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FEDERAL AVIATION LEGISLATION

A REVIEW OF SOME OF THE BASIC CONCEPTS UNDERLYING EXISTING AND PROSPECTIVE LEGISLATION*

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MY purpose in this discussion is to try to furnish some guidance towards an understanding of the basic principles and concepts of federal aviation legislation as it exists today, and to give some indication of the more important of the changes which have been proposed therein. The very breadth of this subject of necessity dictates a fairly generalized discussion, rather than a detailed analysis, of the legal problems which arise under our federal aviation legislative pattern.

This discussion will be devoted entirely to substantive problems arising under federal aviation legislation. In performing its functions in relation to the federal aviation program, the Civil Aeronautics Board also has its full share of procedural problems. These are, however, in almost no significant respect peculiar to aviation law, but rather are essentially the same as those which confront all administrative agencies in the exercise of adjudicatory and rule-making functions under their respective statutes, and under the Administrative Procedure Act. Consequently, the procedural aspects of federal aviation legislation will not be covered in this discussion.

At the outset it may be useful to identify two terms to be used frequently. Throughout this discussion, the Civil Aeronautics Act of 1938 which has, since its enactment in June 1938, been the basic charter of federal regulation of aviation, will be referred to simply as the "Act." This legislation has now been on the statute books for nearly nine years without important amendment of its substantive provisions by Congress, and with very few minor modifications.

The word "Board" will refer to the Civil Aeronautics Board, the five-member commission which is responsible under the Act for the economic regulation of air transportation, and for the adjudicatory,

* This paper was originally prepared for and presented at the Aviation Law Institute of the American Bar Association held in April, 1947 at Milwaukee, Wisconsin.

rule-making, and accident investigation aspects of air safety regulation.¹

EXTENT OF JURISDICTION OVER CIVIL AVIATION
ASSERTED BY FEDERAL LEGISLATION

The initial question which doubtless will be of interest is the extent to which jurisdiction over aviation has been asserted by the applicable federal legislation. Consideration of this matter necessarily divides itself between two aspects of federal regulation — safety and economic, as to which the degree of federal jurisdiction asserted differs quite markedly.

Safety Regulations

In the field of safety regulation, jurisdiction is asserted over air commerce which by definition includes all of the following: (1) all transportation of United States mail by air; (2) the carriage of persons or property by aircraft for hire, or the navigation of aircraft in the conduct or furtherance of a business, in interstate or foreign commerce, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation; (3) any operation or navigation of aircraft within a civil airway; or (4) any operation or navigation of aircraft which directly affects, or may endanger safety in, interstate, overseas or foreign air commerce.²

It is self-evident that federal jurisdiction asserted by the Act over air safety is very extensive. Any flight into or across a civil airway (a path through the navigable airspace of the United States established by the Administrator of Civil Aeronautics),³ or which directly affects interstate or foreign commerce, or which may endanger safety in such commerce, is subject to federal regulation. This is the case even though the flight is wholly intrastate, and even though it only potentially endangers safety in interstate or foreign commerce.

In 1941 the Board, on the basis of findings as to the increase of commercial operations and of aeronautical activity of the armed forces, concluded that "the operations of uncertificated airmen anywhere in the navigable airspace overlying the United States constitute a hazard to interstate, overseas, and foreign commerce," and that "to protect interstate, overseas, and foreign commerce, it is necessary that all pilots and aircraft operating in the air space overlying the United States be certified."⁴ Accordingly, it adopted regulations requiring all airmen

¹ Reorganization Plans Nos. III and IV which became effective June 30, 1940, reallocated certain duties and functions under the Civil Aeronautics Act of 1938 as between the Civil Aeronautics Authority and the Administrator of Civil Aeronautics, renamed the former the Civil Aeronautics Board, and placed them both in the Department of Commerce, although the Board in performing its functions remained entirely independent of and in no way subject to the control of the Secretary of Commerce. Unfortunately, the Civil Aeronautics Act itself has never been revised to reflect these changes with the result that there has been considerable confusion among those not intimately familiar with the workings of the civil aeronautics agencies of the government.

