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A NEW LOOK AT SECTION 416(b) OF THE CIVIL AERONAUTICS ACT

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RECENT pronouncements by the Civil Aeronautics Board as to the meaning of Section 416 (b) of the Civil Aeronautics Act¹ have caused increased concern as to whether the other economic provisions of the Act are to be universally applied or can be disregarded at will by the Board, according to its prevailing temperament.

Section 416 (b) is one of the two exemption provisions in the Civil Aeronautics Act.² In recent years, this section has reached a level of importance which, if left unchecked, could render all outstanding certificates of public convenience and necessity mere pieces of paper of no greater value than a World War II ration coupon. Although Congress, in adopting the Civil Aeronautics Act of 1938, prescribed only one method for the Board to grant the privilege of carrying the U. S. mail — by means of a certificate — a majority of the Board, on December 3, 1953, declared that the "Board is empowered by Section 416 (b) of the Civil Aeronautics Act to authorize by exemption the transportation of mail by air carriers not holding certificates of public convenience and necessity authorizing the transportation of mail."³

¹ 52 STAT. 973, 1005 (1938), 49 U.S.C. §§401, 496(b) (1946).

² The other exemption provision, Section 1(2), provides: "That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest." 52 STAT. 977, 49 U.S.C. §401(2) (1946). First appearing in the 1937 bills after the close of the 1937 hearings [S. 2 Committee Print of May 13, 1937, 75th Cong., 1st Sess., Sec. 305(a); H.R. 7273, 75th Cong., 1st Sess., Sec. 305(a), introduced by Congressman Lea, May 27, 1937], Section 1(2) appears to have been designed for such transportation agencies as the Railway Express Company which undertook to engage in air transportation without directly operating aircraft. See *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 9738*, 75th Cong., 3d Sess. 428-29 (April 1, 1938).

³ C.A.B. Doc. 5551 *et al.*, Applications of Various Air Carriers to Carry First Class and Other Preferential Surface Mail by Air, Serial No. E-7937, p. 13 (mimeo.), Dec. 3, 1953. Chairman Ryan and Member Gurney dissented. Subsequently, the Board unanimously denied exemptions to 53 of the applicants; and,

This holding is the most far-reaching one of the Board to date and is directly contrary to prior Board statements on the exclusiveness of a certificate as the means for authorizing the transportation of mail by air.⁴ Two of the five Board members dissented to this broad construction of Section 416(b) and a third indicated some reluctance in his views when he later joined in turning down all the applications for mail exemptions. Some critics of the Board, however, display no such uncertainty. They apparently believe that the Act provided two alternative methods for "authorizing" any air transportation — by a certificate, issued after a hearing in conformity with the detailed requirements of the Act, or by an exemption, issued without a hearing on such terms as the Board desires.⁵

The extent to which the exemption has replaced the certificate as the means of granting operating permits is indicated by the types of orders issued by the Board in recent months. During the six months ending February 28, 1954, 95% of the orders granting operating rights were by Section 416(b) exemptions rather than permanent or temporary certificates of public convenience and necessity.

Although the courts frequently have faced procedural disputes aris-

with members Lee and Adams dissenting, denied the exemption applications of Slick Airways and the Flying Tiger Line. C.A.B. Order, Serial No. E-7985 (mimeo.), Dec. 21, 1953. Petitions to reconsider both the Board's finding that it had power to "authorize" mail transportation by exemptions and the Board's order denying the exemptions were denied with no change in the 2-1-2 Board division. Order, Serial No. E-8167 (mimeo.), March 17, 1954.

⁴ In all American Aviation, 2 C.A.B. 133, 136 (1940), the Board declared: "There is no doubt of the jurisdiction of the Civil Aeronautics Board over the carriage of mail in experimental service, whether or not patented devices are used. Such carriage of mail is now air transportation within the Civil Aeronautics Act. As such, it is subject to the Act in its entirety and can be engaged in *only* pursuant to the terms of a certificate of public convenience and necessity issued under section 401 of the Act." (Emphasis added.) See also Eastern Air Lines, Inc.-Autogiro Service, 2 C.A.B. 54, 55, 61-62 (1940).

In Alaska Air Transportation Investigation, 2 C.A.B. 785, 793 (1941), the Board noted that Section 416(b) "contemplates only a power to relieve an air carrier from the necessity of conforming to those requirements of the Title [IV] which are subject to enforcement by the Board in the ordinary sense, rather than from a statutory condition attached to the right to obtain a franchise. . . . If Congress, in granting power to the Board to exempt from provisions of the Act, intended to vest in the Board a power which would enable it, in effect, to rewrite the grandfather clause, it is believed that such a power would have been vested in clear and specific terms."

For subsequent Board opinions interpreting or applying Section 416(b), see Investigation of Nonscheduled Air Service, 6 C.A.B. 1049 (1946); American Airlines, Inc., Consolidation of Routes, 7 C.A.B. 337, 348-49 (1946); Chicago & Southern Air Lines, Hot Springs Exemption, 7 C.A.B. 451, 453 (1946); Los Angeles Helicopter Case, 8 C.A.B. 92, 96-97 (1947); Standard Air Lines, *et al.*, Exemption Request, 9 C.A.B. 583, 585-96 (1948); Large Irregular Carriers, Exemptions, 11 C.A.B. 609, 611-14 (1950); Ketchikan Area Route, 11 C.A.B. 463, 472-73 (1950); Service to Kodiak Island, 12 C.A.B. 367, 369 (1950); Anchorage Area Irregular Routes, 14 C.A.B. 93, 94-95 (1951).

⁵ See, e.g., O'Mahoney, *Legislative History of the Right of Entry in Air Transportation Under the Civil Aeronautics Act of 1938*, 20 J.A.L. & C. 330, 348 (1953): The exemption provision "in effect gave the Board plenary power to issue exemptions for any class of carriers" and "except for wage and hour restrictions, no other restrictions were introduced or ever imposed upon the exemption powers which the Congress apparently wished the Board to exercise freely and boldly in order to usher in the new air age." Compare Netterville, *The Regulation of Irregular Air Carriers: A History*, 16 J.A.L. & C. 414 (1949).

ing from Section 416 (b)⁶, the precise meaning of the Board's exemption power has never been presented to the courts for an independent appraisal. The only method for appraising the Board's present interpretation of Section 416(b), therefore, is to go back in time to the 1935-1938 period and attempt to ascertain what Congress itself intended when it conferred the exemption power to the Board's predecessor — the Civil Aeronautics Authority.

CONGRESSIONAL INTENT OF SECTION 416(b)

Sixteen years of Board regulation have largely obscured the original intent of Congress in adding the exemption provision to the Civil Aeronautics Act. As passed in 1938, and as it reads today, Section 416 (b) (1) provides that the Board may exempt from any economic provisions of Title IV any air carrier or class of air carriers if it finds that the enforcement of such provisions

"is or would be an *undue burden* on such air carrier or class of air carriers by reason of the *limited extent* of, or *unusual circumstances* affecting, the operations of such air carrier or class of air carriers and is not in the *public interest*." (Emphasis supplied)⁷

Since the exemption section, by its terms, applies to any air carrier and any economic provision under Title IV, the limitations, if any, on the Board's authority to issue exemptions lie in the meaning of "exempt"; the section's relationship to other provisions of Title IV and the meaning of the qualifying standards: "undue burden," "limited extent of the operations of such air carrier," "unusual circumstances affecting the operations of such air carrier," and "the public interest." Except for "the public interest," these standards are not defined by the Act.⁸ As the Board's own exercise of its exemption power demonstrates, the three undefined phrases are subject to diverse interpretations. The only recourse for determining Congressional intent in these phrases — and, indeed, in the meaning of the entire exemption section — lies in the legislative history of 416(b), the other provisions of Title IV, and the concrete problems in the air transportation industry which Congress was then facing.

Nature of Air Transportation, 1935-38

Civilian aviation, in the mid-thirties, was broadly classified by the Department of Commerce and those concerned with the industry in two categories: (1) "air transport" or "scheduled air carrier opera-

⁶ See, e.g., *C.A.B. v. American Air Transport*, 201 F. 2d 189 (D.C. Cir. 1952); *Air Transport Associates v. C.A.B.*, 199 F. 2d 181 (D.C. Cir. 1952), *cert. den.*, 344 U.S. 922 (1953); *Cook Cleland Catalina Airways v. C.A.B.*, 195 F. 2d 206 (D.C. Cir. 1952); *New England Air Express, Inc. v. C.A.B.*, 194 F. 2d 894 (D.C. Cir. 1952); *Eastern Air Lines, Inc. v. C.A.B.*, 185 F. 2d 426 (D.C. Cir. 1950), *cert. granted and judgment vacated as moot*, 341 U.S. 901 (1951); *Standard Airlines, Inc. v. C.A.B.*, 177 F. 2d 18 (D.C. Cir. 1949).

⁷ 52 STAT. 1005 (1938), 49 U.S.C. §496(b) (1946).

⁸ Section 2 of the Act, the "Declaration of Policy." 52 STAT. 980 (1938), 49 U.S.C. §402 (1946).

tions," and (2) "nonscheduled" or "fixed base" operations. The third category which exists today — "nonscheduled airlines" or "large irregular air carriers" — was unknown at the time the Civil Aeronautics Act was enacted.

Senator McCarran, sponsor of the Civil Aeronautics Act, fully explained the two types of civilian aviation on the Senate floor, May 11, 1938:

"Air transport, practically defined, means the movement by aircraft of passengers, express, and mail on predetermined schedules in interstate and foreign or overseas transportation."⁹

"Nonscheduled flying," on the other hand, embraced many diverse phases of aviation. The principal ones, he pointed out, were:

"First. Aerial surveying and photography.

"Second. Sight-seeing and passenger rides.

"Third. Flying schools.

"Fourth. Aerial advertising.

"Fifth. Crop dusting.

"Sixth. Forest and power-line patrol.

"Seventh. Charter operations, for passengers, freight, and express.

"Eighth. Privately owned aircraft for the furtherance of a business, or for pleasure and personal transportation."

The average cost of aircraft used in such nonscheduled flying was \$3,000.¹⁰

The scope of domestic scheduled and nonscheduled operations, 1935-38, can be seen by the following data:

PLANE-MILES FLOWN, 1935-38¹¹
(thousands)

	<i>Scheduled Air trans- port</i>	<i>Nonscheduled</i>			
		<i>Instruc- tional</i>	<i>Commercial (for-hire)</i>	<i>Connected with Business (not-for-hire)</i>	<i>Pleasure</i>
1935	55,380	23,405	23,150	12,655	25,546
1936	63,777	30,375	23,167	13,230	26,548
1937	66,072	34,559	22,613	15,602	30,422
1938	69,669	39,755	25,990	17,920	35,010

Nonscheduled commercial (for-hire) plane-miles included charter operations, sightseeing, and passenger rides for compensation as reported by owners of aircraft "not used in regular air transportation."¹² In terms of passengers carried for hire, the scheduled air carriers transported 1,102,707 in 1937 and the nonscheduled operators carried 1,296,000 — 799,214 of which were in commercial for-hire operations (charter, sightseeing, and passenger rides) and the remainder of which were in instructional operations.¹³

⁹ 83 CONG. REC. 6631 (May 11, 1938).

¹⁰ 83 CONG. REC. 6630-31 (May 11, 1938).

¹¹ Civil Aeronautics Authority, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 109, 111 (1939).

