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# Note

## PART 298 AIR CARRIERS AND SERVICE TO SMALL COMMUNITIES: THE DEMISE OF CERTIFICATION?

The nation's present system of certificated carriers is unable to provide air service to small communities without millions of dollars of subsidy payments annually.<sup>1</sup> This indicates the need for a bold new approach to the problem of providing service to marginal markets.<sup>2</sup> Consequently, the Civil Aeronautics Board has responded to the need, and in its search for responsive, reliable and economical air service in the short-haul, low-density market, is increasingly relying upon non-certificated carriers,<sup>3</sup> specifically commuter carriers.<sup>4</sup> If this trend continues, an integral part of the nation's air transportation system will be operating outside the regulatory scheme of certification mandated by Congress.<sup>5</sup>

The short-haul, low-density air service market, generating only

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<sup>1</sup> Estimated subsidy accrued by the local service carriers by the end of fiscal year 1971 exceeded \$700,000,000. CAB, Subsidy to United States Certificated Air Carriers, Appendix No. 1 (May 1971) (hereinafter cited as Subsidy).

<sup>2</sup> The CAB has defined a "marginal point" as an air market that enplanes an average of less than forty passengers daily. As of 1969, more than 250 points being served by certificated carriers were classified as marginal. CAB, Bureau of Operating Rights Study, Service to Small Communities (hereinafter cited as Bureau Study), Part II, Appendix A (March 1972).

<sup>3</sup> Non-certificated carriers are those air carriers engaged in interstate air transportation that have been exempted by the CAB from the requirements of certification under the Federal Aviation Act of 1958, 72 Stat. 731, *as amended* 49 U.S.C. §§ 1301-1542 (1970), *formerly* the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

<sup>4</sup> Part 298 of the CAB Economic Regulations grants a blanket exemption from certification to the class of air carriers classified as "air taxi operators." The sole condition of this exemption is that the carrier is restricted to the operation of "small" aircraft. 14 C.F.R. § 298. "Commuter carriers" are those air taxi operators that either operate on a published schedule of at least five round trips per week between two or more points, or carry mail pursuant to a current contract with the Postal Service. 14 C.F.R. § 298.2. The CAB first approved the substitution of non-certificated commuter carrier service for that of suspended certificated carrier service at Douglas, Arizona. CAB Order E-21301 (Sept. 21, 1964). As of October 1970, commuter carriers have replaced certificated carrier service at sixty-five points. Initial Decision of Hearing Examiner, Part 298 Weight Limitation Investigation, CAB Docket 21761, 13 (Sept. 27, 1971) (hereinafter cited as Initial Decision).

<sup>5</sup> See 49 U.S.C. §§ 1371-1387 (1970).

a marginal number of passengers daily,<sup>6</sup> has presented the CAB with a complex problem: how to encourage the development of an air transportation system suited to the needs of the nation while at the same time promoting the sound economic condition of the airline industry.<sup>7</sup> In 1944 the Board created a special class of carriers, *i.e.*, the "local service air carriers," attempting to meet this problem.<sup>8</sup> Although this "solution" has been declared a success,<sup>9</sup> severe criticism of the Board's regulatory policies in this area have been voiced.<sup>10</sup>

While created to serve the air transportation needs of small communities, local service carriers are today rapidly abandoning those markets in favor of large city markets.<sup>11</sup> Declining revenues and increased operating costs have compelled the CAB to acquiesce in the complete abandonment of certificated service or the substitution of non-certificated carrier service in many small community markets.<sup>12</sup>

The decline of the utilization of certificated carriers in the small community market can be traced directly to the CAB's desire to lessen the necessity for direct subsidy payments supposedly required to make certificated service economically feasible. Numerous attempts have been made by the Board to reduce the drain on the federal treasury resulting from the inordinate amount of subsidy

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<sup>6</sup> See note 2 *supra*.

<sup>7</sup> 49 U.S.C. §§ 1302 (a) & (b) (1970).

<sup>8</sup> Investigation of Local Feeder and Pickup Service, 6 CAB 2 (1944).

<sup>9</sup> See, *e.g.*, Bureau Study, Part III at 1, note 2, *supra*; Editorial, CAB: On Getting Off The Ground, Government Executive 13 (Aug. 1972); Editorial, Needed: Jet Age Decisions, FLIGHT MAGAZINE 21 (June 1964).