² Section 1(3), (20); 49 USCA 401(3), (20).

³ Section 1(16); 49 USCA 401 (16).

⁴ Regulations Serial No. 193, Title: Pilot and Aircraft Certificates Required, Amendment No. 135 to C.A.R., dated October 10, 1941.

and all aircraft flying within the United States to have certificates. These regulations were held to be within the power of the Board when contested by a pilot who had engaged only in intrastate flights not involving a civil airways, despite the fact there was no showing that such flights actually affected or endangered any plane in air commerce.⁵

It appears probable that the Board can issue any safety regulations which it, acting in its expert capacity, reasonably finds to be necessary to govern aircraft or airmen which otherwise would or might directly affect or endanger safety in interstate or foreign air commerce. Presumably any such findings by the Board will stand unless there is good evidence that the Board has acted in an arbitrary or capricious manner in making them. Nor would the courts seem likely to substitute their judgment for that of the Board, particularly in a matter affecting safety in a field as technical as aviation.

Economic Regulations

Turning to economic regulation, the federal jurisdiction asserted by the Act is not as extensive as in the case of safety in two important respects — it extends only to common carriage by air, and only to those actually engaging in interstate, overseas or foreign commerce. It does not in terms extend to any one who by his activities only affects or places a burden upon interstate or foreign commerce in the air.

This more limited authority in the economic field results from the fact that Congress provided for economic jurisdiction only over "air transportation" which, as defined in the Act, means (1) the transportation of United States mail, or (2) the carriage of persons or property as a *common carrier* for compensation in interstate, overseas, or foreign commerce, whether such commerce moves wholly by aircraft, or partly by aircraft and partly by other forms of transportation.⁶

These existing differences between safety and economic regulation are primarily a matter of policy and not of constitutional limitation. The power of Congress to regulate economic matters is in principle just as extensive as that over safety. Undoubtedly the Act could have provided for federal regulation of contract as well as common carriers, and of economic practices and activities which directly affected, or would constitute an undue burden upon interstate, overseas, or foreign air transportation.

There are two important problems which the definition of air transportation poses to the Board. One is the difficult determination in specific cases as to what is a common carrier and what is a contract carrier. Most lawyers are familiar with the complex factual issues frequently involved in making such a determination. Neither the Act, which contains no definition of common carriage, nor general practice, provide any definitive standard which can be laid along side a given air service to tell whether it is contract or common carriage. The same

⁵ *U.S. v. Drumm*, 55 F. Supp. 151 (D.C. Nev. 1944), see also *Rosenhan v. U.S.*, 131 F. (2d) 932, 935 (C.C.A. 10th, 1942).

⁶ Section 1(10), (21); 49 USCA 401 (10), (21).

general principles and standards appear applicable to air carriers as in the case of water carriers, motor carriers or other surface carriers.⁷ Once the factual determination is made, the legal consequences are clear. The common carrier by air must comply with the fairly comprehensive economic requirements of the Act and the contract carrier by air is wholly free from federal economic regulation.

The second difficult problem is related to the legal status of a common carrier by air operating only between points within a single state. It is entirely improbable that any such operation will not, from time to time, carry persons or property moving in interstate commerce, only a part of the journey being on the intrastate carrier by air. Clearly such an operator is carrying traffic moving in interstate air transportation as defined in the Act. But the economic requirements of the Act apply only to one who "undertakes . . . to engage in air transportation."⁸ Purely incidental and occasional carriage of an interstate passenger by an intrastate operator should not be regarded as undertaking to engage in air transportation. On the other hand, where any deliberate arrangements for the handling of through traffic which may be of interstate character have been made—the issuance of through tickets, interline reservations, or the like—the carrier has undertaken to engage in air transportation and is subject to the requirements of the Act. In between these two situations, there doubtless are many marginal situations as, for example, where an intrastate carrier arrives and departs from the same airport as a scheduled interstate air carrier, and does in fact connect with and carry a number of passengers arriving or departing on the interstate carrier, but without establishing any through ticketing arrangements. Whether, or under exactly what circumstances, this will be held to be undertaking to engage in air transportation has not been formally before the Board or the courts. Despite the difficulties posed factually, however, it is clear as matter of law that an air service operating wholly within one state may under specific circumstances be subject to federal economic regulation.

