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CURRENT LEGISLATION AND DECISIONS

Supplemental Air Transportation—Public Law 87-528

Public Law 87-528¹ amends various sections of the Federal Aviation Act of 1958.² In addition it sets up new laws for interim operating authority and continuity of operations by supplemental air carriers which are currently operating under a semblance of authority granted by the Civil Aeronautics Board.³

The more important sections of the Federal Aviation Act of 1958 affected will be treated in more detail following this general summary of the new law. Congress, through P.L. 87-528, has changed or added definitions of "Supplemental air carrier,"⁴ "Supplemental air transportation,"⁵ a provision for the issuance of certificates of public convenience and necessity to engage in supplemental air transportation,⁶ a section permitting terms and conditions, as stipulated by the Board, to be placed in the certificate,⁷ a clause giving the Board power to require the supplemental air carriers to acquire public liability insurance, and to file performance bonds under certain circumstances.⁸ In addition Public Law 87-528 makes supplemental carriers ineligible for mail subsidy,⁹ gives the Board power to issue special operating authorization where it finds that supplemental air service is required in addition to regularly scheduled services,¹⁰ makes final disposition of all the applications brought under any phase of the *Large Irregular Air Carrier Investigation*,¹¹ and finally, provides for amendment of the civil and criminal penalties of the Federal Aviation Act of 1958.¹²

The new statute is the end result of an investigation begun in 1951 to

¹ 76 Stat. 143 (July 10, 1962).

² 49 U.S.C. § 1301-1542 (1958).

³ Those carriers operating under CAB Orders No. E-9744 (Nov. 15, 1955), E-13436 (Jan. 28, 1959), E-14196 (July 8, 1959), and P.L. 86-661, 74 Stat. 527 (July 14, 1960).

⁴ 76 Stat. 143, § 1: "an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation."

⁵ 76 Stat. 143, § 1: "*charter trips* in air transportation other than the transportation of mail by aircraft, rendered pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act." (Emphasis added.)

⁶ 76 Stat. 143, § 2: "In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. *Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.*" (Emphasis added.)

⁷ 76 Stat. 143, § 3: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; *except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.*" (Emphasis added.)

⁸ 76 Stat. 144, § 4.

⁹ 76 Stat. 145, § 5.

¹⁰ 76 Stat. 145, § 6.

¹¹ 76 Stat. 149, § 11.

¹² 76 Stat. 149, § 12-13.

determine the status of the so-called "large irregular air carriers"¹³ and the Board's orders resulting from that investigation.¹⁴

To understand fully the reasons for the development of this legislation it is necessary to examine briefly the background and evolution of the irregular carrier.¹⁵ When the Civil Aeronautics Act of 1938¹⁶ was adopted, it was apparent that it would be both inequitable and impractical to subject all carriers or operations, regardless of their circumstances, to the provisions of the Act. Therefore a section was incorporated in the Act to allow the Board to exempt certain classes of operators or carriers from some of the restrictions in the Act.¹⁷ This exemption provision was carried over into the Federal Aviation Act of 1958, and is still in existence today.¹⁸ This concept of exemption from certification worked fairly well until the close of World War II. Following the war every segment of the air transportation industry enjoyed tremendous growth, far beyond anything imagined by the Congress when it enacted the Civil Aeronautics Act of 1938. Large numbers of ex-military pilots and surplus aircraft furnished entrepreneurs an easy access to the necessary personnel and equipment, and the exemption provision of the 1938 Act provided the quickest and surest method of entry into the air carrier field. The expansion of the irregular carriers was phenomenal, and most operators envisioned a very happy future. But by 1951 this growth was beginning to cause some rather severe problems of competition between the route carriers and the irregular carriers. This condition coupled with the Board's power to exempt certain classes of carriers from the provisions of the Act prompted one observer to comment: "In recent years, this [exemption] 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."¹⁹

In 1951 the Board undertook to define its policy in relation to the large irregular air carriers in a proceedings which consolidated some sixty-six applications for continued, enlarged or original exemption authorizations.²⁰ It is significant to note the large number of intervenors in the proceedings²¹ and the varied segments of the economy represented. Included were the principal certificated route carriers, civic and governmental bodies, railroads and industry associations.²² Judging from the large number and diversity of intervenors it would appear that the irregular carriers had certainly generated some real competitive problems.

¹³ Large Irregular Air Carrier Investigation, CAB Order No. E-5722 (Sept. 21, 1951), 14 C.A.B. 459.