<sup>10</sup> See, *e.g.*, Eads, *The Effect of Regulation on the Cost Performance and Growth Strategies of the Local Service Airlines*, 38 J. AIR L. & COM. 1 (1972) (hereinafter cited as Eads); Elliott, *Development of Third Level Air Transportation*, 29 J. AIR L. & COM. 182 (1963) (hereinafter cited as Elliott). The actions and policies of the CAB in other areas also have not been free from criticism. See, *e.g.*, Moss v. C.A.B., 430 F.2d 891, 893 (D.C. Cir. 1970) (the Board is "unduly oriented towards the interests of the industry it is designated to regulate"); W. JORDAN, AIRLINE REGULATION IN AMERICA, 233 (1970); A. PHILLIPS, AIR TRANSPORTATION IN THE UNITED STATES, 157 (1970) (the Board is a trade association operated by oligopolistic carriers); B. SCHWARTZ, THE PROFESSOR AND THE COMMISSIONS, 214-18, 254-55 (1959). *But see, e.g.*, R. CAVES, AIR TRANSPORT AND ITS REGULATORS: AN INDUSTRY STUDY, 288-95 (1962); S. RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION, 253 (1961).

<sup>11</sup> Compare Bureau Study, Part III at 14, note 2, *supra*, with Elliott at 183, note 10, *supra*.

<sup>12</sup> Cf. Bureau Study, Part II at viii, note 2, *supra*.

being paid to the local service carriers.<sup>13</sup> Although subsidy payments steadily declined from fiscal years 1963 to 1970, the 1970 rate revisions that were designed to induce more and better service to marginal points nearly doubled the previous year's figure.<sup>14</sup>

To solve the problem of the continued deterioration of small community air service and runaway subsidy costs, the CAB is now expanding the use of non-certificated Part 298 carriers. The Board has approved the substitution of commuter carrier service for suspended certificated carrier service at more than sixty-five points since 1964.<sup>15</sup> Furthermore, a staff study prepared by the CAB, detailing the interrelationship of service to small communities, local service carriers and subsidization, stressed the ability of commuter carriers to provide air service to these markets *without* the need for substantial subsidization.<sup>16</sup>

The staff study concluded that four alternatives are available to maintain air service to marginal points with minimized subsidy costs:

- (i) Termination of all subsidies with reliance on third level (Part 298) unsubsidized carriers;
- (ii) Certification and subsidization of Part 298 carriers;
- (iii) Subcontracting and flow-through subsidy between local and third level carriers; and
- (iv) Contract system plus unsubsidized services by third level carriers.<sup>17</sup>

Non-certificated Part 298 carriers are expected to provide the majority of the air service in all but alternative two. But in the midst of a recently concluded rulemaking proceeding, whose focal consideration was the definition of "large aircraft" in the Part 298

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<sup>13</sup> Although the local service experiment added hundreds of cities to the certificated air carrier system, by 1970 service had been suspended in over 400 of these cities. Mergers of weak carriers with the strong in the hope of reducing subsidization has also been tried. Bureau Study, Part III at 11-13, note 2, *supra*. Recently, the Board's approval of certificated carriers subcontracting their marginal routes to commuter carriers has given rise to claims of reduction in subsidy requirements. Eads at 31-32, note 10, *supra*.

<sup>14</sup> Subsidy, note 1, *supra*. The present rate structure has been described as denying the Board the "tools for rational and efficient control of subsidies." Bureau Study, Part III at 30, note 2, *supra*.

<sup>15</sup> Initial Decision at 13, note 4, *supra*.

<sup>16</sup> Bureau Study at Parts II & III, note 2, *supra*.

<sup>17</sup> *Id.* at Part III.

exemption, the Board rejected the alternative of certification for commuter carriers.<sup>18</sup> The rulemaking proceeding had been the result of an investigation that concluded that the present 12,500 pound maximum gross take-off weight limitation imposed on Part 298 aircraft should be liberalized.<sup>19</sup> The implications of this liberalization and the rejection of certification of commuter carriers as a viable alternative to the problems of small community air service can be demonstrated by analyzing the scheme mandated by Congress to regulate interstate air transportation.