Proposed Legislation

As might be expected, a good deal of attention has been given to the problem of federal as against state regulation of civil aviation. In 1943, the House Committee on Interstate and Foreign Commerce reported out a bill which extended federal jurisdiction over civil aviation in several important respects.⁹ Safety jurisdiction was extended to air navigation, which was defined to mean the operation or navigation of aircraft upon any airport in the United States or in the air

⁷ A comprehensive discussion of this problem is contained in Neal, *The Status of Non-Scheduled Operations Under the Civil Aeronautics Act of 1938* (1946), 11 *Law & Contemporary Problems* 508.

⁸ Section 1(2); 49 USCA 401 (2).

⁹ Report No. 784 to accompany H.R. 3420, dated October 20, 1943, Committee on Interstate and Foreign Commerce, House of Representatives, 78th Congress, 1st Session.

space over the United States.¹⁰ Economic jurisdiction was extended by redefining air transportation to include carriage by air as a common carrier between any two places within the United States, or a place within and a place outside thereof.¹¹ The Committee stated that the inherent nature of aviation required federal regulation of all air navigation and air commerce, and made findings to support the complete jurisdiction asserted.¹² Provision was also made for the regulation of air contractors, which were defined to include all who carried persons or property by air for hire otherwise than as a common carrier.¹³ This bill, which was in its later stages stoutly opposed by many state interests, never reached the floor of the House.

In the present Session of Congress,¹⁴ S.1 and H.R. 2337 similarly provide for the extension of federal regulation of safety to air navigation, and S.1 for federal regulation of air contractors. But no effort is made to extend economic regulation to all commercial movement by air, although in both bills interstate air transportation is defined to include carriage "in interstate commerce between places in the same state." This latter apparently is designed to make clear the intention to regulate operations within a single state if carrying interstate commerce. S.1 also makes reference to the vexing problem of the extent of exclusive federal jurisdiction by provision that "all rights respecting control of air navigation not herein specifically granted to Federal Government or an agency thereof are reserved to the several states."

Neither of these bills has as yet been accorded a hearing by the Congressional Committees to which referred. The jurisdictional provisions seem certain to evoke considerable difference of opinion whenever that is done.

ADMINISTRATION OF ECONOMIC REGULATION OF AIR TRANSPORTATION BY CAB

Having reviewed the extent of federal jurisdiction, it will be of interest to examine in what manner it has been exercised. Such examination here will of necessity have to be limited to a few major aspects of economic regulation which it is hoped will provide a framework of reference for any further study that may be given to the problems of economic regulation under the Act.

Authorization to Engage in Air Transportation

Section 401 of the Act makes it unlawful to engage in air transportation, that is, as a common carrier by air in interstate or foreign commerce unless possessed of a certificate of public convenience and necessity issued by the Board. The Board is directed to issue a cer-

¹⁰ Sections 2(e) and 9, H.R. 3420, 78th Congress, 1st Session.

¹¹ Sections 2(g) (i) and (k), H.R. 3420, 78th Congress, 1st Session.

¹² Report No. 784 to accompany H.R. 3420, *supra* footnote 9, at page 8.

¹³ Sections 2(b) (c) (i) and (k) and 7, H.R. 3420, 78th Congress, 1st Session.

¹⁴ 80th Congress, 1st Session.

tificate if it finds that the applicant is fit, willing, and able to perform the transportation properly, and that such transportation is required by the public convenience and necessity.¹⁵

With respect to the determination of fitness, willingness, and ability, the Board has laid down relatively simple tests, namely, whether the applicant has demonstrated (1) a proper organizational basis for the conduct of air transportation; (2) a plan for the conduct of the service by competent personnel; and (3) adequate financial resources to finance the operation. The Board looks, therefore, to the general ability and responsibility of the applicant to provide the authorized service.