¹² *Id.* at 111-12.

¹³ *Id.* at 111. For data on passenger-miles for domestic airlines, 1937-38, see Note 128 *infra*.

Confronted with a spectrum of air transportation ranging from the scheduled, mail-carrying airlines at one extreme to the private flyer who occasionally carried a passenger for hire at the other extreme, Congress faced a vexing problem in determining the scope of economic regulation in the Civil Aeronautics Act. By 1938, all interested parties were in agreement that a system of certificates of public convenience and necessity was necessary to replace the haphazard and cut-throat system then existing for the allocation of routes to airlines. But, from 1935 until the enactment of the McCarran Bill, there was considerable difference of opinion as to how far it was necessary to go to regulate entry into air transportation in order to bring the desired stability to the industry.

The device selected for regulating entry into air transportation was the certificate of public convenience and necessity. From the introduction of S. 3027 in June of 1935 until Congress approved S. 3845 three years later, every bill prohibited any "air carrier" from transporting persons, property, or mail by air in interstate commerce unless such air carrier held a certificate issued by the proper authority.¹⁴ The definition of "air carrier," therefore, was critical in determining the extent to which the certificate requirement would apply to those engaged in air transportation.

The Alternative Solutions

In addition to requiring certificates for all carriers of mail by air (a point on which there was virtually no disagreement), Congress was faced with three alternatives. It could define "air carrier" so as to include (1) only scheduled airlines; (2) all common carriers by air; or (3) all air carriers for hire. Each had its drawbacks: the first would include small scheduled operators in areas like Alaska where, because of such unusual circumstances as weather and geographical remoteness, the certificate requirement and its accompanying obligations might render the normal economic regulation inappropriate. The first definition would also inhibit the inception of so-called "feeder" lines in limited areas where scheduled air transportation was still undeveloped. Requiring certificates for such small, limited scale operators might put them out of business because of the expense and delay involved in following procedures to obtain a certificate. In addition, the first definition would open the door to evasion of economic regulation by permitting operators to provide "nonscheduled" air transportation

¹⁴ S. 3027, 74th Cong., 1st Sess., §405(a) (June 10, 1935); S. 3027 Substitute, 74th Cong., 1st Sess., §405(a) (July 10, 1935); S. 3420, 74th Cong., 1st Sess., §405(a) (Aug. 15, 1935); S. 2, 75th Cong., 1st Sess., §305(a) (Jan. 6, 1937); H.R. 4600, 75th Cong., 1st Sess., §305(a) (Feb. 10, 1937); H.R. 5234, 75th Cong., 1st Sess., §305(a) (March 2, 1937); S. 2 Substitute, 75th Cong., 1st Sess., §305(a) (March 3, 1937); H.R. 7273, 75th Cong., 1st Sess., §305(a) (May 27, 1937); H.R. 9738, 75th Cong., 3d Sess., §402(a) (March 4, 1938); S. 3659, 75th Cong., 3d Sess., §311(a) (March 11, 1938); S. 3659 Substitute, 75th Cong., 3d Sess., §402(a) (March 20, 1938); S. 3760, 75th Cong., 3d Sess., §402(a) (March 30, 1938); S. 3845, 75th Cong., 3d Sess., §401(a) (April 14, 1938); Act of June 23, 1938, §401(a), 52 STAT. 987, 49 U.S.C. §481(a) (1946).

paralleling certificated routes so as to undermine the route security and economic stability of certificated carriers.

Defining "air carrier" to include all air carriers for hire would prevent any such evasion of the purposes of the Act, but it magnified the difficulties confronting the small, limited scale operators for which there was no existing need for restriction. And, even if the definition were limited to common carriers by air, the ambiguities of the term "common carrier" scarcely mitigated the threat to the survival of the small, remote scheduled operators or the small charter or contract operators who might occasionally perform common carrier services.

Congress' final answer to this dilemma was to select the "common carrier" definition of air carrier, leaving to the Board the authority to exempt, within prescribed bounds, the small air carriers whose limited operations or geographical remoteness made the certificate or other requirements of the Act both unnecessary to accomplish the purposes of the Act and an undue burden on the carriers in question.

The 1935 Bills

S. 3027, introduced by Senator McCarran, on June 10, 1935,¹⁵ defined "air carrier" so broadly that it evoked widespread opposition during the Senate hearings. The certificate requirement embraced all air carriers for hire¹⁶ without providing any exemptions. During the hearings on S. 3027 before the Donahey committee, Joseph B. Eastman, Federal Coordinator of Transportation, suggested that the definition of "air carrier" was broader than necessary. While supporting the general purpose of the bill, Eastman said:

"As now worded the definition of 'air carrier' . . . makes the provision of the bill applicable to all carriers for hire, including, for example, those which render only special contract service for a single patron, or furnish local sightseeing service, or which casually or occasionally transport persons or property but are not regularly engaged in for-hire transportation. In the main, however, the regulation provided is appropriate only to carriers which hold themselves out to the general public to furnish a regular intercity service. . . . It is suggested, therefore, that the definition of 'air carrier' be limited to operators who render common carrier service

¹⁵ S. 3027, 74th Cong., 1st Sess. (1935). Prior bills to regulate air transportation had been introduced: S. 3187 (McCarran) and H.R. 8953 (Wood), 73d Cong., 2d Sess. (1934), which would have required certificates only for mail carriers; H.R. 5174 (Lea), 74th Cong., 1st Sess. (Jan. 21, 1935), which would have required all "airlines" to obtain certificates except for such "temporary or emergency operation or service" which the proposed Air Commerce Commission otherwise authorized; and S. 1332 (McCarran), 74th Cong., 1st Sess. (Jan. 22, 1935), which would have required certificates only for mail carriers.

¹⁶ "Air carrier" was defined as "any person who or which, whether as a carrier by air, a contract carrier by air or otherwise, transports passengers or property by air in interstate or foreign commerce for hire." S. 3027, 74th Cong., 1st Sess., §403(e) (1935). S. 3027, an Amendment in the Nature of a Substitute, introduced by Senator McCarran on July 10, 1935, revised the definition to conform with the Motor Carrier bill definition. The new definition of "air carrier" covered "any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property in interstate or foreign commerce by aircraft for compensation or hire. S. 3027 Substitute, 74th Cong., 1st Sess., §403(d) (1935). (New language emphasized.)

and that a conditional exemption be provided for sightseeing and casual, occasional, or other transportation as to which there appears to be no immediate need for regulation. Such an exemption would enable the Commission to apply the regulation whenever, on complaint or on its own initiative, it found competitive conditions detrimental to the service on which the public has come to depend."¹⁷

Louis R. Inwood, Secretary of the Independent Aviation Operators of the United States, echoed Mr. Eastman's sentiments. Mr. Inwood represented that section of the industry which included fixed base, charter, and flying school operators.¹⁸ Pointing out that such carriers occasionally might cross state lines in conducting their nonscheduled or charter operations, he recommended that the bill be limited to scheduled air carriers:

"The very nature of the airplane is such that 99 percent of the commercial operators, other than the scheduled operators, engage in interstate commerce, because with the exception of possibly five States of the Union, a brief flight of 2 hours will certainly take you over the border of nearly any State; and these operators, while they do not make a constant practice of interstate commerce, at frequent times during the year must engage in interstate commerce. So that you are including, when you include these fixed-base operators, a type that perhaps would work a burden on the Interstate Commerce Commission as well as on the operators themselves, by this vast bulk. * * *

"The charter operator does not interfere with interstate commerce. The bulk of his operations, say, 75 percent, is probably intrastate. But the remaining 25 percent forces him to come under the provisions of the rate-making provisions. As it is stated in another paragraph, he is restricted to a certain defined territory. I have in mind an operator who is possibly pretty hungry—which represents the majority of our operators—and this operator is possibly restricted, due to his ignorance and to his inability to employ counsel, to four States. He may not have railroad fare to come to Washington, D. C., to apply properly to the Interstate Commerce Commission. He may have a charter trip offered him by some citizen of the community with whom he is well acquainted, to go to a State outside of that restricted territory. He cannot stop to get a further license from the Interstate Commerce Commission. He probably would not know how to go about it.

"So that I really feel that the logical solution in this bill would be to take the scheduled air transport people and put them under the Interstate Commerce Commission and take out all nonscheduled operations."¹⁹

Especially pertinent were the views of Daniel C. Roper, Secretary of Commerce. These views formed the original justification for the exemption section and demonstrate the type of scheduled operations which Congress, from 1935 to 1938, believed the administering agency

¹⁷ *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3027, 74th Cong., 1st Sess. (July 31, 1935)*, reprinted, *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 2 and S. 1760, 75th Cong., 1st Sess., 673-74 (1937)*.

¹⁸ *Id.* at 676 (July 31, 1935).

¹⁹ *Id.* at 677, 680 (July 31, 1935).

might temporarily exempt from the economic provisions of Title IV. Roper pointed out that certain phases of American aviation such as the nonscheduled or fixed-base operators had not reached the state of development requiring regulation in respect to their entrance into air transportation. To require them to submit to the legal, accounting and auditing expenses required by the bill would, he believed, work an extreme hardship at that time. He recognized that where air carriers were then rendering effective service on scheduled routes, they should be protected by certificates of public convenience and necessity. But, for geographical areas remaining untapped by air transportation, he opposed any economic regulation which might discourage the development of new feeder lines:

"That certain phases of American aviation have reached a state of development requiring effective regulation in respect to their entrance into the transportation industry cannot be disputed. In that connection it might be remarked that our extensive experience in aeronautics has impressed us with the idea that the whole field can be generally divided into two major classifications; on the one hand the scheduled air-transport carriers, virtually all of whom hold air-mail contracts, and on the other, what we call miscellaneous flying, which embraces the remaining categories. That the scheduled air carriers could and should be regulated, not only for their own but for the general good, is agreed. Whether at this time the Government should go further in regulation of miscellaneous flying is a broad question. That part of our aeronautics is still in the guild stage, where the units have been found to be made up from four to five men participating in a variety of activities, such as flying training, charter flights, minor construction, emergency repair, and aerial photography. * * *

"In thus suggesting to withdraw all but the scheduled carriers from the scope of the bill, we are motivated largely by considerations of economy. We know the financial condition of the . . . fixed operators. Their condition is woefully poor. To require them to submit to the legal, accounting, and auditing expenses that this bill imposes would work an extreme hardship on them at the present time.