### I. CERTIFICATION OR EXCEPTION

In 1938 Congress declared that a certificate of public convenience and necessity is required before one can engage in interstate air transportation.<sup>20</sup> This certificate can only be issued after the CAB has determined that a carrier is "fit, willing and able to perform [air] transportation properly."<sup>21</sup> Once a carrier has been issued a certificate of public convenience and necessity, it must comply with the pervasive economic regulations promulgated by the Board.<sup>22</sup>

Certification, and its pendent regulations, has advantages and disadvantages. The necessity of obtaining CAB approval prior to entry into or termination of service in any market is a costly disadvantage.<sup>23</sup> Similarly, obtaining Board approval of proposed rate increases results in months of delay before a simple managerial decision can become effective. In terms of advantages, only certificated carriers can receive subsidy payments, thus enabling the carrier to weather the ever-increasing storms of a down-turned economy.<sup>24</sup> Route protection, at least during the period of develop-

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<sup>18</sup> Decision of the Board, Part 298 Weight Limitation Investigation, CAB Order 72-7-61 (July 18, 1972) (hereinafter cited as Decision).

<sup>19</sup> Initial Decision, note 4, *supra*.

<sup>20</sup> Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, *reenacted as Federal Aviation Act of 1958*, 72 Stat. 7, *as amended* 49 U.S.C. §§ 1301-1542 (1970).

<sup>21</sup> 49 U.S.C. § 1371(d)(1) (1970).

<sup>22</sup> *See* 49 U.S.C. §§ 1371-87 and 1421-32 (1970).

<sup>23</sup> 49 U.S.C. § 1371 (1970). Legal fees in excess of \$50,000 are not uncommon when required to meet the public notice and hearing requirements of § 1371.

<sup>24</sup> 49 U.S.C. § 1346 (1970) is the enabling statute for the Board to grant subsidy payments and the CAB has construed this statute to apply only to certificated carriers. *See also* Bureau Study, Part II at 46, note 2 *supra*.

ment of a market, is also an advantage of certification.<sup>25</sup>

While certification may be advantageous or disadvantageous, depending on one's point of view, it is still the heart of the regulatory scheme.<sup>26</sup> Congress, however, has enabled the Board to exempt carriers from certification if the enforcement of its requirements would not be in the public interest *and* either the limited extent *or* the unusual circumstances of the carrier's operations would make the Act an undue burden.<sup>27</sup> The exemption power of section 416(b) of the Act is exercisable "*if and only if*" the statutory prerequisites are present.<sup>28</sup>

Professor Craig, writing in this *Journal* in 1954, examined the legislative intent of section 416(b).<sup>29</sup> In addition to anticipating the judicial recognition of the place of certification in the regulatory scheme, Professor Craig concluded that Congress was aware that certification might be inappropriate in certain situations.<sup>30</sup> But in his view, the legislative history clearly indicated that a section 416(b) exemption was necessary *only* for "embryonic feeder lines struggling to get started in areas theretofore untapped by air transportation."<sup>31</sup>

Because of their relative unimportance, the CAB granted a section 416(b) exemption to non-scheduled air carriers in 1938.<sup>32</sup> This exemption was revised in 1947 when the Board designated non-scheduled operators as "irregular air carriers" and defined the class as those carriers conducting operations without any discernable degree of regularity.<sup>33</sup> Within this class a distinction was made

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<sup>25</sup> Cf. Bureau Study, Part II at 52-53, note 2, *supra*.

<sup>26</sup> A.L.P.A., *Int'l v. C.A.B.*, 458 F.2d 846, 849 (D.C. Cir. 1972); *United Air Lines, Inc. v. C.A.B.*, 231 F.2d 483, 488 (concurring and dissenting opinions) (D.C. Cir. 1956). Cf. *Pan American World Airways, Inc. v. C.A.B.*, 261 F.2d 754, 757 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959).

<sup>27</sup> 49 U.S.C. § 1386(b) (1970).

<sup>28</sup> *Pan American World Airways, Inc. v. C.A.B.*, 261 F.2d 754, 756-57 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959). See also *A.L.P.A., Int'l v. C.A.B.*, 458 F.2d 846 (D.C. Cir. 1972).

<sup>29</sup> Craig, *A New Look At § 416(b) of the Civil Aeronautics Act*, 21 J. AIR L. & COM. 127 (1954) (hereinafter cited as Craig).

<sup>30</sup> *Id.* at 157-58. cf. *A.L.P.A., Int'l v. C.A.B.*, 458 F.2d 846 (D.C. Cir. 1972) and *Pan American World Airways, Inc. v. C.A.B.*, 261 F.2d 754 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959).

<sup>31</sup> Craig at 157-58, note 29, *supra*.

<sup>32</sup> CAB Reg. 400-1 (Oct. 18, 1938).