¹⁴ Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Nov. 15, 1955), 22 C.A.B. 838; CAB Order No. E-13436 (Jan. 28, 1959), 28 C.A.B. 224; CAB Order No. E-14196 (July 8, 1959), 29 C.A.B. 419.

¹⁵ See Naterville, *The Regulation of Irregular Air Carriers; A History*, 16 J. Air L. & Com. 414 (1949).

¹⁶ 52 Stat. 973 (1938) (now Federal Aviation Act of 1958, 49 U.S.C. § 1301-1542 (1958)).

¹⁷ Civil Aeronautics Act of 1938 § 416(a)-(b), 52 Stat. 1004.

¹⁸ 49 U.S.C. § 1386 (1958).

¹⁹ Craig, *A New Look at Section 416(b) of the Civil Aeronautics Act*, 21 J. Air L. & Com. 127 (1954).

²⁰ Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Nov. 15, 1955), 22 C.A.B. 838.

²¹ Some 30 different organizations were represented.

²² See 22 C.A.B. at 855-56.

The Board's Order, E-9744,²³ which stated a new policy towards the large irregular air carriers, was the product of that investigation. The large irregular carriers were designated Supplemental Air Carriers, and were given interim authority to conduct: (1) unlimited charter operations on a plane-load basis for the carriage of passengers and property in domestic, overseas and territorial (except Alaska) operations; (2) charter operations for carriage of passengers in international operations on an individual exemption basis (similar to that set forth in the 1955 Transatlantic Charter Policy);²⁴ and (3) individually ticketed or way-billed operations by each carrier not to exceed ten trips per calendar month in the same direction between any two points (except for intra-Alaska operations and except for the carriage of passengers in international operations). Of the sixty-six original applicants forty-nine large irregular air carriers were granted interim exemption, pending hearings on each of their individual applications.²⁵

It was the third provision above which was to prove to be the most controversial and the most vulnerable portion of the Board's decision. The intervening certificated carriers attacked the ruling on the basis of the Board's failure to find facts sufficient to show "undue burden" as required by the statute.²⁶ The United States Court of Appeals agreed²⁷ and stated in effect that even though it was true the Board had been operating under the exception provision for many years, and that the Board had in all probability not stated any more extensive facts to support their conclusions of undue burden in prior cases than they had in this case, in the prior decisions the carriers were truly irregular. In this case the applicants closely resembled the certificated route carriers by virtue of being designated supplemental air carriers and by the provision allowing them a form of scheduled operation between any two points.²⁸ Consequently the Board had to meet the standards of the statute and show facts to support its conclusion that there would be an undue burden on the applicant by not exempting him from the Act. The case was remanded to the Board for its further findings of fact to support its conclusions.

While the Board was contemplating this reversal, the Federal Aviation Act of 1958 was passed. The new Act made no change in the significant provisions of the 1938 Act²⁹ and was in no way determinative of what was to occur in the later final decision by the Board.³⁰ The Board's 1959 Order E-13436³¹ dealt primarily with the form in which the final authorization should be granted to the supplemental air carriers. Confining its decision to domestic service only, the Board reconfirmed the unlimited

²³ See *supra* note 20.

²⁴ CAB Order No. E-9221 (May 20, 1955), 20 C.A.B. 782.

²⁵ See *supra* note 20.

²⁶ Civil Aeronautics Act of 1938 § 416(b), 52 Stat. 1004, provides that the Board may exempt from the provisions of Title IV:

any air carrier or class of air carriers, 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 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 added.)

²⁷ *American Airlines, Inc. v. CAB*, 235 F.2d 845 (D.C. Cir. 1956).

²⁸ 22 C.A.B. 838, 854 (1955).

²⁹ Section 416(b) of the Federal Aviation Act of 1958 is substantially the same as § 416(b) of the Civil Aeronautics Act of 1938.

³⁰ CAB Order No. E-13436, 28 C.A.B. 224 (1959).

³¹ 28 C.A.B. 224 (1959).

charter provision and the ten trip individual sale provision.³² However, the Board this time approached the problem as one of limited certification rather than of exemption. In all likelihood this was prompted by the difficulty encountered in the 1955 decision and the problem of finding facts to support the undue burden requirement in the case of a supplemental air carrier.³³ The Board based its decision upon the broad congressional intent demonstrated by the enactment of the Federal Aviation Act of 1958. This intent seemed to be that the development of the air transportation industry should be based primarily upon a process of certification. Hence, as the supplemental carriers had proved to be an important segment of the industry, they should be given the dignity, protection and authorization of certification to insure proper development, rather than be left to the hazards of piecemeal exemption.