"Careful consideration should be given to the requirement for certificates of convenience and necessity for operators. Doubtless where routes have been established and where operators are rendering effective service, protection should be given in a manner provided for by a certificate of convenience and necessity, but consideration also should be given to large areas remaining in the country which have not yet been tapped by air transportation. In any contemplated regulation the utmost care should be taken to see that restrictions against new lines should not be made so severe as to discourage proper development."²⁰

The scheduled airlines likewise recognized the hardship which could result from such an extensive application of the certificate requirement. In a memorandum directed to the committee, Eastern Air Lines made the initial recommendation for a special exemption section to provide for the small, local operator. Because the recommended

²⁰ *Id.* at 734-35 (Aug. 6, 1935).

language served as a model for succeeding versions of the exemption section, the comments by Eastern Air Lines appear to be especially meaningful on the intended scope of 416(b):

"Commissioner Eastman points out in his letter that the definition of the word 'air carrier' as contained in section 403(d) makes the provisions of the bill applicable to all carriers for hire, including those who render only a local sightseeing service or special contract service for a single patron or which casually or occasionally transport persons or property but are not regularly engaged in 'for hire' transportation. We suggest that at the end of Section 405, on page 16, a new paragraph be added remedying this defect, as follows:

"Notwithstanding any of the provisions of this part, the Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, exempt from the requirements of this section any air carrier or class of air carriers if it finds that the enforcement of this section with respect to such air carrier or class of air carriers is not necessary in the public interest by reason of the limited operations carried on by such air carrier or class of air carriers.'"²¹

The Senate Committee carefully weighed all four viewpoints in revising S. 3027. The new bill, S. 3420,²² was introduced by Senator McCarran, August 15, 1935, nine days after the close of the hearings. This bill restricted the definition of "air carrier" to those carriers "in regularly scheduled service" for compensation or hire²³ and added an exemption provision which followed the recommended language of Eastern Air Lines.²⁴ In an accompanying report, the Committee explained the bill section by section, reprinting opposite each section pertinent excerpts from the hearings. Opposite the revised definition of "air carrier," the report cited the comments of Eastman, Inwood, and Eastern Air Lines.²⁵ Opposite the new exemption section, the report cited the comments of the Secretary of Commerce recommending that while established airlines should be protected by certificates, the restrictions "should not be made so severe as to discourage proper develop-

²¹ *Id.* at 765 (Aug. 6, 1935).

²² S. 3420, 74th Cong., 1st Sess. (1935).

²³ S. 3420, 74th Cong., 1st Sess., §403(d) (1935): "The term 'air carrier' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property in interstate or foreign commerce by aircraft in *regularly scheduled service* for compensation or hire." (New language emphasized.)

²⁴ S. 3420, 74th Cong., 1st Sess., §405(p) (1935): "Notwithstanding any of the provisions of this part, the Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein exempt from the requirements of this section any air carrier, airport operator, or class of air carriers or airport operators if it finds that the enforcement of this section with respect to such air carrier or airport operator, or class of air carriers or airport operators, is not necessary in the public interest by reason of the limited operations carried on by such air carrier or airport operator, or class of air carriers or airport operators." As the committee's additions to Eastern Air Lines' proposed exemption section indicate, the certificate requirements of this bill also applied to the "airport operator." §405(a).

²⁵ *Derivation of S. 3420*, Committee Print, Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (Aug. 31, 1935).

ment" of "new lines" in the "large areas remaining in the country which have not yet been tapped by air transportation."²⁶

The 1937 Bills

The Senate took no action on S. 3420 during the remainder of the Seventy-fourth Congress. When the Seventy-fifth Congress convened in January, 1937, however, alternative bills were introduced in both houses. S. 2,²⁷ introduced by Senator McCarran on January 6, 1937, and H.R. 4600,²⁸ its counterpart introduced by Congressman Ellenbogen, February 10, 1937, basically followed the pattern of S. 3420, defining "air carrier" as meaning only "regularly scheduled" air carriers.²⁹ The exemption section was identical to that proposed by Eastern Air Lines.³⁰ H.R. 5234,³¹ introduced by Congressman Lea on March 2, 1937, and its counterpart, S. 2, An Amendment in the Nature of a Substitute,³² introduced by Senator Truman, March 3, 1937, expanded the definition of "air carrier" to include all air carriers transporting passengers or property as common carriers.³³ This bill eliminated the exemption provision.

During the hearings before the House and Senate committees, the dispute centered around the "common carrier" definition of "air carrier" in the Lea-Truman bill. The Department of Commerce, represented at the hearings by Dennis Mulligan, of the Office of Solicitor, questioned the desirability of such a broad definition which would, he believed, place an onerous burden of obtaining a certificate on the nonscheduled "small fry" then under the Department's safety regulation. Colonel Edgar S. Gorrell, representing the scheduled airlines, strongly challenged the basis of Mulligan's fears. Those nonscheduled operators providing charter or contract services, he asserted, were not "common carriers" and therefore not "air carriers" within the meaning of the Act. If the scope of the Act were limited to regularly scheduled air carriers, he pointed out, the door would be open for "an irresponsible operator to establish service between areas of high density traffic,

²⁶ *Ibid.*

²⁷ S. 2, 75th Cong., 1st Sess. (1937).

²⁸ H.R. 4600, 75th Cong., 1st Sess. (1937).

²⁹ The only difference between section 303(e), which defined "air carrier," and section 403(d) of S. 3420, 74th Cong., 1st Sess. (1935), was the omission of the words "or foreign." S. 2 and H.R. 4600, 75th Cong., 1st Sess., §303(e) (1937); Note 23, *supra*.

³⁰ S. 2 and H.R. 4600, 75th Cong., 1st Sess., §304(e) (1937): "Notwithstanding any of the provisions of this part, the Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein exempt from the requirements of this part any air carrier or class of air carriers if it finds that the enforcement of this part with respect to such air carrier or class of air carriers is not necessary in the public interest by reason of the limited operations carried on by such air carrier or class of air carriers."

³¹ H.R. 5234, 75th Cong., 1st Sess. (1937).

³² S. 2, Amendment in the Nature of a Substitute, 75th Cong., 1st Sess. (1937).

³³ Section 303(a) of both H.R. 5234 and S. 2 Substitute, 75th Cong., 1st Sess. (1937) read: "'Air carrier' means any citizen of the United States who or which undertakes, whether directly or by a lease or any other arrangement, to transport by aircraft, (1) as a common carrier, passengers or property in interstate, overseas, or foreign commerce, or (2) mail." (New language emphasized.)

milk off a considerable amount of traffic, engage in unfair practices, rate wars, and so forth, and produce the very condition which it would be the intention of Congress to guard against." The McCarran-Ellenbogen definition, he concluded, "would encourage the irresponsible to defeat regulation by abandoning regular schedules."

Mulligan first leveled his criticism of the definition in the Lea-Truman bill before the Senate Committee on Interstate Commerce:

"MR. MULLIGAN. The following structural features should be given careful consideration before any final action is taken on the proposed legislation:

"Paragraph (a) of section 305 would appear to require a certificate of convenience and necessity for nonscheduled air carriers quite as well as scheduled airlines. It is believed that, at the present time, there is no real need for any such regulatory provision and that a more careful differentiation should be made with respect to the regulatory features applicable to each kind of air-carrier service. * * *

"Paragraph (g) of section 305 definitely requires provision for mail carriage. Should this requirement extend to all air carriers holding certificates, including unscheduled carriers? The policy contained in this provision would seem to be open to question. If any restriction is intended, the restriction should be set forth. * * *

"The question is this, Senator: According to the language, anyone holding a certificate, or anyone to whom a certificate was issued, would have to carry mail. Now, we ask, Would you want a nonscheduled carrier—assuming that this language holds in the nonscheduled as well as the scheduled—Would you want to require of the nonscheduled carrier, the chartered service, the carrying of the mail?

"SENATOR MCCARRAN. Certainly. Why not? Every railroad carries mail. The common-carrier lines carry mail.

"MR. MULLIGAN. The nature of the chartered service is sometimes very nondescript, Senator. They go when somebody comes forward with the price.

"SENATOR MCCARRAN. Is not that a matter for the Commission to determine?

"MR. MULLIGAN. Oh, yes, but the question is asked. As a matter of policy would you want some of our very small fry, who are, for the most part, constituted of one pilot and one airplane at a base, to carry the mail?

"Assuming that this provision covers them, since they are nonscheduled carriers, would you want to require them to carry the mail?

"SENATOR MCCARRAN. Without any desire to be captious, Mr. Mulligan, I cannot get the intervention of the Department of Commerce into the carrying of mail within the United States.

"MR. MULLIGAN. We are very much concerned with our nonscheduled carriers, Senator. Our present interest includes not only the scheduled carriers but the nonscheduled fliers—the private and the amateur pilots. They are all bunched together in one fold. * * *

"At the time, our interest extends beyond the field of regulation. A good deal of our activity is in the encouragement of private flying, far afield from any of this air-line work, and sometimes there is very little distinction between the so-called nonscheduled operator and his status as an amateur. He may have a commercial license

and a commercial ship, and in the event somebody offers him money to fly from New York to Pittsburgh, he will jump at the chance. He may assume that status only once in a year."⁸⁴

Colonel Gorrell, in seeking to disquiet Mulligan's fears for the charter and contract carriers, said:

"One of the witnesses before this committee labored under the misapprehension that the definition in the substitute would embrace contract carriers and carriers by charter. He apparently reached this conclusion because the substitute eliminated the reference to regularly scheduled service. Of course, nothing can be clearer than that a contract carrier is not a common carrier. This distinction has been established and elaborated in a multitude of decisions. Thus when the substitute refers only to common carriers, there is no remote possibility that the contract carriers or the carriers by charter or any of the other special classes referred to by the witness would be included within the scope of the bill. As I understand the bill, it is designed quite deliberately to leave totally unaffected all carriers which are not common carriers. Therefore, there is no reason whatever for the special classifications provided for in the Motor Carrier Act, because the Motor Carrier Act reached not only common carriers but contract carriers as well.

"Were I in any doubt as to whether contract carriers are included in this bill, I should strongly recommend that there should be clarifying words. However, I can think of no clearer terms than those used in the substitute S. 2 to exclude utterly from the scope of the proposed legislation all reference to contract carriers or carriers by charter.

"The differences in the definition of air carrier between the original and the substitute S. 2 seem to me of some importance, and I strongly favor the definition as adopted in the substitute. If the scope of the regulation were to be confined only to carriers in regularly scheduled service, that would immediately open the way to evasions of the act on the part of the very persons who most clearly should be subjected to regulation. It must be borne in mind that one can be a common carrier even though one is not in regularly scheduled service. While it is true that the maintenance of regular schedules is highly evidentiary of the existence of a common carrier's status, nonetheless the existence of that status does not hinge entirely upon the maintenance of such schedules.

"Thus, if the definition in the original were to be adopted, there would be the danger that a common carrier could evade regulation simply by making its schedules irregular, or by failing to maintain any definite schedules at all. This would result in a great controversy and uncertainty. Furthermore it would open the way to an irresponsible operator to establish service between areas of high density traffic, milk off a considerable amount of traffic, engage in unfair practices, rate wars, and so forth, and produce the very condition which it would be the intention of Congress to guard against. At the present time there are few if any operators on a common-carrier basis who do not maintain regularly scheduled

⁸⁴ *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 2 and S. 1760, 75th Cong., 1st Sess., 98-100 (March 11, 1937).* Commissioner Eastman also testified on the subject on the same day: "There may be, and are, common carriers for hire who are not engaged in regularly scheduled service. I see no particular objection to covering all who are common carriers. Whether or not that is entirely necessary I am not so sure." *Id.* at 73.

service, and if the substitute S. 2 is adopted it is unlikely that there ever will be many carriers who do not maintain regularly scheduled service. The danger I refer to is simply that the definition as originally proposed would encourage the irresponsible to defeat regulation by abandoning regular schedules."⁸⁵

The same controversy between Mulligan and Gorrell was repeated before the Lea committee in the hearings on H.R. 5234. Mulligan again recommended that no certificates be required for nonscheduled air carriers, adding that the bill should clearly distinguish between common carriers, contract carriers, and private carriers. He pointed out that there were no clearly defined types of air carriers in the country at that time except for the scheduled airlines which were clearly common carriers. He inferred, however, that in the light of existing judicial interpretations of common carrier liability for air carriers, operators providing essentially charter or contract service might be construed to be "common carriers" and therefore subject to all of the economic regulations of the bill.⁸⁶

Gorrell remained unmoved. He did not share Mulligan's view that the term "common carrier" was so broad a term at law as to include the charter and contract carriers in which the Department of Commerce was so interested:

"Since it is possible for a person to institute a common-carrier service without operating on a regular schedule, and since such a service would have economic consequences altogether comparable to the consequences of any other common-carrier service, it is desirable that the definition of air carrier should not be confined to the regularly scheduled operator.