<sup>33</sup> CAB Reg. 388, 12 FED. REG. 3076 (May 10, 1947).

between large and small irregular carriers; small irregular carriers were restricted to the use of aircraft not exceeding 12,500 pounds gross take-off weight.<sup>34</sup> The stated purpose in exempting irregular carriers, both large and small, was to provide a means to meet the need for air service arising on an irregular basis that could not be "fulfilled economically by [certificated] carriers operating on regular schedules and routes."<sup>35</sup>

Small irregular carriers were reclassified as "air taxi operators" in 1952. They were given their own exemption, promulgated as Part 298 of the Board's economic regulations, and were authorized to conduct scheduled operations in anticipation that they would offer high frequency operations in off-route markets thereby feeding passengers into the certificated system.<sup>36</sup> Since there was no intent to exclude scheduled air taxi operations between points already served by certificated carriers, the Board retained the 12,500 pound weight limitation to prevent destructive competitive effects upon the certificated system.<sup>37</sup>

When Part 298 was promulgated, local service carriers were operating aircraft fleets, consisting primarily of DC-3's,<sup>38</sup> with an average capacity of twenty-two passengers.<sup>39</sup> The 12,500 pound limitation effectively prevented the air taxi operators from providing service in aircraft comparable to those utilized by the locals. Although the DC-3 has long since faded from the local service

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<sup>34</sup> 14 FED. REG. 6194 (Oct. 13, 1949). The Board had originally established the weight figure at 10,000 pounds. 12 FED. REG. 3076 (May 10, 1947). But when the Civil Aeronautics Administration (now the Federal Aviation Administration) revised its definition of "large aircraft" to 12,500 pounds in its safety regulations and maintenance requirements, the CAB followed suit.

<sup>35</sup> 12 FED. REG. 3076 (May 10, 1947). The history of the exemption of irregular air carriers is reviewed in Nettervill, *The Regulation of Irregular Air Carriers: A History*, 16 J. AIR L. & COM. 414 (1949). The specific exemptions that were granted to irregular air carriers are detailed in Jackson, *Economic Regulation of Irregular Air Carriers*, 15 J. AIR L. & COM. 231 (1948).

<sup>36</sup> CAB Economic Regulation 167, 17 FED. REG. 635 (Jan. 11, 1952), 14 C.F.R. § 298. See also Decision at 25, note 18, *supra*.

<sup>37</sup> Decision at 19-20, note 18, *supra*. The CAB had authorized large irregular carriers to operate a maximum of three round trips per month between designated points. Large Irregular Carriers, Exemptions, 11 CAB 609 (1950). The Board's power to allow non-certificated carriers to operate regular schedules was sustained in *Air Coach Transport Ass'n v. American Airline Inc.*, 353 U.S. 905 (1957) and *American Airlines, Inc. v. C.A.B.*, 235 F.2d 845 (D.C. Cir. 1956), *cert. denied*, 356 U.S. 951 (1958).

<sup>38</sup> Initial Decision at 7, note 4, *supra*.

<sup>39</sup> CAB, HANDBOOK OF AIRLINE STATISTICS (1956).

carrier fleet, the 12,500 pound limitation was not modified. Today air taxi aircraft, under this weight limitation, still cannot feasibly seat more than twenty passengers.<sup>40</sup> Moreover, to utilize fully the revenue producing payload potential of an aircraft with a limited gross takeoff weight non-essential systems and conveniences such as pressurization, lavatory facilities, spacious accommodations and air conditioning must be deleted.<sup>41</sup>

The 12,500 pound weight limitation hampers the quality of service and therefore is a barrier to the expanded use of Part 298 carriers; for if the CAB intends commuter carriers to assume a larger role in the nation's air transportation system by performing the majority of services to small communities, the aircraft utilized for these operations must be acceptable to the flying public. Thus, changes in both the certificated carrier industry and the air taxi, commuter carrier industry compelled the CAB to re-evaluate the 12,500 pound limitation.<sup>42</sup>

## II. LIBERALIZATION OF THE PART 298 WEIGHT LIMITATION

The need for a liberalization of the weight limitation is graphically demonstrated by the significant changes in the certificated carrier industry since 1952. The DC-3's have been replaced by sophisticated, twin-engined jets, which now produce more than seventy per cent of the local carriers' revenue passenger mileage,<sup>43</sup> and have helped raise the total domestic passenger figures from less than one million in 1952 to more than twenty-six million in 1970.<sup>44</sup> Part of this dramatic growth can be credited to the average seating capacity of the local carrier aircraft leaping from the 1952 figure of twenty-two to today's figure of seventy.<sup>45</sup>

The air taxi industry has experienced similar growth. The 2,000 small irregular carriers, which operated a total of 177 different aircraft in 1952,<sup>46</sup> have now evolved into an essential component

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<sup>40</sup> *Id.* at 19.

