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AIR ROUTES UNDER THE CIVIL AERONAUTICS ACT*

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OUR existing pattern of air routes has been the subject of frequent criticism by many groups and individuals including myself. Certainly as one views it in the broad it possesses many elements of weakness. These are, in the main, two—inherently weak routes and the integration of routes into weak systems.

It certainly was the intent of the Civil Aeronautics Act (Act) to avoid the development of such a situation. We had been through it in the case of the railroads, and the railroad situation was and still is bedevilled by this problem. The powers conferred upon the Civil Aeronautics Board (CAB) were conferred with the aim of preventing a repetition of exactly that situation, and yet it has repeated itself. There is no question about that. The profit and loss statements of the airlines speak more loudly than I can. So that it has become time to look the facts in the face and see what we can do about them.

A partial cause for this situation lay in the fact that the new governmental agency under the Act did not have a clean slate upon which to write. The existing lines were given grandfather rights and became permanently entitled to fly the routes that they had pioneered. Most of these were initiated under the supervision of the Post Office. Its planning in this respect was both good and bad, leaving the overall national situation in a piebald condition. Some weakness prevailed where local pressure ran away with wise judgment. But, as a whole, the recognition of grandfather rights was not too serious a setback to the development of an adequate air transportation system.

The real difficulties began with the Act. The first and greatest of them lies in its mail pay provisions. Few people on the outside seem to be familiar with the theory of mail pay. Yet an understanding of it is basic to practically everything in commercial aviation.

It was recognized by the Congress that some subsidy was essential for the development of air transportation. The idea of subsidy was not new; it was present from the start. But the approach of the 1938 Act was new, for as it has been interpreted, the Congress authorized the CAB to guarantee in perpetuity, according to the viewpoint of

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my former colleagues, mail pay sufficient to provide a fair return on any system that the CAB decided that it was desirable to fly in the interest of public convenience and necessity.

The largeness of that guaranty may not be apparent on its face. But when you examine it, I doubt whether you will find an equivalent power committed to any other public agency. For it in substance gives the Board a blank check to string air routes across the face of the United States as well as the world without regard to the financial burdens that this may entail, limited only by the Board's conception of public convenience and necessity.

There are, of course, a few other limiting conceptions, but very few. There is the limiting conception of honest and efficient management, namely, that Congress does not obligate itself to reimburse management for corruption and stupidity—a concept difficult to apply in practice. There is the practical limitation that too extraordinary a bill might so shock the Committee on Appropriations as to induce the Congress to renege upon the pledges that it authorized its agent, the CAB, to make. There is the limitation inherent, I believe, in the concept of public convenience and necessity, namely, that public desirability must be weighed against public cost, but this concept, innately incapable of mathematical application, seems to have little strength as witness the Board's continued authorization of Chicago & Southern's New Orleans-Havana flights and its recent authorization of the extension of those flights to Caracas. Never in history has the public been asked to pay so much for so little.

But other than these, there are no limitations. There is no budget in the light of which the cost of present operations and contemplated expenditures needs to be measured. Indeed, as regards present net revenue, the recent annual statements of most of the airlines are meaningless, for petitions for revised rates are pending and most of the airlines are operating under temporary, really tentative, rates far below what they are entitled to receive, not only for the future but for some time in the past. And if a move now being sponsored by some of the carriers for so-called retroactive rates, that is, rates higher than those under which they were operating without the slightest complaint, succeeds, operations both for the past and for the future may be put upon a cost plus basis.

There is no limitation to the effect that mail pay will be available only on those routes that the Post Office wants to have flown. Indeed, under the law the Post Office can be required to meet the costs of flying both routes and schedules that it deems utterly useless for postal needs.

There is not even the limitation that this largess authorized to be paid to a holder of a certificate can ever be effectively stopped despite whatever original misjudgment may have occurred in its issuance, or

whatever changed factors may characterize the operation. My own view is that, since public convenience and necessity was the basis for the issuance of a certificate, the absence of public convenience and necessity should be ground for its termination. But this view was opposed by my colleagues and found no favor with the President's Air Policy Commission (PAPC). As the New Yorker has recently remarked, "God rest ye, merry taxpayers."

These consequences that by law attached to the initiation or extension of air routes, attracted little attention between 1938 and 1946. Those years remind of the years 1924 to 1929 in the stock market. Then any bet on the long side was good, and similarly from 1938 to 1945, any extension of any air route seemed to be wise. And it was in this period that the doctrines involving new routes and extensions were evolved.