With respect to the determination of public convenience and necessity a more complex question is presented. Undoubtedly, it is one of most elastic yardsticks in use in public regulation. Only a detailed analysis of the Board's actions in certificating carriers, and it has decided proceedings disposing of several hundred applications, would furnish any guide to the content of the phrase "public convenience and necessity" as applied by the Board, and even then it may be doubted whether any clear outline would emerge. In any event such a detailed analysis is not feasible in this present discussion.¹⁶

It may be noted, however, that the Board has emphasized that there are certain provisions in the Act which furnish general guidance in determining public convenience and necessity under the Act. Foremost among these is the declaration of policy contained in Section 2 wherein the Board is expressly directed to consider certain general standards in determining public convenience and necessity.¹⁷ Second are the provisions of the Act relative to government support of the development and maintenance of a sound air transportation system,¹⁸ and the resulting financial responsibility entailed in granting a certificate. Accordingly, among other considerations, the probable cost of a proposed operation to the government in mail compensation, both for the newly certificated air carrier and for any existing air carrier adversely affected by the new certification, has been a consideration to which the Board has given attention. This attention to cost to the government is noted here because it is a factor not usually present in the determination of public convenience and necessity in other fields.

One other factor which has been important in the Board's approach to problems of certification of new service and, indeed, an influential factor in the Board's thinking in relation to a great multitude of problems under the Act, has been a firm belief in the value of competition. The Board has repeatedly emphasized the importance which it attaches to the existence of a reasonable amount of competition to

¹⁵ Section 401; 49 USCA 481.

¹⁶ For a discussion, see Note, "Factors Considered by the Civil Aeronautics Board in Certifying Air Carriers," 1946, *Geo. Wash. L. Rev.* 611.

¹⁷ Section 2; 49 USCA 402.

¹⁸ Section 406(b); 49 USCA 486(b).

provide the necessary stimuli to more economical and efficient operation, and to the development of new methods and techniques. The Board has recognized that under our system of private enterprise the needed incentives can only be provided by, and the results achieved measured through, the medium of competition and the comparative values which it provides. The function of regulation is not to provide a substitute for the incentives of competition, but to take full advantage of them by preserving, to the fullest extent consistent with needed economic stability, a climate in which the forces of competition will have an opportunity to operate.

The Board's reference to the factor of competition in the determination of public convenience and necessity finds statutory sanction in Section 2 (d) of the Act wherein the policy is declared that the Board shall consider as in the public interest "competition to the extent necessary to assure the sound development of an air transportation system."¹⁹

The results of the application of the standard of public convenience and necessity are, of course, manifested in the certification of air services. In the domestic trunkline field there has been an increase in the certificated route miles from 38,911 miles in 1938 to 83,354 miles as of the present time. This expansion has been accomplished entirely by extending or adding to the routes of existing carriers, in many cases by the establishment of competition between points already provided with air service. No new carrier has been certificated to operate in the domestic trunkline field, the Board having regarded the existing 18 carriers as ample to provide all of the competition which was to be desired in that field. Additional carriers were deemed to constitute a threat to the economic stability of the existing carriers, and thus to create the prospect of increased requirements for government support without offsetting advantages.

However, the pending Air Freight proceeding will again present to the Board, under circumstances requiring careful consideration, the question whether additional carriers should not be certificated in the domestic trunkline field.²⁰ There have been consolidated in this proceeding about 15 applications of new carriers for certificates authorizing air cargo service only. Any such services authorized would be in addition to the operations of the presently certificated operators who are authorized to carry both passengers and property, and who, at least partly in response to the stimulus of extensive contract operations by some of the air cargo applicants, have increasingly been endeavoring to develop their air freight business. Without in any way predict-

¹⁹ 49 USCA 402 (d).

²⁰ On May 5, 1947, the Board promulgated Section 292.5 of its Economic Regulations by which effective June 10, 1947, it granted an exemption to certain existing carriers to permit them to engage in the transportation of cargo only, such exemption to last for each such carrier until any application for a certificate of public convenience and necessity by it shall have been disposed of. Regulations Serial No. 389, 12 Fed. Reg. 3079.

ing the result of this proceeding, I think it fair to state that one consideration, among a great many others, which will certainly receive attention is the contention that the competition of carriers whose prime interest is the development of air cargo may be a needed prod to the fullest exploration and development of the potentialities of that field. On the other hand, although no mail pay is requested by the air cargo applicants, there will be the question whether their efforts will deprive the existing carriers of a needed source of revenues and thus increase the mail needs of the carriers already certificated.