<sup>41</sup> Decision at 7-9, note 18, *supra*.

<sup>42</sup> Part 298 Weight Limitation Investigation, CAB Order 70-1-15 (Jan. 5, 1970).

<sup>43</sup> Compare Eads at 13, note 10, *supra*, and Decision at 27, note 18, *supra*.

<sup>44</sup> Decision at 26, note 18, *supra*.

<sup>45</sup> Initial Decision at 8, note 4, *supra*.

<sup>46</sup> *Id.* at 9.



of the nation's air transportation system. Over 3,200 air taxi/commercial operators are now registered with the Federal Aviation Administration; of these 2,600 have filed with the CAB under Part 298<sup>47</sup> and approximately one hundred hold themselves out as commuter carriers.<sup>48</sup> Although only commuters are required to report their traffic figures to the CAB, the annual commuter traffic alone is approaching five million passengers.<sup>49</sup> Moreover, commuters provide regularly scheduled service to more than 300 communities and in 152 cities is the only scheduled service available.<sup>50</sup>

Local service carriers are in the process of acquiring larger capacity jet aircraft, which are not economically feasible for operations in markets that produce only a marginal number of passengers daily.<sup>51</sup> These acquisitions have resulted in the reduction of service to one flight per day or the complete curtailment of service in the small community market. With the locals utilizing aircraft with a minimum capacity of forty passengers and moving towards a minimum capacity in excess of sixty, the twenty passenger limitation resulting from the 12,500 pound restriction is grossly over-protective. Moreover, the cramped, unpressurized and bumpy, low altitude flights provided by air taxi and commuter carrier aircraft cannot compete with the relatively comfortable accommodations found in most certificated carrier flights.

Since the original weight limitation was designed to prevent destructive competition with DC-3 type aircraft,<sup>52</sup> a new limitation should reflect that the locals are using larger capacity aircraft and not penalize the Part 298 carriers for utilizing aircraft that contain

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<sup>47</sup> 37 FED. REG. 23340 (Nov. 2, 1972).

<sup>48</sup> There does not appear to be an exact figure for the number of commuter carriers in existence. The hearing examiner indicated that as of September 1971, there were 103 commuter carriers. Initial Decision at 9, note 4, *supra*. The Board in its decision in July 1972 indicated there were 126 commuter operators. Decision at 34, note 18, *supra*. While the largest amount ever reported was 240 commuters in 1968, the ranks of the carriers actually in operation appear to be constantly changing. See Bureau Study, Part II at 46, note 2, *supra*.

<sup>49</sup> Cf. Decision at 21, note 18, *supra*. This represents a sixfold increase in the number of passengers carried by the locals in 1952. *Id.* at 26.

<sup>50</sup> Initial Decision at 11, note 4, *supra*.

<sup>51</sup> Bureau Study, Part III at 2, note 2, *supra*. The local service carriers' fleet of aircraft in 1971 was 40% jet aircraft. In comparison, only 5% of their fleet consisted of jets in 1966. Decision at 27, note 18, *supra*.

<sup>52</sup> See text at notes 38 to 41, *supra*.

the basic amenities expected in air travel. Thus, the Board concluded the weight limitation should be replaced by a maximum passenger capacity coupled with a maximum revenue producing payload capacity.<sup>53</sup> This would allow Part 298 carriers to carry a full load of passengers *plus* cargo and baggage in excess of 2,000 pounds while allowing the aircraft to provide the comfort features of a commercial airliner. A thirty passenger limitation, the Board felt, would still prevent competition between the commuters and the locals in that the commuters could not realize the lower operating costs per mile potential of the locals' higher capacity aircraft.<sup>54</sup>

Assuming *arguendo* that Part 298 carriers would not pose the risk of diverting significant revenues from the certificated system,<sup>55</sup> the Board's basis for the liberalization is still questionable for two reasons. First, the presence of the statutory prerequisites for exemption is doubtful in the case of commuter carriers. Secondly, the exemption of a large and rapidly expanding portion of the nation's air transportation system is contrary to the intent of the regulatory scheme of certification.

### III. SECTION 416(b) AND AIR TAXI OPERATORS

Since under the liberalization air taxi operators are still exempt from certification, the statutory prerequisites for exemption must be present, *i.e.*, the public interest must require exemption from the rigors of certification either because of the limited extent of or the unusual circumstances of the carrier's operations.