Even though congressional intent probably was to foster development of the air transportation industry through the use of certification, it hardly seems reasonable to impute this intent to Congress with respect to the supplemental air carriers in view of the fact that these carriers were not in existence when the appropriate sections of the Civil Aeronautics Act of 1938 were passed. Since the Federal Aviation Act of 1958 was silent concerning supplemental carriers it shed no new light on the decision.³⁴ The new basis for the decision by no means settled the problem. The intervenors contended that the Board had no power to restrict the certificate³⁵ and that it had failed to designate the terminal base points of operation.³⁶ On appeal the court again found the intervenors contentions to be correct and stated that the authorization in the certificate granted the supplemental air carriers violated section 401(e) of the 1958 Act.³⁷ The failure to designate the terminal base points in the certificate was also held to be a violation of the same section. The court remarked

³² 22 C.A.B. at 854.

³³ The probability that the requirement of certification would be an undue burden on the small or fixed base operator was the primary reason for the inclusion of § 416(b). It provides for exception from any or all of the economic regulations of Title IV. However, as the self sufficiency of the large irregular carriers became established, the concept that conformity to the provisions of the Act would be an undue burden narrowed considerably. Compliance with some of these requirements was ordered in 1947 (12 Fed. Reg. 3076 (1947)). These carriers were ordered to comply with, among others, the tariff filing provisions, the anti-discrimination laws and the rules concerning disclosure of stock ownership. In 1949 the regulations were amended (14 Fed. Reg. 1879, 1883 (1949)) to require compliance with all provisions of the Act except certification, the duty to provide adequate service as per certificate and through service upon reasonable request; and the requirement of filing detailed schedules with the Postmaster General to facilitate mail carriage distribution. This was the status of the carriers involved prior to their re-classification as supplemental carriers by the 1955 Board decision. It is, as the court stated, difficult to conceive that not exempting this class of carriers from the certification requirement would, in the absence of clear facts, work an undue burden on them.

³⁴ It was clearly announced that the re-enactment did not constitute legislative adoption of administrative interpretations or judicial decisions, and that the re-enactment was to be considered a neutral factor in future questions of interpretation. 1958 U.S. Code Cong. & Ad. News 3741, 3750.

³⁵ The essential wording of § 401(e) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(e)) states: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change *schedules*, equipment, and facilities for performing the authorized transportation and service as the development of the business and demands of the public shall require." (Emphasis added.)

³⁶ Section 401(e) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(e)) also provides: "Each certificate issued under this provision *shall specify the terminal and the intermediate points*, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered;" (Emphasis added.)

³⁷ *United Airlines, Inc. v. CAB*, 278 F.2d 446, (D.C. Cir. 1960).

that the position of the Board was unfortunate, but that the remedy lay with new legislation, not with an erroneous interpretation of the statute. The United States Supreme Court granted certiorari,³⁸ vacated the judgment and remanded with the instruction to retain jurisdiction until such time as Public Law 86-661³⁹ expired or new legislation was enacted.

As a result of these two court decisions the supplemental air carrier concept as envisioned by the Board was wiped out. However, Public Law 86-661 was enacted after the two decisions above to preserve the status quo by granting temporary authority for the Board's then existing Orders⁴⁰ growing out of the *Large Irregular Air Carrier Investigation*. This Act provided the necessary time allowance in which Congress could enact the present law.

The Board's orders were considered a substantial victory for the supplemental carriers. The permission to compete with regular certificated route carriers, the requirement for irregularity being removed and the ability to advertise a limited schedule provided the supplemental carriers with a rather large degree of freedom of operation. However, the Board retained the power to reduce the number of allowable scheduled flights per calendar month should it become necessary in order to protect the route carrier from undue damaging competition. The rule that there could be no pooling of services and mergers of operations was already in existence. With these two provisions of control the Board felt there was sufficient protection for the route carriers.

The underlying policy of the Board's decisions reflected the view that there was a definite need for supplemental service during peak periods of travel between certain points, and as the regular route carriers could not fill this need during those periods⁴¹ it was in the public interest to provide the best service possible. The Board felt that through its Orders this necessary service could be performed with a minimum of damage to the regular route carriers. As evidenced by the court decisions previously discussed, the chief problem the Board encountered was in trying to institute this concept under a statute which was not designed to cope with such a situation. It became obvious after the last decision reversing the Board's Orders that specific legislation was necessary if the supplemental carrier was to survive. There is no doubt that a supplemental service is necessary and that it can, under proper circumstances and regulations, be beneficial to the public without damaging the regular route carriers. Public Law 87-528 is an attempt to insure the public proper service without causing undue competition among the supplemental carriers and the regular route carriers. In considering the various sections of the new law only the more important sections will be discussed in detail. The remaining sections will be touched upon briefly.