"At the present time there are in the continental United States few, if any, common carriers who are not operating on regular schedules. The importance of the definition is rather to preclude the possibility that after the bill is passed anyone may escape regulation simply by adopting irregular schedules. As long as a service is a common-carrier service, it should be subject to regulation.

"It should be made clear, likewise, that the term 'air carrier' does not include any of the charter or contract carriers. Although such carriers were embraced within the Motor Carrier Act in a separate category, there is no need for any such provision in the case of the air carriers. While charter and contract service is considerable in amount, it has not yet presented any important economic problem."⁸⁷

Mulligan's concern for the nonscheduled air carriers appears to have been well justified under the broad application of common carrier liability which the courts were applying to air carriers. A federal case he cited in the hearings⁸⁸ had held that the sole patron on a trip by the Curtiss Flying Service from Miami to Tampa was not a "charterer" but

⁸⁵ *Id.* at 500-01 (April 12, 1937).

⁸⁶ *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5234 and H.R. 4652, 75th Cong., 1st Sess., 260-61 (April 7, 1937).*

⁸⁷ *Id.* at 341 (April 8, 1937).

⁸⁸ *Id.* at 261 (April 7, 1937).

a "passenger" and that the defendant was subject to common carrier liability for the passenger's death in a crash.³⁹ State cases had gone as far. The New Jersey Supreme Court had held that a company carrying passengers on a sight-seeing trip by air was subject to common carrier liability.⁴⁰ Similarly, in an Illinois case, a company carrying two passengers on a chartered emergency night trip was held to be a common carrier.⁴¹ And, the California Supreme Court had found that a fixed-base operator carrying two passengers on pleasure trips to the ocean and back, landing on the field from whence he started, was a common carrier.⁴²

Both the House and Senate committees apparently agreed that Muligan's point was sound: that the scope of the economic regulations was unnecessarily broad. Although the common carrier definition of "air carrier" was retained,⁴³ both committees reported bills which included exemption provisions.⁴⁴ The provisions were virtually identical. They authorized exemptions for air carriers, except mail carriers, where enforcement of the economic provisions were an "undue burden . . . by reason of the limited operation of such air carrier or class of air carriers and is not necessary in the public interest."⁴⁵ Neither bill reached a vote before Congress adjourned.

³⁹ *Curtiss-Wright Flying Service v. Glose*, 66 F. 2d 710 (3d Cir. 1933), *cert. den.*, 290 U. S. 696 (1933).

⁴⁰ *Ziser v. Colonial Western Airways, Inc.*, 10 N.J. Misc. 1118, 162 Atl. 591 (N.J. 1932), which pointed out, *inter alia*, that a "set schedule is no essential of common carrying. . . ." 162 Atl. at 592.

⁴¹ *McCusker v. Curtiss-Wright Flying Service, Inc.*, 269 Ill. App. 502 (1933): "a common carrier is one who undertakes, for hire, to transport, from place to place, such persons or the goods of such persons as choose to employ it."

⁴² *Smith v. O'Donnell*, 215 Calif. 714, 12 P. 2d 933 (1932).

⁴³ Section 303(a) of both H.R. 7273, 75th Cong., 1st Sess., introduced by Congressman Lea on May 27, 1937, and reported to the House a day later (H. REP. No. 911, 75th Cong., 1st Sess.), and of S. 2, 75th Cong., 1st Sess., as reported to the Senate on June 7, 1937 (S. REP. No. 686, 75th Cong., 1st Sess.) read as follows:

"'Air Carrier' means any person who or which undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in transportation by aircraft of United States registry (1) as a common carrier of passengers or property in interstate, overseas, or foreign commerce for compensation or hire, or (2) of mail." (New language emphasized.)

Noted the House Report: "The present air-transportation system has been developed at great expense both to the Government and private industry, to say nothing of the lives taken during this development. It is now seriously threatened by the initiation of unregulated airlines, unhampered by any duty to perform the governmental service of carrying mails and not covered by the present law. The Government cannot allow unrestrained competition by unregulated air carriers to capitalize on and jeopardize the investment which the Government has made during the past 10 years in the air-transport industry through the mail service and which was planned to permit, and at present is permitting, the Government to carry on its air-mail service at constantly decreasing costs per unit.

"The needs of the public require the immediate extension of Government control to the air-transport industry. In order to prevent chaotic conditions and promote the rapid growth that comes with orderly regulation this need should be fulfilled at the earliest practicable date." H. REP. No. 911, 75th Cong., 1st Sess. 19 (May 28, 1937).

⁴⁴ H.R. 7273, 75th Cong., 1st Sess., §304(f) (1937); S. 2 as reported, 75th Cong., 1st Sess. §304(f) (1937).

⁴⁵ The provisions read (language appearing only in H.R. 7273 in brackets and language added by Senate bill, S. 2 as reported, emphasized):

"Notwithstanding any of the [other] provisions of this part, the Commission, from time to time and to the extent deemed by it to be

The 1938 Bills

In January, 1938, both committees resumed their efforts to evolve a bill which was satisfactory to both the Administration and the air transport industry. Key figures in this revision were Clinton M. Hester and Fred D. Fagg, representing the Interdepartmental Committee on Civil Aviation Legislation, and Colonel Edgar S. Gorrell, representing the Air Transport Association.⁴⁶ The common carrier definition of "air carrier" remained intact, but the exemption provision was the subject of protracted revision in an effort to meet with the satisfaction of all parties.⁴⁷ After two months of revision in the House Committee,⁴⁸ Congressman Lea reintroduced his bill as H.R. 9738, March 4, 1938.⁴⁹ In place of "the limited operation" of an air carrier as a prerequisite for an exemption, this bill substituted the phrase "unusual circumstances affecting the operations of such air carrier," and eliminated the exception for mail carriers.⁵⁰

necessary, may exempt, from the requirements of this part or any section or paragraph thereof, or any rule, regulation, term, or condition promulgated thereunder, any air carrier or class of air carriers other than mail carriers, if it finds that the enforcement of this part or any section or paragraph thereof, or any rule, regulation, term, or condition promulgated thereunder, is an undue burden and would work an [unnecessary] *unreasonable* hardship on such air carrier or class of air carriers by reason of the limited operation of such air carrier or class of air carriers and is not necessary in the public interest."

⁴⁶ The Interdepartmental Committee, consisting of the Assistant Secretaries of the State, War, Navy, Post Office, Commerce and Treasury departments, was established in the fall of 1937 for the purpose of studying the pending civil aviation legislation and making such recommendations as the committee might deem feasible. After conducting hearings, October 6 to 25, 1937, the committee assigned to Hester, assistant General Counsel of the Treasury Department, Fagg, Director of Air Commerce in the Department of Commerce, and Major St. Clair Street, of the War Department, the task of drafting a bill incorporating the Committee's views. *Hearings Before House Interstate and Foreign Commerce Committee on H.R. 9738*, 75th Cong., 3d Sess. 36, 48, 63, 133-34 (March 10, 11, 23, 1938). The resulting Interdepartmental Committee bill, printed for use by both House and Senate committees, January 4, 1938, required certificates only for airlines in "scheduled air transport service" and included no exemption provision. Interdepartmental Committee Bill, §§1(c) and 601. Thereafter, Hester, representative of the Interdepartmental Committee; Gorrell, president of the Air Transport Association; and other interested parties conferred with Congressman Lea on the proposed legislation. Differences between the Interdepartmental bill and H.R. 7273 were compromised, and the resulting bill, H.R. 9738, introduced by Congressman Lea and Senator Truman in March. *Hearings before House Interstate and Foreign Commerce Committee on H.R. 9738*, 75th Cong., 3d Sess., 36, 48, 53, 55-57, 59-61, 70-71 (March 10-11, 1938); *Hearings before Senate Committee on Commerce on S. 3760*, 75th Cong., 3d Sess., 2 (April 5, 1938); *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. 14 (April 6, 1938).

⁴⁷ Successive committee prints of the House bill were printed, January 22, 24, 29, and February 19, 1938; and of the Senate bill, January 7, 12, 13, 17, 19, 22, 24, and February 25, 1938. H.R. 9738 and S. 3659 were the final products.

⁴⁸ See Note 46 *supra*.

⁴⁹ H.R. 9738, 75th Cong., 3d Sess. (March 4, 1938).

⁵⁰ H.R. 9738, 75th Cong., 3d Sess., §402(o) (1938). The complete provision read:

"The Authority, from time to time and to the extent necessary, may exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden

The hearings on H.R. 9738 demonstrate that no change in the basic purpose of the exemption provision was intended by this change of language. Congressman Boren, disturbed about the possibility that the exemption provision might be construed to permit the nullifying of the labor conditions in the bill, questioned Hester closely on the matter.⁵¹ Hester, who together with Fagg presented the views of the Administration,⁵² denied that the exemption was as far reaching as Boren feared:

"MR. HESTER. Both of those provisions appeared in your last bill, and we think they have to be read consistently, but we will be glad to give that thought and consideration and report to you on it.

"MR. BOREN. Of course, I am not particularly interested in whether it was in last year's bill or this year's bill; but if I interpret this thing correctly, it simply gives a complete outlet to abandon or nullify all provisions of the foregoing sections at any time within the discretion of the Authority. That is a pretty large assumption of power and I do not know whether it is wise to give any body that power."⁵³

Hester replied by reading the standard in the exemption section which was to guide the Authority in the exercise of its power. After Boren pointed out that in the interests of safety it would be unwise to abrogate regulations providing for maximum flying hours for pilots, Fred Fagg of the Bureau of Air Commerce pointed out that the exemption section could not apply to such regulations since they would be a part of the safety provisions contained in another part of the bill.⁵⁴

"MR. BOREN. Then, Mr. Fagg, let me suggest that, in your exemption section here, or later, there be made some reference one to the other on this particular problem so that, for instance, under this [exemption] section on page 28, you say that nothing in this section shall be deemed to apply to the maximum hours, and so forth and so on, as affecting —

"MR. FAGG (interposing). May I indicate the essential purpose of this section, the exemption provision on page 28?

"MR. BOREN. Yes, sir.

"MR. FAGG. The definition of the term 'air carrier' given is so broad that it would include both carriers on scheduled and carriers not on scheduled routes, and we had two alternatives, one making this whole act apply to scheduled air-line operations and leaving out any regulatory provisions whatsoever for carriers not on schedule or including a broad definition and then caring for the immediate circumstance by allowing exemptions.

"Now obviously, while we might follow the provisions of the Motor Carrier Act with regard to contract carriers and that sort of thing and get down to the point where a certificate of convenience might even be issued to charter operators or those not on schedule,

on such air carrier or class of air carriers by reason of *unusual circumstances affecting the operations* of such air carrier or class of air carriers and is not in the public interest." (New language emphasized.)