In the process of the Part 298 weight limitation investigation, the CAB determined that it is still in the public interest to exempt air taxi operators from certification.<sup>56</sup> The basis for this determination was the Board's conclusion that certification remains an "inappropriate regulatory framework" for the air taxi industry because the type of air service provided by *unsubsidized* air taxi and commuter carriers cannot successfully be provided by certificated carriers *even* with direct subsidization.<sup>57</sup> Moreover, the high financial

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<sup>53</sup> Decision at 9-17, note 18, *supra*.

<sup>54</sup> *Id.* at 30.

<sup>55</sup> *Cf.* Decision at 28, note 18, *supra*.

<sup>56</sup> Decision at 32, note 18, *supra*.

<sup>57</sup> *Id.* at 32-33.

risk faced by commuters providing air service to small communities requires a degree of flexibility that certification would prevent.<sup>58</sup> The inherent conclusion is that certification would defeat the purpose of providing responsive, reliable and economical air service to small communities without the need for large amounts of subsidization.

Other public interest considerations noted by the Board included stimulation of the design and manufacture of an airframe specifically suited for air taxi and commuter carrier operations,<sup>59</sup> and relief of the administrative burden currently necessitated by the policy of relaxing the 12,500 pound limitation on an *ad hoc* basis.<sup>60</sup>

Assuming that the public interest prerequisite was satisfied, the Board was still required to find that certification was an undue burden because Part 298 operations were either unusual or limited.

#### A. Unusual Extent of Operations

The Board found the "unusual extent" of Part 298 operations was exemplified by the service provided: connecting small communities and adjoining airports with the major air terminal in a metropolitan area with considerably more frequent and convenient operations than those provided by the certificated system.<sup>61</sup> Moreover, the Board found that Part 298 carriers were "unusual" because they complement rather than supplant certificated services<sup>62</sup> without the need for subsidization. But to leave no doubt of air taxi operations being qualified for exemption from certification, the Board also made findings concerning the alternative basis for exemption—the limited extent of operations.

#### B. Limited Extent of Operations

The Board demonstrated the limited extent of operations by comparing the domestic passenger totals of the certificated and

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<sup>58</sup> *Id.* at 33.

<sup>59</sup> *Id.* at 13-16, 32.

<sup>60</sup> *Id.* at 12-13, 32.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> *Id.* at 21. *Quaere*: Whether the substitution of non-certificated service for certificated service at 65 points is complementary or supplementary? The latest replacement of certificated service by non-certificated service is at Lima, Ohio. Service by Allegheny Airlines has been suspended in favor of service by Apollo Aviation, a non-certificated carrier that has no experience in providing regularly scheduled service. CAB Order 72-12-27, 37 FED. REG. 26540 (Dec. 13, 1972).

commuter carriers; the reported figures for commuter carriers represented only three per cent of the nation's total.<sup>63</sup> Although the traffic figures for the other 2,500 air taxi operators are not available, the Board maintained that the air taxi passenger figures are insignificant since these operators perform only "demand" air services similar to charter flights.<sup>64</sup>

Additionally, the Board compared the estimates of revenue passenger mileage for certificated and Part 298 carriers in 1952 and 1971. The CAB estimated that the revenue passenger mileage of the air taxi industry in 1952 amounted to only .5 per cent of the certificated carriers' domestic revenue passenger mileage. The 1971 figures reveal a ratio of .4 per cent. Since there is "no significant proportional expansion in the air taxi [revenue passenger mileage]" the Board concluded that the operations of Part 298 carriers should remain exempt from certification.<sup>65</sup>

#### IV. THE EFFECT OF THE PART 298 LIBERALIZATION

Commuter carriers, by definition, conduct regularly scheduled operations between two or more points at least five times per week<sup>66</sup> and the larger commuters could appropriately be referred to as "mini-airlines" because their service is comparable to the certificated carriers. The only readily discernible difference between commuter operations and certificated carriers is that the Part 298 exemption limits commuter carriers to the operation of small aircraft.

Without question, commuter carriers functioning as mini-airlines should be greatly benefited by the liberalization of the Part 298 aircraft limitation. The lack of amenities resulting from the previous gross weight limitation should be rectified since the weight

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<sup>63</sup> Decision at 21, note 18, *supra*. Ninety per cent of the traffic carried by commuter carriers is in markets not exceeding 200 miles in length, while ninety per cent of the domestic traffic on the certificated system is in routes exceeding 200 miles in length. *Id.* at 22. A study of commuter carrier operations estimates that the total gross revenues for the commuter carrier industry was seventy million dollars for fiscal year 1971. Waldo & Edwards, *THE UNITED STATES COMMUTER CARRIER AIRLINE INDUSTRY: ITS CURRENT STATUS AND FUTURE OUTLOOK* (1970). The Board indicated that the total gross revenues for *each* local service carrier in the same period was seventy-two million dollars. Decision at 34, note 18, *supra*.