A second class of certificated operations is the so-called feeder or local services. The Board has within the last year and a half certificated some 10 companies to operate 11,529 route miles of local services in various areas throughout the country. All of these certificates are for three years only. In addition, 5 other applicants have been authorized to get certificates for 7,926 route miles upon showing that airports are available. None of the feeder carriers thus certificated has previously held any certificate from the Board. The Board was of the opinion that the development of the local and feeder services should be entrusted to independent interests which would devote their full energy and attention to the exploration of this new and admittedly experimental field. Accordingly, applications by trunkline carriers to operate feeder services have been denied. However, no direct competition among the feeder lines has been provided for. In each case the feeder line has been given the only such certificate in the area in which it is authorized to operate. Competition will exist only in the matter of costs. The results achieved by each such carrier will undoubtedly be compared with those of all other feeder lines in determining mail pay, and probably in passing upon renewal of the present temporary certificates.

One additional aspect of feeder line certificates may be noted. All of the feeder line certificates are limited to a temporary period of three years and their purpose is expressly stated to be experimental. The effort is to ascertain the possibilities of this type of service through actual operations. The issuance of such a temporary certificate having been upheld in court,²¹ it would appear that the Board can under the test of public convenience and necessity find that an operation should be established, not only where there has been demonstrated on the record a probable need for such service by the public, but where the public interest in the development of our air transportation system makes it desirable to have a practical test as to whether a public need for such type of service exists and whether it can be economically furnished.

With regard to the field of overseas and foreign operations, the Board has by its decisions increased the certificated route miles from

²¹ *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 App. D.C. 341, 147 F.(2nd) 152 (1945).

31,067 miles in 1938 to 175,368 miles at the present time. Apart from purely local trans-border operations between the United States and adjacent countries, the number of United States air carriers certificated to operate in international and overseas operations has increased from two to eleven. Of these only one was a newly organized carrier, and in that case the Board has approved acquisition of control thereof by an existing domestic carrier. In all of the other cases the operator was new to the field of foreign operations, but had previously been established in domestic operations.

The certification of competitive services in the international field has set the stage for one of the most significant legislative proposals now pending before Congress. This is the effort to replace the existing legislative policy regarding competition in so far as the international field is concerned by a monopoly of all United States operations in international air transport vested in a consolidated United States international air carrier. Under this proposal a single privately owned company would be entrusted with the authority to operate all United States air services in international transportation throughout the world. In general, the proposed result would be achieved by merging into one company all existing U.S. international air services and transferring to such company all properties now used therein. The consolidation would be accomplished pursuant to a plan to be advanced by one or more air carriers and approved by the Board. Typically, 25% of the stock of the new company would be issued to the domestic airlines, 20% to the steamship companies and 10% to railroads. As to the remaining 45% of the stock, there would be no provisions governing ownership, other than that no single person or company could own more than 3% of the total outstanding stock. Elaborate provisions for government regulation of this company are made. There are also provisions for several forms of government support of its operations.

The Board is opposed to the basic policy enunciated in all of these bills, that is, the elimination of all competition among United States operators in international air transportation and the entrusting of operation of our entire worldwide air transport system to a single chosen instrument, and believes that the policy of regulated competition as it exists today should be retained. This is also the view of the Air Coordinating Committee, which in addition to the Board includes in its membership the Departments of State, Commerce, War, Navy and the Post Office.

It seems appropriate to mention briefly the status of non-scheduled common carriers by air in interstate or foreign commerce. These are clearly subject to federal regulation under the Act. However, in Section 416(b) of the Act the Board is given the power to exempt from economic regulation any class of air carriers if it finds that the enforcement of the requirements of the Act with respect thereto would

be an undue burden by reason of the limited extent of, or unusual circumstances affecting, the operations of such carriers.