⁵¹ *Hearings before House Interstate and Foreign Commerce Committee on H.R. 9738*, 75th Cong., 3d Sess., 419-20 (April 1, 1938).

⁵² *Id.* at 36-41 (March 10, 1938).

⁵³ *Id.* at 420 (April 1, 1938).

⁵⁴ *Id.* at 420 (April 1, 1938).

we thought that at the present time there was no need for that, and as a matter of fact it probably would work undue hardship both on the Authority representing the Government and on the carrier. Therefore this provision has been put in to exempt from any requirement of a certificate of convenience of that type of carrier until it is found to be in the public interest.

"So perhaps we leaned so strongly in trying to provide an exemption for a type of carrier we do not want to regulate immediately that that purpose is not quite apparent even yet in this regulation.

"MR. BOREN. I want to announce my purpose to the committee and for your information, to say that it is my intention to examine further into that and perhaps to offer an amendment that will guarantee safety and labor any possible exemptions under this title."⁵⁵

After the close of the hearings, the Lea committee discarded the "unusual circumstances" phrase, reinserted the "limited character of operations" standard, and added a proviso prohibiting any exemption from regulations limiting maximum flying hours for pilots or copilots.⁵⁶ The bill was then reported,⁵⁷ debated⁵⁸ and passed⁵⁹ with no further changes on the wording of the exemption provision.

The House debates demonstrated that the standard of "limited character of operations" applied with equal force to small scheduled feeder lines in areas untapped by existing airlines as it did to the many varieties of small nonscheduled air carriers. Representative Crosser offered an amendment to the exemption section which would have prohibited any exemptions from the labor section for carriers engaged in scheduled air transportation or in the transportation of mail by aircraft.⁶⁰ Congressman Lea characterized the Crosser amendment as "a serious menace to the future of aviation."⁶¹

⁵⁵ *Id.* at 420-21 (April 1, 1938).

⁵⁶ H.R. 9738, 75th Cong., 3d Sess., §402(o), as reported, April 28, 1938. The complete provision read as follows:

"The Authority, from time to time and to the extent necessary, may exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that due to the limited character of the operations of such air carrier or class of air carriers, the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation, is or would be such an undue burden on such air carrier or class of air carriers as adversely to affect the public interest by obstructing the development of such air carrier or class of air carriers: Provided, That nothing in this subsection shall be deemed to authorize the Authority to exempt any air carrier or class of air carriers from any requirement of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, which provides for maximum flying hours for pilots or copilots." (New language emphasized.)

⁵⁷ H. Rep. 2254, 75th Cong., 3d Sess. (April 28, 1938). Part 2 of this report, containing the minority views, was printed May 5, 1938. Opposition to the bill stemmed solely from the bypassing of the Interstate Commerce Commission to establish a new administrative agency.

⁵⁸ 83 CONG. REC. 6401-13, 6501-15, 7064-7104 (May 7, 9, 18, 1938).

⁵⁹ 83 CONG. REC. 7104 (May 18, 1938).

⁶⁰ 83 CONG. REC. 7078 (May 18, 1938). Crosser claimed that no one could define what a feeder line was. He feared the Authority would exempt from the labor section "any line it chooses. * * * Can you tell me what is meant by 'limited character of operations'? Certainly not. What to one person's mind seems 'limited' does not seem limited to another." *Id.* at 7079.

⁶¹ 83 CONG. REC. 7079 (May 18, 1938).

"The exemption we propose is not to take a cent from these men [the pilots] but to give the aeronautics authority the right to make an exemption where, on account of the limited character of the particular operation, these rates of pay might work an undue burden on a small line. That is all there is to it. * * *

"I may say to the gentlemen we are not taking the bars down. We simply provide a method of adjustment so as to prevent this labor decision from obstructing the development of small lines.

"The amendment that the gentleman proposes would prevent the making of any exemption in cases where the pilots are flying on schedule or carrying air mail. Every air line in interstate or foreign commerce that amounts to anything has to go on a schedule. They cannot secure the business unless they do. So the gentleman from Ohio would, as a practical matter, prevent by law any reduction of compensation and would say to feeder lines all over the country, no matter how small, 'You cannot operate unless you pay the same wages that are paid by the large air lines, running up to six, seven, or eight dollars an hour.' You know what that means. It means that we will have no feeder lines."⁶²

Congressman Mead challenged Lea's argument, pointing out that the concern for the small scheduled feeder line was unduly speculative.

"Until the day of the feeder service, or the pickup service, or the experimental service actually arrives, why break down labor standards? I really believe there is much merit in the amendment offered by the gentleman from Ohio."⁶³

Lea's position prevailed; and the Crosser amendment was defeated.⁶⁴

⁶² 83 CONG. REC. 7079 (May 18, 1938). Congressman Nichols also argued that the Crosser amendment would impede "the establishment of small lines which feed trunk or transcontinental lines." *Id.* at 7080.

⁶³ 83 CONG. REC. 7083 (May 18, 1938). The subject of "feeder service" and "pick-up service" was thoroughly examined during the course of the hearings before the House Committee on Interstate and Foreign Commerce. Dr. Lytle S. Adams, President of the Tri-State Aviation Corporation, asked that his small company have the right, under the proposed bill, to continue its small package freight, pick-up or feeder passenger, and experimental mail services. Tri-State had commenced operations, September 9, 1937, transporting small packages under contract with department stores and mail-order houses in off-line areas of West Virginia and the Ohio Valley. Five planes were utilized in this non-scheduled operation, carrying an average pay load of 600 pounds on an average haul of 100 miles for an average revenue of \$40 a trip. In conjunction with its freight service Tri-State was also developing a "feeder" or "pick-up" passenger service, by which it carried limited numbers of passengers from off-line points to points served by the scheduled airlines. *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 9738*, 75th Cong., 3d Sess., 153-60 (March 24, 1938).

Congressman Lea expressed his concern during the hearings as to whether full compliance with the labor provisions of the Act might be an undue hardship on such "small operators" with "a little local line" as Tri-State: "I am looking at these feeder lines as essential to the ultimate success and expansion, because we now have these big lines running across the country, but we do not have the fine roots of the tree that supply the tree. We have a few big limbs, without any small branches. So, these little branches must be looked to as one of the most essential things to the ultimate success of aviation and we must build our bill to fit their circumstances." *Id.* at 261-62 (March 29, 1938). See also testimony of Gorrell, *Id.* at 364-66, 369.

Congressman Randolph referred to Tri-State as his example in arguing on the House floor that the Crosser amendment would "add too heavy burdens to those small operators." 83 CONG. REC. 7083 (May 18, 1938). He defined "feeder service" as "a small line operating between four, five, or six towns in a more or less sparsely populated area where passengers may be carried to stops or terminals of a transport line." *Id.* at 7082.

⁶⁴ 83 CONG. REC. 7084 (May 18, 1938).

As will be seen below, however, Congress subsequently provided that labor exemptions for the feeder-type carrier could only be issued after a special hearing.

Further light on the type of scheduled air carriers which Congress contemplated might qualify for exemptions appears from the evolution of the Senate bill.

The first McCarran bill of 1938 — S. 3659 — included an exemption provision which was identical with S. 2 as reported in 1937, except that the prohibition on exemptions for mail carriers was revised to bar exemptions for any scheduled air carrier.⁶⁵ Senator Truman countered by introducing an Amendment in the Nature of a Substitute, which included an exemption identical with the original H.R. 9738 — applying to all air carriers, scheduled or nonscheduled, and replacing the standard of “limited operation” with “by reason of unusual circumstances affecting the operations of such air carrier. . . .”⁶⁶ In explaining the “principal differences” between the economic regulation in S. 3659 and the substitute, Senator Truman said:

“Section 402(o) of the substitute empowers the Authority to make exemptions from any provision of the Act where it would cause undue hardship. It is designed especially to enable the Authority to adjust some of the requirements of the law where necessary to encourage small operators, such as the small operators in Alaska, in cases of hardship. Section 305(c) of S. 3659 contains a similar provision but is applicable only to a nonscheduled operation. There might be undue hardship on a scheduled operator as well, as is shown by those in Alaska.”⁶⁷

Senator McCarran, testifying before the Senate Committee on Interstate Commerce, defended his bill which limited exemptions to non-scheduled air carriers:

“The reason given for the omission from the substitute of the limitation prohibiting the exemption of air carriers engaged in scheduled air transportation is not persuasive. There is extremely little, if any, scheduled air transportation in Alaska. On the other hand, there are two important reasons for retaining the prohibition.

⁶⁵ S. 3659, 75th Cong., 3d Sess., §305(c), as introduced, March 11, 1938. The complete provision read as follows:

“Notwithstanding any of the provisions of this part, the Authority, from time to time and to the extent deemed by it to be necessary, may exempt, from the requirements of this part or any section or paragraph thereof, or any rule, regulation, term, or condition promulgated thereunder, any air carrier or class of air carriers *not engaged in scheduled air transportation*, but only if it finds that the enforcement of this part or any section or paragraph thereof, or any rule, regulation, term or condition promulgated thereunder, is an undue burden, and would work an unreasonable hardship, upon such air carrier or class of air carriers by reason of the limited operation of such air carrier or class of air carriers, and is not in the public interest.” (New language emphasized.)

⁶⁶ S. 3659, Amendment in the Nature of a Substitute, 75th Cong., 3d Sess., §402(o), as introduced, March 30, 1938. The text of the exemption section is quoted. Note 50, *supra*.

⁶⁷ *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. 3-4 (April 6, 1938). The same comparison between the two bills was repeated, 83 CONG. REC. 6726 (May 12, 1938).

First, all scheduled air carriers should be subject absolutely to the safety requirements proper for air transport. Second, the Authority should not be permitted to relieve any air carrier from the requirements laid down by Congress for the protection of labor. The first of these reasons was unimportant in connection with S. 2, because that bill related only to economic regulation; the second was not clearly apparent when that bill was reported by the committee and would have been corrected by an amendment from the floor."⁶⁸

Senator Truman's views prevailed in committee.⁶⁹ His version of the exemption section was adopted verbatim in S. 3845⁷⁰ which was reported to the Senate, April 28, 1938.⁷¹ Senator McCarran's objections, however, were honored on the floor when the Senate adopted the McCarran amendment which provided:

"That there shall be no exemption from paragraph (l) of section 401 [the labor provision] of this title for carriers engaged in sched-

⁶⁸ *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess., 162-63 (April 7, 1938).*

⁶⁹ On April 14, 1938, Senator McCarran introduced S. 3845 to replace his earlier bill, S. 3659. The exemption section of this new bill closely followed the terminology of H.R. 9738, as introduced, except that the Authority could not exempt air carriers "engaged in scheduled air transportation or in the transportation of mail by aircraft." S. 3845, 75th Cong., 3d Sess., §417(b). The complete section read as follows:

"The Authority, from time to time and to the extent necessary, may exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers *not engaged in scheduled air transportation or in the transportation of mail by aircraft*, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation, is *or would be* an undue burden on such air carrier or class of air carriers by reason of *unusual circumstances affecting the operations* of such air carrier or class of air carriers, and is not in the public interest." (New language emphasized.)

The phrase "not engaged in scheduled air transportation or in the transportation of mail by aircraft" was deleted in S. 3845, as reported, April 28, 1938.

⁷⁰ S. 3845, 75th Cong., 3d Sess., §417(b), as reported, April 28, 1938. See Notes 66, 50, 69, *supra*.