<sup>64</sup> *Cf.* Decision at 17, note 18, *supra*.

<sup>65</sup> Decision at 22, note 18, *supra*. See also note 63, *supra*.

<sup>66</sup> See note 4, *supra*.

factor of non-essential convenience systems will not reduce the revenue producing payload of the aircraft under the new limitation. The ability to operate more accommodating aircraft should result in increased boardings by passengers, who previously avoided commuter operations because of the "unprofessional" atmosphere created by the smallness of their aircraft.

Although the scope of the exemption should extend to small air taxi or demand operations that are truly unusual or limited, ninety per cent of the total reported passenger figures for Part 298 operations were carried by the fifty largest commuter carriers.<sup>67</sup> To use the circumstances of 2,600 Part 298 carriers to justify the exemption from certification of a small number of mini-airlines is unwarranted. The continued exemption, under the present regulatory framework, of multi-million dollar and multi-million passenger air transportation operations cannot be reconciled with the notion of "embryonic feeder lines struggling to get started."<sup>68</sup>

The CAB's rebuttal to this argument is that the tremendous growth of certain commuter carriers must be viewed in terms of a readily discernible standard, *i.e.*, the certificated system, rather than in a vacuum.<sup>69</sup> This standard is misleading once an exempted class of air carriers grows beyond a certain size; if the tremendous growth of the airline industry as a whole continues, the "mini-airline" operations of the commuter carriers will soon expand into "super-airline" operations greatly exceeding the size and competitive effect of *all the airlines* in existence in 1938 when Congress declared that certification was necessary to engage in air transportation.

A primary objective militating in favor of the weight limitation liberalization is to make commuter carrier operations more attractive to the travelling public. This in turn will lead to greater substitution of commuter carriers for heavily subsidized or uneconomical certificated carrier operations. If the public interest considerations in certification were only concerned with having the service provided by the most responsive, reliable and economic means, this continued substitution of non-certificated carriers would

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<sup>67</sup> Bureau Study, Part II at 47, note 2, *supra*.

<sup>68</sup> See text at notes 29 to 31, *supra*.

<sup>69</sup> Decision at 21, note 18, *supra*.

be in accordance with the Board's other policies, which include the meeting of the nation's air transportation needs.

The public interest in certification, however, declared by Congress<sup>70</sup> and recognized by the courts<sup>71</sup> is that of allowing only those that have demonstrated their fitness, willingness and ability to engage in interstate air transportation. The expanded use of unregulated air service ignores this public interest consideration in the process of exposing the air traveler to the whims of air carriers that have been known to cease operations overnight<sup>72</sup> and to expose the entire public to the consequences of air carrier operations that trim their budgets during periods of financial hardship by compromising safety and maintenance considerations first.<sup>73</sup>

## V. CONCLUSION

Disillusionment with certificated carrier service to small communities, resulting from the curtailment of service even though subsidy costs are rising, is resulting in the abandonment of the regulatory scheme of certification for the short-haul, low-density market. Because the underlying assumption is that certification leads to economically unfeasible operations, the Board has refused to require commuter carriers to meet the rigors of certification while simultaneously replacing subsidized certificated carrier service at many points with non-certificated commuter operations. Although there is broad discretion to function within the bounds of the statutory scheme devised by Congress, the intent and purpose of the enabling statute should be the controlling consideration. Already one court has questioned the process of replacing certificated carrier service with non-certificated service.<sup>74</sup>

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<sup>70</sup> 49 U.S.C. § 1371 (1970).

<sup>71</sup> See note 26 *supra*.

<sup>72</sup> See, e.g., AIRLINE PILOT 13 (April 1970): "The rapid expansion of the [air taxi] industry has left behind dozens of operators who have failed for one reason or another. Poor management, bad planning, faulty timing, lack of financing and a whole list of common business ills have taken their toll, not to mention some quick-profit seekers who build fast, sell and run, leaving the business and the customers floundering."

<sup>73</sup> National Transportation Safety Board study of the safety standards of air taxi operations. Advance report taken from Associated Press release in the Dallas Morning News 27A (Dec. 30, 1972).

