policy and the subsequent use of foreign carriers in domestic air transportation were termed as strike-breaking attempts by the Air Line Pilots Association, the International Association of Machinists and the Flight Engineers International Association. *Av. DAILY*, Apr. 13, 1979, at 253. Additionally, the Secretary of Transportation, Brock Adams, characterized the Bureau's action as "government interference in a federally mediated strike. . . ." Letter from Brock Adams to Marvin S. Cohen, Chairman of the CAB (Apr. 9, 1979), *reprinted in Av. DAILY*, Apr. 23, 1979, at 300-01.

¹³³ A strike of large dimensions has a greater paralyzing effect upon transportation than a small, local one. Consequently, as more domestic planes are grounded due to a strike the ability of other airlines to reroute the unaccommodated traffic declines.

¹³⁴ In the case of a severe, crippling strike, public and political pressure upon labor unions and management to settle the dispute is great. *See J. BAITSELL, AIRLINE INDUSTRIAL RELATIONS: PILOTS AND FLIGHT ENGINEERS* 340 (1966). *See also Hearings on S. 1300, supra* note 79, at 46. By providing an alternate service, foreign carriers reduce public hardship and thus a significant pressure upon the parties, particularly management, to conclude negotiations. *See* note 132 *supra*, and accompanying text.

¹³⁵ *See* notes 132-34 *supra*, and accompanying text.

Assume the other requirements of section 13 are satisfied and the only issue in granting the exemption is whether or not it will create an undue advantage for either party in a labor dispute. The mechanics of a major airline go on strike during a slack travel season. As a result, the domestic carrier fleet is reduced to eighty percent of its normal capacity. By increasing flights and maximizing freight capacity, United States carriers are able to accommodate ninety-nine percent of the striking airline's traffic. In this hypothetical, the CAB may readily conclude no undue advantage will result for labor or management if foreign carriers are permitted to carry the unaccommodated traffic. Any undue advantage which may occur is primarily caused by the United States carriers which have rerouted all but one percent of the traffic to their flights. The effect of an exemption is negligible in this instance, and an exemption may properly be granted in accordance with section 7(D).¹³⁶ Conversely, consider the following fact situation. The pilots of two major airlines go on strike during a peak holiday travel season. The domestic carrier fleet is reduced to sixty-five percent of its normal capacity. United States carriers are able to accommodate only eighty percent of the striking airlines' traffic. In this hypothetical, foreign carriers can feasibly carry up to twenty percent of the airlines' traffic. Granting an exemption in this case could have enormous effects upon the parties' relative bargaining positions.¹³⁷ This fact situation would therefore be most likely to result in an undue advantage to either labor or management and an exemption should not be granted.¹³⁸

Subsection 7(D) thus appears to decrease use of the exemption authority as a strike increases in dimension and its effect becomes more severe.¹³⁹ This result, however, is completely illogical from the perspective of the public interest. It is obvious that the more massive a strike becomes and the more crippling its effect upon air transportation, the more appropriate is the occasion for granting an exemption in order to alleviate the hardship upon the public.

¹³⁶ See generally International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹³⁷ See notes 132-34 *supra*, and accompanying text.

¹³⁸ See generally International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹³⁹ See notes 132-38 *supra*, and accompanying text.

Additionally, the legislative background of section 13 indicates it is specifically intended to apply during a severe labor dispute, such as the 1979 United Airlines strike.¹⁴⁰

The purpose of subsection 7(D), protection of the airlines and labor organizations in a dispute,¹⁴¹ seems to be in direct conflict with the purpose of a section 13 exemption, protection of the public from severe disruption in air transportation.¹⁴² If the Board finds that an undue advantage will result when it grants an exemption during severely disruptive strikes, it will be nullifying its own authority in a case in which that authority is most needed to protect the public from harm. Significantly, the CAB has argued previously that use of foreign carriers to provide alternate service during a strike leaves the labor dispute unaffected.¹⁴³ According to the CAB, allowing foreign carriers to provide substitute services in these circumstances is "essentially a labor neutral question" which merely serves the public and leaves the parties' *status quo* unaltered.¹⁴⁴ This logic suggests that the CAB will interpret "undue advantage" under section 13 to mean something more than a mere removal of public pressure. If so, the CAB's position¹⁴⁵ will discourage a finding of "undue advantage" in this context. This view, however, appears to nullify to a great extent the legislative intent behind subsection 7(D). Whether the CAB's argument will be accepted in a particular case by the Secretary of Transportation or a reviewing court remains to be seen. Regardless, the basic conflict between section 13 and subsection 7(D) remains. If a finding of "undue advantage" under subsection 7(D) is made, that determination will render section 13 inapplicable, irrespective of the resulting hardship to the general public.¹⁴⁶

¹⁴⁰ S. REP. NO. 329, *supra* note 53, at 9-10.

¹⁴¹ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁴² See notes 83-85 *supra*, and accompanying text.

¹⁴³ *Hearings on S. 1300*, *supra* note 79, at 51. The CAB made this statement in response to charges by the AFL-CIO that its non-enforcement policy during the United Airlines strike constituted strike-breaking. See note 132 *supra*.