⁷¹ SEN. REP. NO. 1661, 75th Cong., 3d Sess. (1938). Noted this report: "The present bill reflects the coordination of thought of important Senate and House committees in a general recognition of the dependence of safety in the air upon the need for permanent economic legislation, and consequent economic stability in the air-carrier industry."

"The bill provides for the usual system of economic regulation of air-transportation companies and applies to all air carriers, who operate as common carriers or who transport mail by air. The legislation is adapted to the special characteristics of transportation by air and is, at present, carried no further than is necessary in the interests of the public and of civil aeronautics."

"... Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense. Aviation in America today, under present laws, is unsatisfactory to investors, labor, and the air carriers themselves."

"... The recognized and accepted principles of the regulation of public utilities, as applied to other forms of transportation, have been incorporated in S. 3845. The committee feels that this bill will not only promote an orderly development of our Nation's civil aeronautics, but by its immediate enactment prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry." *Id.* at 2. There was no specific discussion in the report of the exemption section.

uled air transportation or in the transportation of mail by aircraft."⁷²

The conferees, in evolving the final version of 416(b) incorporated both the House standard of "limited operations" and the Senate standard of "unusual circumstances," incorporated the Boren amendment and modified the McCarran amendment so as to permit small scheduled air carriers operating in daylight hours to obtain exemptions from Section 401(l) after notice and hearing.⁷³

The three-year legislative history of Section 416 (b) demonstrates a consistent Congressional intent as to the meaning of its standards. Exemptions were to be permitted, where consistent with the "public interest" (the policies of the Act),⁷⁴ for those carriers "who render only a local sightseeing service or special contract service for a single patron or which casually or occasionally transport persons or property but are not regularly engaged in 'for hire' transportation,"⁷⁵ for "some of our very small fry, who are, for the most part, constituted of one pilot and one airplane at a base,"⁷⁶ for "the nonscheduled fliers — the private and the amateur pilots,"⁷⁷ for "contract carriers," "charter operators or those not on schedule . . . until [regulation] is found to be in the public interest."⁷⁸ Exemptions were also contemplated for certain scheduled air carriers: for the encouragement of "new lines" that might develop in "large areas remaining in the country which have not yet been tapped by air transportation,"⁷⁹ for prospective "small lines" which would "feed trunk or transcontinental lines,"⁸⁰ and for the "small operators, such as the small operators in Alaska, in cases of hardship."⁸¹ So construed, Section 416(b) presents no tortuous constructions, for in such circumstances the enforcement of some or all of the economic provisions would, indeed, "be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting" their operations.

WHAT 416(b) DOES NOT MEAN

Equally important in determining the intent of Section 416(b) is what it was *not* intended to accomplish.

Through the years, careless references have been made to exemptions as "authorizations." By its nature, however, Section 416(b) was intended to be used *solely* for the "exemption" of air carriers, not for the issuance of any "authorization" or rights which attached to a certificate. As an exemption, it was intended to relieve certain small, limited-

⁷² 83 CONG. REC. 6853 (May 13, 1938).

⁷³ 52 STAT. 1005 (1938), 49 U.S.C. §496(b) (1946); H. REP. NO. 2635, 75th Cong., 3d Sess. 70 (June 7, 1938).

⁷⁴ Note 8 *supra*.

⁷⁵ Note 21 *supra*. See also Note 17 *supra*.

⁷⁶ Note 34 *supra*.

⁷⁷ *Ibid*.

⁷⁸ Note 55 *supra*.

⁷⁹ Note 20 *supra*.

⁸⁰ Note 62 *supra*.

⁸¹ Note 67 *supra*.

type air carriers from the obligations or responsibilities of the Act which might otherwise threaten their very survival. Congress empowered the Board, in dealing with such carriers, to issue exemptions from one or more of the economic provisions, until such time as the regular duties and obligations might be appropriate. But, in no sense did Congress in Section 416(b) delegate its powers to authorize affirmatively certificate privileges.⁸²

Authorizing Competitive Services

There is nothing from the hearings, the debates, or the bills themselves to indicate that exemptions were contemplated for any regular domestic scheduled airlines on routes where other certificated carriers were rendering effective service. Nor is there any indication that exemptions were intended for those nonscheduled air carriers which under the guise of irregular operations might seek to divert traffic from certificated carriers. Indeed, the Secretary of Commerce in his 1935 statement which first prompted the exemption section, specifically pointed out:

"Doubtless where routes have been established and where operators are rendering effective service, protection should be given in a manner provided for by a certificate of convenience and necessity, but consideration also should be given to large areas remaining in the country which have not yet been tapped by air transportation."⁸³

And, as Colonel Gorrell subsequently indicated, limiting the certificate requirement to scheduled air carriers

"would open the way to an irresponsible operator to establish service between areas of high density traffic, milk off a considerable amount of traffic, engage in unfair practices, rate wars, and so forth, and produce the very condition which it would be the intention of Congress to guard against."⁸⁴

Admitting New Air Carriers Without Hearing

Route security and protection against cutthroat competition were recognized as two fundamental principles of the new legislation. Congressman Lea, sponsor of the bill in the House, forcefully pointed this out during the debates on the floor:

⁸² It is axiomatic that no rule or order may be issued by an administrative agency "except within jurisdiction delegated to the agency and as authorized by law." Administrative Procedure Act, §9(a), 60 Stat. 242 (1946), 5 U.S.C. §1008(a) (1946). Section 416(b) of the Civil Aeronautics Act by its terms is limited to an authorization of "exemptions" from the provisions of that Act and the Board's own orders issued pursuant to that Act. As such, it is merely a "dispensing" or "suspending" power. It is well settled that Congress may confer such a power to an agency if the standards provided are sufficiently definite, *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932), *Field v. Clark*, 143 U.S. 649, 692-94 (1892), but in no sense does it permit the Board to go beyond suspending the applicability of particular provisions of the Act or of its regulations and assume *affirmative* powers not therein granted by Congress. To do so would clearly be *ultra vires* and therefore invalid. *Brannan v. Stark*, 342 U.S. 451 (1952), *Texas & Pacific Ry. Co. v. U.S.*, 289 U.S. 627, 640-41 (1933).

⁸³ Note 20, *supra*.

⁸⁴ Note 35, *supra*.

"At the present time there is no control by the Federal Government that can assure to one of these companies security of route or any protection against cutthroat competition. Now, when the airplane is about able to engage successfully in passenger and express business, the field is open to destructive cutthroat competition unless we have legislation such as is proposed here.

"One hundred and twenty million dollars has already been invested in commercial aviation in the United States. It is the information of the committee that \$60,000,000 of this sum has been wiped out. The fact that so much money has been put into commercial aviation shows the faith, the genius, and the courage of the American people in that they are willing to invest as they have in aviation up to this date. However, in the absence of legislation such as we have now before us these lines are going to find it very difficult if not impossible to finance their operations because of the lack of stability and assurance in their operations. You would not want to invest \$200 or \$2,000 a mile in a line that has no assurance of security of its route and no protection against cutthroat competition.

"Part of the proposal here is that the regulatory body created by the bill will have authority to issue certificates of convenience and necessity to the operators. This will give assurance of security of route. The authority will also exercise rate control, requiring that rates be reasonable and giving power to protect against cutthroat competition. In my judgment, those two things are the fundamental and essential needs of aviation at this time, security and stability in the route and protection against cutthroat competition."⁸⁵

Under the scheme of the Act, existing air carriers were entitled to "grandfather" certificates unless their operations had been "inadequate and inefficient."⁸⁶ Such certificates could be altered, amended, modified, or suspended only after notice and hearing and only where the public convenience and necessity so required.⁸⁷ They could be revoked only for intentional failure to comply with the economic provisions of the Act.⁸⁸

Future applicants for certificates were required to show, after public hearing, that they were fit, willing, and able to perform the proposed transportation properly, and to conform with the Act and the Authority's regulations, and that the proposed transportation was required by the public convenience and necessity.⁸⁹ Interested parties — rival applicants or existing carriers — were entitled to participate in such proceedings.⁹⁰

Did Section 416(b) authorize the Board to circumvent these procedures regarding hearings and the necessary showing for a certificate by means of exemption? All statements on the subject in the hearings, the reports, and the debates indicate to the contrary.

⁸⁵ 83 CONG. REC. 6406-07 (May 7, 1938).

⁸⁶ Section 401(e); 52 STAT. 987 (1938), 49 U.S.C. §481(e) (1946).

⁸⁷ Section 401(h); 52 STAT. 987 (1938), 49 U.S.C. §481(h) (1946).

⁸⁸ *Ibid.*

⁸⁹ Sections 401(b), 401(c), 401(d); 52 STAT. 987 (1938), 49 U.S.C. §§481(b), (c), (d) (1946).

⁹⁰ Sections 401(b), 401(c); 52 STAT. 987 (1938), 49 U.S.C. §§491(b), (c) (1946).

During the Senate debates, Senator King expressed concern as to whether the "grandfather clause" might be used to prevent the establishment of new routes.

"I am concerned to know just how far . . . the bill 'freezes' existing routes and corporations that have established airplane routes throughout the United States. If it authorizes their activities to the exclusion of others who may desire to enter this great field, then I think there should be some amendments that would fully protect the public and protect those who are interested in the development of this great art."⁹¹

After pointing out that the "grandfather clause" was intended to give recognition to the pioneers of air transportation, Senator McCarran explained in detail how new routes were to be established — by granting a "franchise" after finding that the new route would serve the public convenience and necessity:

"But before that could be done, full and complete hearings would have to be had. . . ."⁹²

Senator King indicated his assent to Senator McCarran's explanation, agreeing that there should be some authority to weigh all the facts and circumstances before determining whether the "necessary certificate" was to be issued.⁹³

Carrying the Mail

Nor was the exemption provision intended to be a device by which the Board could "authorize" the transportation of mail by air. The only delegation of authority to the Board for selecting carriers of mail by air was through the certificate procedures.⁹⁴ With a few minor ex-

⁹¹ 83 CONG. REC. 6851 (May 13, 1938).

⁹² 83 CONG. REC. 6852 (May 13, 1938).