Under this section the Board has by regulation exempted from the economic requirements of the Act all air carriers which are engaged in non-scheduled operations, that is, irregular and infrequent operations. So for the present such carriers are not subjected to federal regulation.²²

Compensation for the Transportation of Mail

Another basic tenet of federal aviation legislation is the encouragement and development of a sound air transportation system properly adapted to the needs of commerce, the postal service, and the national defense. Although this finds many reflections in the provisions of the Act, certainly the most important is the provision in Section 406 for government support of the development of such a system through mail compensation. This is important because the financial responsibility of the federal government which flows from the granting of a certificate has been a very influential factor in the resolution of many issues presented to the Board.

The standard provided in Section 406 (b) of the Act for the determination of mail rates is "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation."²³

The great majority of the problems which are presented to the Board in administration of this section are those which confront any administrative agency which has the task of fixing just compensation for a service rendered or for regulating rates to be charged. There are, however, two points worth noting because they illustrate to some degree the difference between a provision for compensation and one for government support. One is the emphasis in Section 406 (b) on the air carrier as the unit of measurement. It is the need of the carrier, and not any particular route or operation, which is to be considered. This has found expression in two very different situations in the Board's history. In one case the Board included in the compensation to be paid an air carrier on one route the need (deficit before mail pay) arising out of operations conducted without mail on a second route which the Board had certificated, but upon which the Post Office Department had refused to place mail until the Congress had made an appropriation covering such route.²⁴ The rate when fixed was paid by the Post Office Department.

²² On May 5, 1947, the Board promulgated effective June 10, 1947, a revision of Section 292.1 of its Economic Regulations applicable to Irregular Air Carriers: Regulations Serial No. 388, 12 Fed. Reg. 3076.

²³ 49 USCA 486 (b).

²⁴ *Chicago and Southern Air Lines, Inc., — Mail Rates for Routes Nos. 8 and 53*, 3 CAB 161 (1941).

In the other case the Board held that it could consider excess profits earned in one division of an air carrier in determining need in a proceeding to fix the mail rate of a wholly separate division.²⁵

Thus, under Section 406 there has been given the Board the great responsibility of fixing rates of mail compensation for the certificated air carriers containing sufficient government aid where required to insure the development of air transportation to the extent required in the national interest. Air carriers are entitled to mail rates which are calculated to enable them to earn a reasonable over-all profit if they are honestly, economically and efficiently operated.

An aspect of the Board's administration of Section 406 (b) which merits brief note is emphasis on statutory standard of "honest, economical and efficient management." Intelligent use of this standard appears to be essential to the administration of the "need" provision, if the natural tendency of such a provision to encourage laxity in cost control is not to prevail. The Board has long recognized its responsibility to seek every means of assuring an economical level of costs, and on the basis that they did not meet the requirements of this standard, either as to amount or as to character, the Board has on a number of occasions refused to take certain expenses into account in determining the need of a carrier. Here again, perhaps, the fact that the Board was dealing with a matter of aid as well as compensation may have permitted it a wider range of discretion. In any event, to date court review of any such action by the Board has not been invoked.

Administration of such a standard to measure allowable expenses is always very difficult. No generally accepted yardsticks by which the efficiency and economy of a particular operation can be objectively measured have been evolved, and in their absence any judgment as to the reasonableness of certain costs is almost certain to prove highly controversial. No two carriers are entirely alike and there is always a plausible reason which can be advanced in explanation of higher comparative costs. There are, however, two related steps in the administration of this standard, of efficiency and economy, the importance of which has been generally recognized, but which should, in my opinion, be given even further practical application. Recent rate opinions of the Board appear to evidence a trend in this direction. One is the classification of air carriers for rate-making purposes,²⁶ and the other is the development of standards for measuring comparative economy and efficiency. The practical difficulties of the foregoing steps are obvious. They require the development of comparative data and statistics which will be recognized and accepted as reliable standards of measurement. You are doubtless familiar with the many arguments which can be marshalled against the validity of any such comparative material as evidence in a proceeding. Nevertheless, it is

²⁵ *Pan American Airways, Inc., Alaska Mail Rates*, 6 CAB 61 (1944).