¹⁴⁴ *Hearings on S. 1300*, *supra* note 79, at 51.

¹⁴⁵ *Id.*

¹⁴⁶ See generally International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

CONCLUSION

The preceding analysis illustrates the strong protectionism embodied in section 13. Its multiple restrictions evidence a legislative intent to provide maximum protections for the airline industry and labor interests. Subsection 7(A) excludes foreign carriers from domestic air transportation so long as domestic carriers are operating in a routine manner.¹⁴⁷ Subsection 7(B) of section 13 assures maximum utilization of United States carriers, giving them priority over foreign carriers.¹⁴⁸ Subsection 7(C) limits the exemption's use so as to apply only in cases of real hardship to the public. Absent such a necessity, the exemption cannot be granted, even though there is no evidence that American carriers and labor will be harmed.¹⁴⁹ Subsection 7(D) protects the aviation industry, labor, and management in strike situations which may be affected by an influx of foreign carrier competition.¹⁵⁰ These and other checks imposed by section 13, including coextensive findings by dual government agencies¹⁵¹ and prompt cessation of the exemption authority once the emergency conditions terminate,¹⁵² represent a continuation of the protectionist attitude which traditionally has characterized the United States' position on cabotage.¹⁵³ Consequently, the limited scope of section 13 provides only a minimal concession to the public's interest in the domestic air transportation system while leaving almost wholly intact the cabotage prohibitions of the Federal Aviation Act.

The critical flaw of section 13 is this unduly excessive weight accorded domestic carrier and labor interests. Today, the United States aviation industry is sufficiently strong commercially that foreign competition need not be so restricted in order to guarantee the continued viability of domestic carriers.¹⁵⁴ In addition, the purpose of the cabotage prohibition, to protect American airlines,

¹⁴⁷ See notes 104-09 *supra*, and accompanying text.

¹⁴⁸ See notes 114-17 *supra*, and accompanying text.

¹⁴⁹ See notes 118-26 *supra*, and accompanying text.

¹⁵⁰ See note 127 *supra*, and accompanying text.

¹⁵¹ See note 96 *supra*, and accompanying text.

¹⁵² International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁵³ See notes 8, 15, 20-24, 44, 53 *supra*, and accompanying text.

¹⁵⁴ As one congressman has noted: "Historically, aviation was a fledgling industry which needed help and financial guarantees, and the public needed con-

workers, and markets from foreign competition, is largely irrelevant in situations where the traffic cannot otherwise be accommodated by United States airlines. Where domestic carriers are unavailable, foreign carriers and crews are not displacing domestic ones, but merely serving an important public need for transportation. Also, to the extent that foreign carriers will increase domestic transportation during an emergency, American employment is increased, not decreased, due to the additional ground handling services, booking services, and related activities which are associated with airline travel.¹⁵⁵ With regard to labor disputes, it is contended that one of the parties will be more willing to frustrate negotiations due to the decrease in public pressure to settle.¹⁵⁶ Even where public pressure is brought to bear, however, there is no guarantee that negotiations will be concluded swiftly, as demonstrated by the 1979 United Airlines strike which grounded twenty-four percent of the domestic carrier fleet but, nevertheless, lasted eight weeks.¹⁵⁷ Additionally, any potential effect which foreign carrier service may have upon strike negotiations is limited by the amount of substitute service provided by non-striking domestic carriers.¹⁵⁸

Even recognizing that labor and airline interests may be adversely affected in a particular instance by an exemption, there is a vital public interest involved here which must receive fair consideration. Where the negative impact upon negotiating parties is insubstantial in relation to the overall benefit which the public may realize if an exemption is granted, the Board should have authority to award an exemption. This is particularly true when alternate transportation modes are not available. Previously, a finding under subsection 7(D) that an undue advantage will result for

trols for safety. But we are 40 years from that point and there is no need for the CAB to be overly protective of a \$100 billion industry." Cohen, *Regulatory Report/CAB's New Chairman Charts an Independent Course*, 7 NAT'L J. REP. 1559, 1566 (1975) (quoting Rep. Norman Y. Mineta).

¹⁵⁵ *Hearings on S. 1300*, *supra* note 79, at 93.

¹⁵⁶ See note 132 *supra*, and accompanying text.

¹⁵⁷ *Hearings on S. 1300*, *supra* note 79, at 40.