<sup>74</sup> A.L.P.A., Int'l v. C.A.B., 458 F.2d 846 (D.C. Cir. 1972). The current practice of allowing commuter carriers to replace certificated carriers in certain mar-

Although the number of passengers travelling in the small community markets may be relatively small, this factor alone should not be decisive of whether the air service they receive will be provided by carriers that have met the minimal standards declared by Congress. Merely because the Board has been unable to ensure that service to small communities is economically feasible when provided by certificated carriers is not a legitimate reason for allowing administrative action that disregards the regulatory framework when the statutory prerequisites are not clearly present.

The liberalization of the Part 298 weight limitation can only portend the expanded use of non-certificated carriers in the nation's air system. The "no destructive competitive effect" logic, which allows non-certificated Part 298 carriers to advance to thirty passenger aircraft because the local service carriers are utilizing aircraft with a minimum capacity of forty passengers, will invariably lead to a further liberalization when the locals abandon their forty passenger aircraft in favor of those with sixty or more minimum passenger capacity. This factor alone will dilute any incentive to the airframe manufacturers to design an airframe conformed with the new Part 298 standard.<sup>75</sup>

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kets is conditioned upon the satisfactory performance of the service by the commuter carrier; if unsatisfactory supposedly the certificated carrier must assume the burden of providing the service again. *Quaere*: How is the public interest served and protected during the period that the commuter carrier service is deteriorating and before the certificated carrier can resume satisfactory operations?

<sup>75</sup> Only in theory will the new limitation have an immediate effect upon the operations of Part 298 carriers. In reality, few aircraft meet the Board's new definition. While the DC-3 is now available for all Part 298 operations under this new limitation, the Board admits that this aircraft, which was unsuitable and uneconomical in short-haul operations as long ago as 1951, is an aging vehicle and can only be considered a short-term measure. Compare Bureau Study, Part III at 16-21, note 2, *supra* with Decision at 13, note 18, *supra*. The reclarification of the Board's new definition of "large aircraft" made it clear that the liberalization was not intended to allow non-certificated carriers to operate the same aircraft, though limited to a passenger capacity of thirty, utilized by the certificated carriers. This reclarification expressly eliminated the use by Part 298 carriers of aircraft such as the Convair 440, the Martin 202 or 404 and the F-27: the aircraft that are the mainstay of the local service carrier fleet for the short-haul market. Part 298 Weight Limitation Investigation, Reconsideration, CAB Order 72-9-62 (Sept. 15, 1972). The hearing examiner noted that several aircraft with passenger capacities in the range of thirty-two to forty-eight were in various stages of production. Initial Decision at 17, note 4, *supra*. Of course the final determination by the Board precludes the use of any of these aircraft as they are currently conformed. Thus, if the new limitation is to be utilized to its fullest extent, Part 298 carriers must await the development of an airframe specifically designed to meet the new standards under Part 298.

The creation of a new class of air carriers in 1944 to serve the needs of the nation's small communities has resulted in the existence of nine local service carriers that have expended nearly one billion dollars of federal subsidy while in the process of totally abandoning or providing deteriorating service to the communities they were created to serve. For the CAB to allow non-certificated carriers to assume the burden of providing the same service and to then allow them to begin to step up to larger aircraft appears to be repeating the same sequence of events that began in the 1944 local service experiment.

If the needs of the nation's air travellers originating in, or destined for, the small community market makes certification an inappropriate framework to control and regulate service to these markets, Congress should modify the system. The constitutional burden to repeal, modify or replace the present system rests with Congress; it is not within administrative discretion to disregard what no longer adequately serves the policies declared by its administrator.<sup>76</sup>

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<sup>76</sup> A number of bills concerning commuter carriers were introduced during the 92d Congress. S. 796, The Limited Air Carrier Act of 1971 and its companion bill, H. 10, 70 dealt with the issuing of "limited air transportation certificates" to certain carriers (*e.g.*, commuter carriers) without the finding that the public convenience and necessity requires the issuing of a normal certificate of public convenience and necessity. The CAB's Bureau of Operating Rights Study of Service to Small Communities (*see* note 2, *supra* and text at notes 16-17), recommendation that an experiment with a contract system for providing air service to small communities resulted in S. 3460, a bill enabling the CAB to perform a three year experiment with the proposal. On these bills, no action was taken in the House and the Senate only held hearings before the Subcommittee on Aviation of the Committee on Commerce (April 10-12, 1972). Another proposal in the House, H.R. 11043, The Commuter Air Carrier Act of 1972, also did not receive any consideration beyond being introduced.