⁹³ *Ibid.*; King wholeheartedly endorsed the principle of certificates to limit entry into air transportation and thereby prevent economic waste: "I agree with my friend that there must be some authority to determine whether rights-of-way and certificates of convenience and necessity shall be granted. If when during the period of the railroad-building mania a few years ago we had had an instrumentality to determine whether many of the roads were necessary, and that question had been determined adversely, millions and hundreds of millions of dollars of capital which have been wasted would have been saved. Many railroad lines have been constructed which should never have been constructed. Scores of railroads are in the hands of receivers and hundreds of millions of dollars have been lost by improvident expenditures in unnecessary railroad lines. I agree, therefore, that there should be some authority to determine whether the public will be inconvenienced, whether there is a necessity for the establishment of other lines, and to weigh all the facts and circumstances, with a view to determining whether the necessary certificate shall be issued." *Ibid.*

⁹⁴ Air carriers holding contracts for the transportation of mail at the time the Act was passed were authorized by Congress to continue carrying mail until a certificate for mail transportation was granted or denied by the Authority. Section 405(a). Air carriers and the Postmaster General were both permitted to apply for certificates for additional mail service, Sections 401(b) and 401(n), which the Board could grant or deny, after notice and hearing, depending upon the requirements of the public convenience or necessity. Sections 401(d), 401(n). The Act further provided that: "From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section." Section 405(g).

ceptions the certificate was intended to replace the former contract system for awarding mail routes.⁹⁵ The McCarran bill would have entitled any certificate holder to carry mail, but this approach was abandoned in favor of the Lea-Truman approach which "would only permit and require an air carrier to transport mail if it is expressly authorized to do so in its certificate of convenience and necessity."⁹⁶

The McCarran bill of 1937 permitted and required certificate holders to transport mail whenever required to do so by the Postmaster General,⁹⁷ and prohibited any air carrier from transporting U. S. mail unless it held a certificate.⁹⁸ The Lea-Truman bills, however, permitted an air carrier to transport mail only when so authorized by its certificate⁹⁹ and prohibited any carrier from transporting such mail

⁹⁵ Noted the final House Report: "Under existing law there is little economic regulation of air carriers. Routes are awarded not upon the basis of the ability of the particular air carrier to perform the service or the requirements of the public convenience and necessity, but upon the letting of air-mail contracts to the lowest responsible bidders. This system has completely broken down in recent months, because the air carriers, in their desire to secure the right to carry the mail over a new route, have made absurdly low bids, indeed, have virtually evinced a willingness to pay for the privilege of carrying the mail over a particular route. . . . * * *

" . . . Thus, if this legislation is enacted, . . . the existing system of carrying mail under contracts with the Postmaster General would be abolished and any carrier holding a certificate authorizing it to carry mail would be permitted to do so." H. REP. No. 2254, 75th Cong., 3d Sess. 2 (April 28, 1938).

The power of the Postmaster General to contract for the transportation of mail by air was preserved in three instances: (1) contracts for experimental air mail service between outlying airports and central city areas under Section 1 of the Experimental Air Mail Act of April 15, 1938, 52 STAT. 218 [declared not to be "air transportation" requiring a certificate by Section 405 (l) of the Civil Aeronautics Act], repealed by the Act of July 2, 1940, 54 STAT. 735; (2) air star route contracts over inaccessible terrain where surface transportation was inadequate under Section 6 of the Experimental Air Mail Act of April 15, 1938, 52 STAT. 218 [also declared not to be "air transportation" by Section 405 (l) of the Civil Aeronautics Act], amended in 1949, 63 STAT. 680, 39 U.S.C. APP. §470 (Supp. 1952); and (3) contracts for emergency mail service where authorized mail services are inadequate [also declared not to be "air transportation"] under Section 405(k) of the Civil Aeronautics Act. A fourth exception was added in 1940, when the Postmaster General was authorized to contract for the transportation of mail in Alaska where no certificate authorizing such service had been issued by the Board. 54 STAT. 1175 (1940), 39 U.S.C. §488(a) (1946). The Postmaster General has no powers to contract for the transportation of mail beyond these provisions for star route contracts over inaccessible terrain, emergency mail service, and off-route Alaskan mail service. The Postmaster General may not enter into contracts for the transportation of mail by air without specific Congressional authorization. *Beach v. United States*, 226 U.S. 243, 256-57 (1912); 15 OPS. COMP. GEN. 1025 (1936).

⁹⁶ H. REP. No. 2635, 75th Cong., 3d Sess. 69 (June 7, 1938).

⁹⁷ S. 2, 75th Cong., 1st Sess., §305(h) (1): "No certificate shall be issued under this part, and no air carrier shall hold or operate under any such certificate, except upon condition—

"(1) That the air carrier shall undertake to provide necessary and adequate facilities and service for the transportation of and to transport United States mail in accordance with this part whenever required to do so by the Postmaster General under such regulations as he may prescribe consistent with this part for which such air carrier shall be entitled to fair and reasonable compensation; . . ."

⁹⁸ S. 2, 75th Cong., 1st Sess. §305(h) (1) (Jan. 6, 1937): "[A]nd it shall be unlawful for any air carrier to handle or transport United States mail unless such air carrier holds a certificate of public convenience and necessity under this part and complies with the terms and conditions thereof. . . ."

⁹⁹ H.R. 5234, 75th Cong., 1st Sess., §305(g) (Mar. 2, 1937); and S. 2, Amendment in the Nature of a Substitute, 75th Cong., 1st Sess., §305(g) (Mar. 3, 1937): "No certificate shall be issued, and no air carrier shall hold, or operate under, any certificate, except under condition that the carrier shall undertake to provide,

unless it held a certificate specifically authorizing such mail transportation.¹⁰⁰

In the 1937 House hearings, Gorrell presented his understanding of the Lea bill:

"In no case can mail be placed upon a carrier unless that carrier has been authorized in its certificate to carry mail. Existing mail carriers receive that authorization as to points now served by virtue of the 'grandfather' clause. For any new service the Postmaster General can certify the need, when and as he wishes, to the Commission, and the Commission shall then authorize that new service unless it finds that such a new service would unreasonably impair some existing carrier. This authorization of a new mail service would occur either through an amendment to some outstanding certificates, or through granting the authority in some new certificate that might be applied for by a carrier not then serving the points in question. * * *

"... The only limitation placed upon the Postmaster General is that of his inability to use for the transportation of the mails the aircraft of a carrier not authorized to transport the mail. He can place mail only with those carriers which have received, in their certificates, the authority to carry mail. . . ."¹⁰¹

The final 1938 version of the Lea bill, as introduced, reported, and passed (as an amendment to S. 3845) retained these provisions permitting and requiring air carriers to transport mail when authorized by its certificate¹⁰² and prohibiting the transportation of mail unless empowered to do so by a certificate.¹⁰³

The final McCarran bill, however, originally permitted *all* certificate holders to carry mail.¹⁰⁴ Both bills, it should be noted, contained exemption sections.¹⁰⁵

On the floor of the Senate, Senator Schwellenbach offered an amendment to the mail-carrying requirement, Section 401 (m), which would

under such rules and regulations, not inconsistent with the provisions of this part as the Postmaster General may prescribe, necessary and adequate facilities and service for the transportation of, and to transport, mail, whenever so authorized by such certificate and so required by the Postmaster General; and such carrier shall be entitled to receive compensation therefor as hereinafter provided."

¹⁰⁰ H.R. 5234, 75th Cong., 1st Sess., §§305(a), 305(f) (Mar. 2, 1937) and S. 2, Amendment in the Nature of a Substitute, §§305(a), 305(f) (Mar. 3, 1937): "No air carrier shall engage in . . . any transportation of mail by aircraft, unless there is in force a certificate issued by the Commission authorizing such carrier so to engage; . . ." * * *

"... And it shall be unlawful for any carrier to transport any class or classes of traffic not authorized in its certificate. . . ."

¹⁰¹ *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5234 and H.R. 4652*, 75th Cong., 1st Sess. 107, 110 (March 31, 1937). See also, *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 2*, 75th Cong., 1st Sess. 461 (April 12, 1937).

¹⁰² H.R. 9738, 73rd Cong., 3d Sess., §402(g) (1938).

¹⁰³ H.R. 9738, 75th Cong., 3d Sess., §402(a) (1938).

¹⁰⁴ S. 3845, 75th Cong., 3d Sess., §401(m) (1938): "It shall be a condition upon the holding of a certificate under this title that the carrier holding such certificate shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. . . ."

¹⁰⁵ H.R. 9738, 75th Cong., 3d Sess., §402(o) (1938); S. 3845, 75th Cong., 3d Sess., §417(b) (1938).

make it read the same as the corresponding provision in the Lea bill.¹⁰⁶ He stated that the amendment was necessary "to make it clear that an air carrier may not transport mail unless it is expressly authorized to do so by the Authority in the certificate of convenience and necessity issued to the air carrier." The Authority should have the power, he asserted, "to determine whether it was consistent with the public convenience and necessity for a particular air carrier to be required to transport mail." He argued that his amendment clearly provided that "an air carrier shall transport mail only when authorized to do so in its certificate by the Authority."¹⁰⁷ Senator McCarran opposed this amendment, asserting that the right to carry mail should flow automatically from the possession of a certificate and that the Postmaster General, not the Authority, should be the agency to authorize the carrying of mail.¹⁰⁸ Senator Truman pointed out that even under the Schwellenbach amendment, carriers could transport mail only when it was tendered by the Postmaster General, but that the amendment was necessary "to make it clear that an air carrier may not transport mail unless it was expressly authorized to do so by the Authority and a certificate of convenience and necessity is issued to the carrier."¹⁰⁹

The Senate adopted Senator McCarran's view, and defeated the Schwellenbach amendment.¹¹⁰ In conference, however, the conferees adopted the Schwellenbach-Truman position which was in accord with the bill as passed by the House.¹¹¹ Explained the Conference Report:

"With respect to the duty placed upon air carriers to carry mail, the Senate bill would require all air carriers holding certificates of convenience and necessity from the Authority to transport mail whenever required by the Postmaster General, without regard to whether the carrier was expressly authorized to do so in its certificate. The House amendment would only permit and require an air carrier to transport mail if it is expressly authorized to do so in its certificate of convenience and necessity. The conference agreement follows the House amendment in this respect."¹¹²

Temporary and Emergency Operations

Furthermore, Section 416(b) was not intended to provide the Board with a flexible device for "authorizing" temporary or emergency operations. Congress became fully aware of the need for flexibility and provided for it in *other* sections. The 1937 bills lacked this flexibility. Both the Lea bill and the Truman substitute corrected this defect, adding provisions for temporary certificates,¹¹³ emergency operations

¹⁰⁶ 83 CONG. REC. 6431, 6769 (May 9, 12, 1938).

¹⁰⁷ 83 CONG. REC. 6431 (May 9, 1938).

¹⁰⁸ 83 CONG. REC. 6769-70 (May 12, 1938).

¹⁰⁹ 83 CONG. REC. 6769 (May 12, 1938).

¹¹⁰ 83 CONG. REC. 6770 (May 12, 1938).

¹¹¹ Notes 94, 102, 103 *supra*.

¹¹² H. REP. NO. 2635, 75th Cong., 3d Sess. 69 (June 7, 1938).

¹¹³ H.R. 9738, 75th Cong., 3d Sess., §§402(d)(2), 402(i) (Mar. 4, 1938); S. 3659, Amendment in the Nature of a Substitute, 75th Cong., 3d Sess., §§402(d)(2), 402(i) (Mar. 30, 1938).

to non-certificated points,¹¹⁴ and emergency mail service.¹¹⁵ These provisions subsequently were incorporated into the McCarran bill and became a part of the Act.¹¹⁶

Sections 401 (d) (2)¹¹⁷ and 401 (g)¹¹⁸ of the Act empowered the Board to issue certificates for a limited period of time as well as permanently. In the words of Senator Truman,

"Certificates shall continue in effect until revoked as provided by law, except for certificates specifically issued for temporary periods to meet temporary needs."¹¹⁹

Section 401 (f) provided the machinery for emergency operations, not Section 416(b). Section 401 (f), as enacted, provided that

"No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate."¹²⁰

Explained Colonel Gorrell:

"Last year's bill permitted emergency landings; said that you would not go to jail if your engine failed and you had to make an emergency landing. This year's bill likewise provides for emergency landings, but has also a more sensible provision, which came out of consideration of the floods in the valley of the Ohio last year. This year's bill permits not only emergency landings, but emergency operations.