The new law would appear to have been well devised to meet the

³⁸ American Airways, Inc. v. United Airlines, Inc. 364 U.S. 297 (1960).

³⁹ Supplemental Air Transportation, Public Law 86-661, 74 Stat. 527 (July 14, 1960) (Expired March 14, 1962).

⁴⁰ See *supra* note 14.

⁴¹ It was recognized by the Board's investigation that if a route carrier were required to purchase additional aircraft or equipment, hire more pilots and personnel to handle certain peak periods, this equipment would sit idle during a large portion of the time. Such a procedure would not only be wasteful but detrimental to the public good, as the additional operating expense involved would eventually come out of the public's pocket through higher subsidy requirements or increased fares.

situation which arose from the difficulty encountered by the Board's decisions. The more important provisions of the Act overcome the objections raised by the two court decisions and also provide for a realistic approach to the problem of balancing the conflicting interests of the regular route carriers, the supplemental carriers and the public. We now turn to an analysis of the pertinent sections of the new law.

Section 1 of Public Law 87-528 amends section 101 of the Federal Aviation Act of 1958⁴² by providing definitions of "Supplemental air carrier"⁴³ and "Supplemental air transportation."⁴⁴ It should be noticed that the definition of supplemental air transportation includes the phrase "charter trips." Thus it would seem that the basic concept of supplemental air transportation has become one of a carrier operating under a limited certificate and restricted to charter operations (subject to an exception found in a subsequent section to be discussed later). This provision conflicts with the Board's previous concept of the supplemental carrier as one operating on an unlimited charter basis with a form of limited scheduling ability.

Section 2 amends section 401(d) of the 1958 Act⁴⁵ by providing that carriers classified as supplemental may be certified when the Board finds that the applicant is fit, willing and able to perform the service and abide by the appropriate rules and regulations. The amended section⁴⁶ also expressly provides that the Board shall have the power to insert limitations in the certificate to insure that the service rendered will be limited to supplemental air transportation as defined in the Act. This provision is a direct adoption of the Board's concept of limited certification announced in its 1959 decision.⁴⁷

Section 3 provides for amendment to section 401(e) of the Federal Aviation Act of 1958.⁴⁸ It is this new paragraph which expressly provides that the Board need not specify, except as it deems practical, the terminal points in the supplemental carrier's certificate. However the geographical area in which service is to be rendered must be designated.⁴⁹ This section therefore avoids the courts decision on this point.⁵⁰ The original provision is retained as to regular certified route carriers.⁵¹

Section 6 of the new law changes Title IV of the 1958 Act⁵² by adding a new section. This section provides that, on an individual basis and after investigation, the Board may authorize limited scheduled flights between certain designated points by a supplemental carrier. This provision incorporates to a certain extent the Board's previous holding that under certain circumstances scheduled flights by supplemental carriers

⁴² 49 U.S.C. § 1301 (1958).

⁴³ See *supra* note 4.

⁴⁴ See *supra* note 5.

⁴⁵ 49 U.S.C. § 1371(d) (1958).

⁴⁶ See *supra* note 6.

⁴⁷ Large Irregular Air Carrier Investigation, CAB Order No. E-13436 (Jan. 28, 1959), 28 C.A.B. 224.

⁴⁸ 49 U.S.C. § 1371(e) (1958).

⁴⁹ "(3) A certificate issued under this section to engage in supplemental air transportation shall designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the geographic area or areas within or between which service may be rendered."

⁵⁰ See *supra* note 37.

⁵¹ See *supra* note 7.

⁵² 49 U.S.C. § 1371-1386 (1958).

should be authorized.⁵³ It will be noted that the provision is not nearly so broad as the Board's earlier action in permitting scheduled flights by any supplemental carrier anywhere in the United States. This amendment seems superior to the rulings made by the Board, since under the latter any number of supplemental carriers were free to compete between any two points at the same time if they desired with the resultant probable loss of revenue to the regular route carrier. Under Section 6 the capacity for air transportation by the holder of the certificate of public convenience between two points must be insufficient to meet the demand now or at some future time,⁵⁴ and only then will one or more supplemental carriers be allowed to provide the service required.⁵⁵ This provision should protect not only the route carrier but also the supplemental carrier awarded the run in that they will not be subjected to possible unlimited competition from other supplemental carriers.