²⁶ The Civil Aeronautics Act expressly authorizes such classification: Section 406; 49 USCA 489.

up to the economists, the analysts, and the engineers to provide the Board with the best possible bases for a comparative approach to classification of the air carriers for the purpose of establishing class rates. Only in this way can the necessary incentives for economy and efficiency, and adequate rewards for the achievement thereof, be provided. There will remain a few small carriers, and certainly the entire group of feeder carriers for the time being, which will require substantial amounts of government aid and for which it may be necessary to continue the fixing of individual rates. Nevertheless, even in these cases, the comparative standards should be used to the fullest extent possible to keep their allowable costs within the reasonable range of economy and efficiency.

The Board has consistently sought by precept and by action to encourage the progress of the air carriers towards the goal of self-sufficiency—that is, the point at which no mail pay beyond that fairly compensatory for the mail services rendered and the mail facilities provided is required. During the war under the abnormal conditions prevailing, the great majority of carriers achieved that goal. But in 1946, many slid back into the position of requiring very substantial amounts of mail pay to enable them to meet their need. The Board has fixed temporary rates for several such carriers giving them greatly increased mail pay, but indicating clearly that it regards the situation as temporary.²⁷ And the Board's concern was indicated by the fact that in each such case it instituted an investigation into the carrier's situation to determine what, if any, steps could be taken to overcome the increasing dependence of such carriers upon government.²⁸ Each such carrier was required to study its situation and present a report to the Board as to what could be done and what plans it had to decrease its dependence upon government aid. These reports, if constructively done, may afford much insight into the problem of developing standards of economy and efficiency.

Acquisition of Control—Participation of Surface Carriers in Air Transportation

Section 408 of the Act prohibits, unless approved by the Board, certain consolidations, mergers, and acquisitions of control.²⁹ Without spelling out in detail all of the specific transactions which Section 408 covers, in general it prohibits without approval all mergers, consolidations or acquisitions of control involving an air carrier and one of the following: another air carrier, a person controlling an air

²⁷ E.g., *Order Fixing Temporary Mail Rate for Pennsylvania Cent. Air.*, Order E-436, Apr. 7, 1947; *Order Fixing Temporary Mail Rate for Western A. L.*, Order E-484, Apr. 29, 1947.

²⁸ E.g., *Order Instituting Investigation and Requiring Special Report—Chicago & Sou. A. L.*, Order E-401, Mar. 24, 1947—*Order Instituting Investigation and Requiring Special Report—Pennsylvania-Cent. Air. L.*, Order E-437, Apr. 7, 1947.

²⁹ 49 USCA 488.

carrier, another common carrier, or a person engaged in any phase of aeronautics.

The Board is directed to approve any such application, upon such terms and conditions as it finds to be just and reasonable and with such modifications as it prescribes, unless it finds that the transaction will not be consistent with the public interest. It is further provided that the Board shall not approve any such transaction which would result in creating a monopoly and thereby restrain competition or jeopardize another air carrier not a party to the transaction, and that if the applicant is a carrier other than an air carrier, the Board shall not approve unless it finds that the transaction proposed will promote the public interest by enabling the applicant to use aircraft to public advantage in its operation and will not restrain competition.

The second proviso of Section 408 (b) is undoubtedly the source of one of the most extensively debated legal issues involving that section and Section 401 which has come before the Board. This is the question of the extent to which the Act limits the entry of surface carriers into air transportation.

The legal situation of a surface carrier undertaking to acquire an existing certificated air carrier is clear. It must be able to show that it can use aircraft to public advantage in its surface operations. This phrase has been construed by the Board to mean auxiliary or supplemental to the surface operations.³⁰ A like proviso in Section 213 of the Motor Carrier Act has been similarly construed by the Interstate Commerce Commission.