"For example, last year, in flying from Chicago to Indianapolis, Cincinnati and Washington, the line going from Indianapolis to Cincinnati could not land in Cincinnati because the flood waters were so high they covered the field higher than the top of the hangers. The planes had to pass Cincinnati by until the waters subsided; had to go by way of Columbus instead of Cincinnati. If last year's bill had been in effect, there would have had to be notice and hearings before the company could have done that, and the service might have been interrupted to the public's detriment."¹²¹

Senator Truman likewise pointed out:

"The substitute, in section 402(f) [section 401(f) of the Act], permits emergency off-line operation as well as emergency off-line

¹¹⁴ H.R. 9738, 75th Cong., 3d Sess., §402(f) (1938); S. 3659, Amendment in the Nature of a Substitute, 75th Cong., 3d Sess., §402(f) (1938).

¹¹⁵ H.R. 9738, 75th Cong., 3d Sess., §803(i) (1938); S. 3659, Amendment in the Nature of a Substitute, 75th Cong., 3d Sess., §803(i) (1938).

¹¹⁶ See Sections 401(d) (2), 401(g), 401(f), and 405(k) of the Civil Aeronautics Act.

¹¹⁷ 52 STAT. 987 (1938), 49 U.S.C. §481(d) (2) (1946).

¹¹⁸ 52 STAT. 987 (1938), 49 U.S.C. §481(g) (1946).

¹¹⁹ Emphasis added. *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. 4 (April 6, 1938).

¹²⁰ 52 STAT. 987 (1938), 49 U.S.C. §481(f) (1946).

¹²¹ *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 9738*, 75th Cong., 3d Sess. 311 (March 30, 1938). See also Gorrell testimony, *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. 27 (April 6, 1938).

landings. Under section 311(e) of S. 3659 there could be no emergency operation except through the granting of a certificate therefor after notice and hearing."¹²²

The Post Office Department was granted broad powers to meet emergency and temporary needs of the postal service. Section 401 (m) required all air carriers holding certificates authorizing mail service to transport mail whenever required by the Postmaster General.¹²³ If this available service proved inadequate, the Postmaster General was empowered to seek the permanent or temporary certification of additional service from the Board.¹²⁴ In emergencies, the Post Office Department did not have to wait for the Board to prescribe regulations under the broad powers of Section 401 (f). In the event of emergencies caused by flood, fire or other calamities, Section 405 (k) authorized the Postmaster General to contract, without advertising, for the transportation of mail by air where available facilities of persons authorized to transport mail to or from such localities were inadequate to meet the requirements of the postal service during such emergency.¹²⁵ The certificate requirement of Section 401 (a) was no barrier, for Section 405 (k) specifically stated that such an emergency operation was not "air transportation within the purview of this Act."¹²⁶

Gorrell fully explained the purpose of this emergency contracting power of the Postmaster General:

"This year's bill has in it a further very wise provision, which last year's bill did not contain, which provides for emergency mail service. Under last year's bill, if a hurricane washed out a railroad bridge, as it did, not so long ago, between Miami and Key West, you would have to go through a considerable regular routine before the Interstate Commerce Commission, before the Post Office Department could have ordered the mail carried to Key West. This year's bill provides that, in an emergency of such a nature, the Post Office Department may make a temporary contract to have the mail carried. We had the same thing in connection with the floods, spring before last, in Pittsburgh. The only mail service in and out of Pittsburgh for a while was that quickly contracted for by the Post Office Department, under which, for a limited time we carried all forms of mail into and out of Pittsburgh by airplane. * * *

"MR. HOLMES. In the case of a wash-out of a railroad down in Key West, you do not mean to say that he would have to come up here and get a permit to fly the mail down there if the Post Office Department said that the mail had to go through?

"COLONEL GORRELL. Under last year's bill, sir, because of the fact there was no air-mail route previously existing from Miami to Key West, such a route would be a new route. Last year's bill said that if the Postmaster General desired a new route, he would have to so

¹²² *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. 4 (April 6, 1938).*

¹²³ 52 STAT. 987 (1938), 49 U.S.C. §481(m) (1946).

¹²⁴ Section 401(n), 52 STAT. 987 (1938), 49 U.S.C. §481(n) (1946).

¹²⁵ 52 STAT. 994, 49 U.S.C. §485(k) (1946).

¹²⁶ *Ibid.*

certify to the Commission, and then the Commission would hold a hearing, and if they found —

"MR. HOLMES (interposing). I agree with you on that. That is, if you are going to establish a permanent route. But here on the other hand is an emergency, and the mail had to go through.

"COLONEL GORRELL. Last year's bill did not cover that point of emergency service.

"MR. HOLMES. You do not mean that the bill would hinder the carriage of that mail by plane from Miami to Key West?

"COLONEL GORRELL. Under last year's bill I see no method by which they could have done it, except possibly by expediting the regular procedure under the bill.

"MR. HOLMES. Under the bill we passed in 1926, under an emergency he could have utilized planes to deliver that mail after the rails had been washed out.

"COLONEL GORRELL. Your bill, passed in 1926, did not cover the transportation of mail. The Air Mail Act of 1934 is the one covering the transportation of mail.

"MR. HOLMES. Either one.

"COLONEL GORRELL. He would have had to ask for bids under that 1934 Act, sir. Under the present bill, H.R. 9738, the Postmaster General, where there is a railroad wash-out or anything of that sort, could get quick bids for temporary air transportation and authorize immediate performance by a temporary contractor. It simplifies such a situation; although for permanent service your bill provides for a system of certificates. It simplifies by a great deal the handling of emergencies."¹²⁷

CONCLUSION

This excursion through the hearings, reports, and debates is not suggested to show the only possible legal constructions of Section 416(b) of the Civil Aeronautics Act. But, it demonstrates, in fact, that in drafting the Act, Congress intended a result which was entirely different from the assertions of some who would elevate Section 416(b) to a limitless delegation of power to the Board to do as it desired, disregarding other economic provisions of the Act.

In applying the standards of Section 416(b) — which out of context appear to mean anything to anybody — it is suggested that much is to be gained by employing the expressions of Congressional intent as a guide in the administration of the exemption power. Following this course, the exemption provision has a meaningful, more definite, position in the scheme of air transportation regulation. It would prevent the spectacle of a regulatory act, contradicting itself, with one area of air transportation regulated by one set of standards and procedures and another area, overlapping the first, regulated only by the unre-

¹²⁷ *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 9738*, 75th Cong., 3d Sess. 312-13 (March 30, 1938). See also Gorrell testimony, *Hearings before a Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. 27 (April 6, 1938); 15 OPS. COMP. GEN. 1025 (1936).

dictable discretion of an agency tied to no standards or procedures except those of its own making.¹²⁸

To those involved in drafting the Civil Aeronautics Act, Section 416 (b) was a necessary escape valve to permit the postponement of the certificate requirement and other economic regulations in limited types of circumstances.

Congress was unwilling to limit the definition of "air carrier" to regularly scheduled airlines because of the potential evasion of the Act by airlines clothed in the guise of "nonscheduled" operations. For this reason, Congress purposely expanded the definition of "air carrier" to include *all* common carriers by air. But Congress also realized that the certificate requirement or other economic regulations might be inappropriate in situations typified by the legitimate nonscheduled air carrier not primarily engaged in intercity common carriage and the small Alaskan air carriers or the embryonic feeder lines struggling to

¹²⁸ The extent to which some air carriers have utilized exemptions under section 416(b) to conduct large-scale transport operations without certificates is indicated by comparing the passenger-miles of those non-certificated "large irregular" air carriers operating through common "ticket agencies" with the passenger-miles of the fifteen domestic air mail carriers operating when the Civil Aeronautics Act was passed:

<i>Domestic Air Mail Carriers</i>		<i>Large Irregular Air Carrier Groups</i>	
PASSENGER-MILES (000s)		PASSENGER-MILES (000s)	
Year Ending June 30, 1938		Year Ending June 30, 1953	
American Airlines, Inc.	127,679	"North American" group:	
United Air Lines Transport Corp.	104,475	Hemisphere Air Transport	97,321
Trancontinental & Western Air, Inc.	72,478	Trans National Airlines, Inc.	63,019
Eastern Air Lines, Inc.	65,141	Twentieth Century Airlines, Inc.	56,987
Northwest Airlines, Inc.	18,182	Trans American Airways, Inc.	36,052
Pennsylvania-Central Airlines Corp.	13,594		253,379
Braniff Airways, Inc.	11,137	"North Star" group:	
Western Air Express Corp.	9,279	Air America, Inc.	53,017
Chicago & Southern Air Lines, Inc.	6,140	Caribbean American Lines, Inc.	36,031
Delta Air Corp.	5,201	Paul Mantz Air Service... ..	13,567
Hanford Airlines, Inc.	2,612	Central Air Transport, Inc.	11,528
Boston-Maine Airways, Inc.	1,971		114,143
Continental Air Lines, Inc.	963	"Skycoach" group:	
Inland Air Lines, Inc.	864	Great Lakes Airlines, Inc.	37,421
National Airlines, Inc.	654	Currey Air Transport, Ltd.	37,038
		Monarch Air Service	13,342
			87,801
		"Safeway" group:	
		Aero Finance Corp.	34,651
		Peninsular Air Transport.	33,357
			68,008
Total	440,371	Total	523,331

*Includes July, 1937, operations of National Parks Airways, Inc. (190), purchased by Western, August 1, 1937.

Sources: CAB, ANNUAL AIRLINE STATISTICS, DOMESTIC CARRIERS, FISCAL YEARS, 1935-40 (1940); CAB, QUARTERLY REPORT OF AIR CARRIER OPERATING FACTORS (Sept., 1953).

get started in areas theretofore untapped by air transportation. To permit the Board, in situations such as these, to relieve air carriers from some or all of the economic regulations that otherwise would be an undue burden, Congress enacted the present language of Section 416 (b). To the extent that hearings, committee reports, and Congressional debate ever can be conclusive, all of the evidence points to the fact that air carriers were deemed to be eligible for the benefits of Section 416 (b) only in situations of this type, and then only so long as such exemptions did not frustrate the policies underlying other provisions of the Act. The activities of these small-scale operators, being of "limited extent" or affected by "unusual circumstances," in no way interfered with the basic policies of the Act at that time.

Conversely, the statements of the framers — as well as the structure of the Act — clearly demonstrate that the Board was not to authorize, whether temporarily or permanently, new air service competitive with existing services or the transportation of mail by air except by the certificate procedures prescribed in the Act.

Congress, in enacting the Civil Aeronautics Act of 1938, devoted three years of careful study to its task. In terms of planning a scheme of comprehensive economic regulation to bring stability and security to a demoralized industry without sacrificing necessary flexibility to meet temporary or emergency needs, Congress exercised rare foresight in anticipating the many contingencies which might arise in the administration of the Act. But only the agency assigned with the duty of administering the Act can accomplish this objective. And, it is suggested, this objective is not readily attainable by following the advice of the Board's critics who would have the Board ignore the intent of Congress, elevate the exemption section to a fictional status of an unlimited delegation of Congressional power by applying novel interpretations of Congress' standards, and then use this provision as an alternative to the specific directions of Congress for the regulation of air transportation. Such a "double standard," which could result from the many tortuous constructions of Section 416 (b) interjected in recent years, is easily avoidable if the standards of that section are viewed against the backdrop of unambiguous legislative intent, the structure and the policies of the Act.