Section 9 gives the Board the power to permit the supplemental carriers to make an orderly transition to an all charter operation. The Board may allow a two year period during which any existing authorization for individually ticketed and individually way-billed services may be continued subject to the following limitation. The annual gross revenue of such holder from services provided under this section shall not exceed during each year of the two year period the average annual gross revenue from individually ticketed and individually way-billed services earned during the period from January 1, 1959 through December 31, 1961.⁵⁶

The remaining sections of the new law have been mentioned briefly at the beginning of this note;⁵⁷ the more important provisions have been given a more detailed treatment; and an attempt has been made to compare the status of the supplemental carrier under the Board's decisions to the status of the supplemental carrier under the new law.

In summary and conclusion, the Board's decisions provided the supplemental air carriers with large freedom of operation; they enjoyed unlimited charter capabilities; they were free to move about the United States and compete with the route carriers, at least to the extent of ten

⁵³ New Section 417, Federal Aviation Act of 1958, (49 U.S.C. § 1371-1386 (1958)) reads: "(a) If the Board finds upon an investigation conducted on its own initiative or upon request of an air carrier—

(1) that the capacity for air transportation being offered by the holder of a certificate of public convenience and necessity between particular points in the United States is, or will be, temporarily insufficient to meet the requirements of the public or the postal service; or

(2) that there is a temporary requirement for air transportation between two points, one or both of which is not regularly served by any air carrier; and

(3) that any supplemental air carrier can provide the additional service temporarily required in the public interest; the Board may issue to such supplemental air carrier a special operating authorization to engage in air transportation between such points.

(b) A special operating authorization issued under this section—

(1) shall contain such limitations or requirements as to frequency of service, size or type of equipment, or otherwise, as will assure that the service so authorized will alleviate the insufficiency which otherwise would exist, without significant diversion of traffic from the holders of certificates for the route;

(2) shall be valid for not more than thirty days and may be extended for additional periods aggregating not more than sixty days; and

(3) shall not be deemed a license within the meaning of section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)).

⁵⁴ New Section 417(a)(1) of the Federal Aviation Act of 1958, see *supra* note 53.

⁵⁵ New Section 417(a)(3) of the Federal Aviation Act of 1958, see *supra* note 53.

⁵⁶ 76 Stat. 148, § 9.

⁵⁷ See *supra* notes 3 through 12 and accompanying text.

flights per month between any two points; they were free to advertise this limited scheduled service; the only check on the limited scheduled operations was the Board's ability to reduce the number of authorized trips on a blanket basis.

There can be no doubt that the Board's decisions did much to strengthen the supplemental carriers' position, but did little to protect the route carrier from destructive competition. The new law has remedied this inequity somewhat as previously discussed. Public Law 87-528 was definitely needed, not only to save the life of the supplemental carriers, but more importantly to provide specific legislation to deal with a type of carrier which was neither in existence nor contemplated, when the Civil Aeronautics Act of 1938 was passed. It was the Board's attempt to deal with a situation not contemplated which caused all the expense and loss of time. This time and money could have been saved by providing legislation when it became reasonably apparent that the problem was developing and would, in all likelihood, become worse as time passed.

The type of supplemental air service envisioned by Congress in the new law is considerably more conservative than the type developed by the Board. The Act now specifically provides that supplemental carriers shall be restricted to charter operations within defined geographical limits, with the right to scheduled operations only after showing a need for scheduled supplemental service in that area, or between those points. This law has taken from the supplemental carriers a large portion of the freedom of operation gained by them under the Board's decisions. However, it would seem that under the amended Act the Board now has the power, as limited by the Act itself, to provide for the increased healthy growth of the supplemental carrier and the route system, and to provide better and more efficient service for the benefit of the public without damaging the route carriers. Under this Act the supplemental carriers will be given the benefit of certification. They should also be provided with a fair assurance of revenue, since they can now be protected from the destructive competition of other supplemental carriers. In addition the new law will assure that the nature and operation of the supplemental carriers will remain supplemental, thus protecting the route carriers. Finally, all the interested parties should be relatively pleased that, after some twelve years from the beginning of the *Large Irregular Air Carrier Investigation*, the Act has made final disposition of the Board's Orders and court decisions growing out of that investigation. Public Law 57-528 seems well suited to the problem, and if properly administered, should provide the necessary additional services required by the public and at the same time should strike a happy balance between the interests of the route carriers and the supplemental carriers.

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