In 1939 the Board under Section 401 granted American Export Airlines, a steamship subsidiary, a certificate to engage in foreign air transportation.³¹ The Board at the same time dismissed an application for approval under Section 408 on the ground that approval was not required. On appeal by an intervening airline, the Court held that where a subsidiary of a surface carrier obtained a certificate to enter the field of air transportation, Board approval under Section 408 of control of the subsidiary by the surface carrier was required, and remanded that portion of the case to the Board.³² This was predicated upon the view that any other action would in effect render the law ineffective. The soundness of the Court's reasoning seems open to serious question in view of the fact that the Board had ample opportunity to pass upon the public interest aspects of the relationship in determining under Section 401 whether to grant the subsidiary a certificate. But, on the remand, it was the law of the case, and applying it the Board found that the steamship company could not meet the test under Section 408 of use of aircraft to public advantage in its

³⁰ *Acquisition of TACA, S.A., by American Export Airlines*, 3 CAB 216 (1941); See, *Petition of American President Lines, Ltd., et al.*, 7 CAB—(Order E-386, Mar. 19, 1947), at page 4 *et seq.* of mimeographed opinion.

³¹ *American Export Airlines, Transatlantic Service Case*, 2 CAB 16 (1940).

³² *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.(2d) 810 (1941).

surface operations, and ordered divestment of control by the Steamship lines.³³ This was subsequently effectuated.

Thereafter in other proceedings there was presented the question as to whether a surface carrier could apply for a certificate in its own name under Section 401 without having to meet the requirement of Section 408 (b) as to use of aircraft in its surface operations. In dicta the Board stated the view that "in determining the question of public convenience and necessity raised by the application of a surface carrier under Section 401 of the Act, we are required to consider, among other factors, the policy Congress specifically expressed in the second proviso of Section 408."³⁴ In other words, as a matter of law, a steamship company would be required to meet the test of the second proviso of Section 408 in order to get a certificate in its own name under Section 401 of the Act. However, in that and other proceedings the Board denied the applications of the steamship companies on other grounds.³⁵

Very recently, pursuant to a petition by nine steamship companies, for an investigation of the problem the Board reviewed this subject once more.³⁶ On this occasion only one member adhered to the previous view that there was in effect a legal requirement that the steamship company could be granted a certificate only if it met the requirement of use of aircraft to public advantage in its surface operation. The majority of the Board held that no legal requirement existed that it meet such test, but concluded that it was the Board's duty to limit the entry of a surface carrier into air transportation to operations which would enable such surface carrier to use aircraft to public advantage in its surface transport operation unless the record in the case were to reveal that the public interest required service by a surface carrier regardless of the circumstance that it was a surface carrier. One member, in concurring, agreed that Section 408 did not constitute any legal barrier, but, unlike the majority, expressed no view on the policy generally of permitting surface carriers to engage in air transportation, which he felt should be picked out case-by-case.

This is the present legislative situation, as the applicable provisions are interpreted by the Board in its administration of the Act. The steamship interests in particular have been active in contending for an opportunity to engage in air transportation without having to meet any special test for certification and committees of Congress have evidenced considerable interest in the matter.³⁷ Legislation clarifying the

³³ *American Export Lines, Control of American Export Airlines*, 3 CAB 618 (1942), 4 CAB 104 (1943).

³⁴ *Latin American Air Service*, 6 CAB 857, 905 (1946).

³⁵ *E.g., Northeast Airlines, et al. North Atlantic Routes*, 6 CAB 319 (1945); *Hawaiian Airlines, Ltd., et al., Hawaiian Case*, 7 CAB 83 (1946).

³⁶ *Petition of American President Lines, Ltd., et al.* Note 30, *supra*.

³⁷ See Hearings Before Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session on Bills Relative to Overseas Air Transportation with respect to H.R. 939, 2851, 3079, 3134 and 3317. No committee report was issued during the 1st Session.

status of steamship companies when making applications under Section 401 of the Act may well be forthcoming. There would appear to be no objection to legislation which simply called for a determination of a surface carrier's application upon all the facts of the particular situation, including among others the fact that the surface carrier was engaged in a competing form of transportation. The potential conflict of interest, and the possibility of resulting detriment to the development of air transportation under certain circumstances, are not an inequality imposed on surface carriers by statute, but are inherent in the factual situation. It would appear to be undesirable, therefore, if any legislation were enacted which required the Board to ignore, as one factor to be considered the economic implications of the fact that the applicant was also engaged in a competing form of transportation.