¹⁵⁸ In response to allegations that the Bureau's non-enforcement policy during the United Airlines strike constituted strike-breaking and interference, see note 132 *supra*, Marvin Cohen, Chairman of the CAB, responded that he perceived "no difference in whether U.S. or foreign air carriers provided such substitute service during a work stoppage." Letter from Marvin S. Cohen to Brock Adams, Secretary of Transportation (Apr. 27, 1979), *reprinted in* AV. DAILY, May 1, 1979, at 5-6.

either party is an absolute bar to granting an exemption, without further consideration of other public benefits which an exemption might produce.¹⁵⁹ A similar criticism applies to subsection 7(C).¹⁶⁰ By requiring that traffic face undue hardship before an exemption may be granted, subsection 7(C) incorrectly focuses upon considerations of public harm and ignores the potential benefit to the public. In addition, 7(C) provides no mechanism whereby the Board can consider the actual impact which a section 13 exemption may have upon the domestic carriers and work force.¹⁶¹ Subsection 7(C), therefore, may bar an exemption even though there is no injury to those interests.¹⁶²

A better approach, one which adequately protects the interests of the general public, labor groups, and the airline industry, is to delete subsections 7(C) and 7(D) altogether, relying instead upon an analysis which gives appropriate consideration to all interests concerned. The inquiry would then focus upon all the factors relevant to granting an exemption, allowing the Board to adopt a balancing approach in order to accord proper weight to each, with no one factor controlling. If, after weighing all the factors, the Board determines that an exemption would result in a substantial net benefit, the exemption would be granted. Considerations which would be relevant to this analysis include, among others:

1. The potential benefit to the general public, shippers, consignees and businesses if the exemption is granted.
2. The potential hardship to the general public, shippers, consignees and businesses if the exemption is denied.
3. The potential benefit to United States air carriers if the exemption is denied.
4. The potential hardship to United States air carriers if the exemption is granted.
5. The potential duration of the emergency.
6. The segment of the transportation market affected.

¹⁵⁹ See generally International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁶⁰ International Competition Act, § 13, 94 Stat. 39-40 (to be codified in 49 U.S.C. § 1386).

¹⁶¹ *Id.*

¹⁶² *Id.*

7. The availability of essential air transportation.
8. The availability of alternate modes of transportation.
9. The impact upon parties to a labor dispute.

In evaluating these factors, the Board would necessarily consider long-range as well as immediate effects. The future financial viability of domestic carriers, the promotion of equitable working conditions in the aviation industry, and the improved competitive position of foreign carriers would all be long-term considerations which the Board would incorporate into its decision-making process. Of course, a section 13 determination would still require the Board to make the specific findings of subsections 7(A) and 7(B).¹⁶³ This would assure the existence of emergency circumstances and the complete expenditure of domestic carrier resources before the exemption authority could be exercised.¹⁶⁴

Frequently, the determination to grant or deny an exemption would be the same under section 13 as it would be under the analysis suggested above. If a small segment of the national transportation market is affected by a strike, and a substantial negative impact would result to the bargaining leverage of the labor group if an exemption is authorized, the result would generally be a denial of the exemption under the suggested balancing approach. In that case, the immediate public benefit would probably be outweighed by the employee benefits lost if union negotiations proved unsuccessful.¹⁶⁵ The result would be the same under section 13 since it disallows an exemption grant where an undue advantage may result for either party to a labor dispute. Conversely, if the affected market depends almost exclusively upon air transportation (Hawaii, American Samoa, Guam), then an exemption might be appropriate under the balancing approach, despite the prejudicial impact which an exemption would have upon negotiating parties. The vital public need for essential air transportation therefore would be the paramount consideration

¹⁶³ See notes 104-17 *supra*, and accompanying text.

¹⁶⁴ *Id.*

¹⁶⁵ The findings which the CAB must make when balancing these interests would impose no greater burden upon the Board than presently exists under the section 13 requirement that the CAB determine whether an "undue advantage" will result for either party to a labor dispute. See note 71 *supra*, and accompanying text.

under those circumstances. The weight which the Board would actually assign to this factor, or to any individual consideration, depends on all the relevant circumstances. Hence, though a market is deprived of essential air transportation, the Board may decline to grant an exemption if the substitute service would alter the relative bargaining positions of labor and management and thereby prolong a strike which otherwise would be concluded rapidly.

The suggested modification of section 13 gives equitable consideration to all interests concerned. The required findings of 7(A) and 7(B) exclude foreign carriers from domestic air transportation where the need is not genuine. By eliminating subsection 7(C) and 7(D), the suggested formula abandons these artificial restrictions in favor of a balancing approach which better accommodates the public's needs in relation to the air transportation system.

The United States traditionally has reserved cabotage for domestic carriers, thereby granting them a monopoly in domestic air transportation. By excluding foreign carrier competition, United States cabotage law gave ample protection to the interests of American carriers and labor but failed to consider the public's need for air transportation when domestic carriers were unavailable. Section 13 of the International Competition Act attempts to remedy this result by providing the CAB authority, in narrow circumstances, to exempt foreign carriers from the cabotage prohibitions of the Federal Aviation Act. In many respects, however, section 13 fails to protect adequately the public interest to be served. The statutory restrictions impose excessive limitations upon the scope of section 13. The worst example is the provision that an exemption may not be issued when an undue advantage will result for either party to a labor dispute.

This narrow application of section 13 is open to criticism. No longer is aviation a fledgling industry which must be protected without due regard for the public, nor is labor threatened in this context with such hardship that its concerns should dominate those of the public. A better approach would balance fairly all relevant concerns without undue restriction on the Board's authority to arrange alternate air service to meet the public's need for domestic air transportation.