This leads me to my second point regarding the manner of building air routes under the Act. If circumstances enable one conveniently to forget the financial implications involved by the creation of an air route, it may be possible to turn the question over to the lawyers for handling through the litigious processes of notice and hearing and the like. This, at least, was what the Act did. It built imitatively upon the techniques present in the Interstate Commerce Act dealing with the extension and abandonment of railroads, forgetting that in that field the driving force was private initiative and the willingness of private groups to gamble for profits and to absorb losses, while in the air transport field there were to be no losses—just subsidy.

A friend of mine, counsel for one of the larger airlines, has recently examined all the decisions of the Board in this field. He has been grieved to find that they lack a doctrinaire consistency—and he has rightly found my decisions to fit within that category. But I think he has misconceived the basic nature of the function underlying —or at least that should underlie—the Board's actions in route grants. Like a hundred others at the Civil Aeronautics Bar he has treated it, under the drive of the statute, as a judicial or quasi-judicial function. But, whatever the statute may say, it is not that. It is, in fact, an underwriting or banking function with two differences. The first is that the bonds need not be sold, and the second is that the measurement of return must include but must not be limited to dollars and cents.

This latter fact is important. National defense, the stimulation of commerce, the postal service (which can rightly be a source of profits as well as losses) are all elements of the public return. But basically it is an issue of return versus investment and, as such, amenable to the banking or underwriting technique rather than the legal one. If we look at it in this fashion, what real reason exists for sticking to a record perhaps two years old when more pertinent and reliable facts are to be found outside the record?

The only reason that suggests itself, apart from the vested interest of lawyers in their own tactics, is the danger of the misconstruction of facts not subjected to cross-examination and the existence of undue pressures not openly presented and articulated.

The first seems to me an ungenerous comment upon the techniques of professions other than the law to arrive at reasonably correct solutions. Both from the standpoint of public influence and private profit, the decisions of, say, Morgan, Stanley & Company or Dillon & Reed, have wide significance. Beyond calling, under the Securities Act, for the basic facts upon which they rest, we permit them to have their influence and rely upon them for building up empires of steel or chemicals or chewing gum. Their inherent rightness is, perhaps, as much to be trusted as similar judgments by a quasi-judicial tribunal.

The second problem—that of undue pressure—is a diffcult problem. But no quasi-judicial tribunal in my experience has been immune from such pressures. The forms of law clearly help to reduce the power of their impact, but they do not eliminate them. The real barrier against them lies in the traditions and ideals of the personnel entrusted with the responsibility of administration. The development of these barriers is made much more difficult, for example, in the CAB than most other agencies, for the clientele there is limited and airlines once admitted to the inner sanctum of certification ally themselves through a powerful and costly lobby against anyone on the outside. The present tactics employed in the Air Freight and Air Freight Forwarder Cases are perfect illustrations of this.

It is the process that interests me, for no one can be happy with the results that have thus far been produced. Let me take, for example, as an illustration the problem of feeder routes in a so-called area case. The area to start with is a country in itself, larger than France or Germany or the Argentine. It is already criss-crossed by a number of trunk routes. Plans for intermediate or feeder routes of varying kinds have been presented. Statistics on population, their peregrinating habits, even the number of fire-plugs, are available. Cost data of the most primitive type is all that has been offered, but lawyers' briefs in abundance are at hand. And from this mass of material a group of men whose acquaintance with the territory may be negligible are supposed without consultation to devise a plan of airline operation that will not only meet the needs of the area, but also be a feasible one to operate. The task, to be properly performed, calls for knowledge not merely about various communities of interest within the area, but airport conditions, types of available equipment, ship utilization and ship distribution, air navigation facilities, and a hundred and one other things. And the result of that judgment may cost the taxpayer $1,500,000 or more a year for at least three years and probably longer. Would any other nation build their airlines this way? Would we devise a scheme for the development of a river basin in this fashion?

A more sensible approach to me would be to determine first what area could profit from such a service, what applicant or applicants among the many could best be trusted with the presentation of a plan, call for these plans, determine which one shows the most promise and, in the light of that, after free and unhindered consultation, promulgate the scheme. At that time the interested communities could be called upon to give their views and such modifications could then be made as might be deemed desirable. But the legalistic approach called for by the Act makes such a technique impossible.

The same technique is equally adaptable to the extension of trunk routes. The problem there again is a twofold one—the needs of the various systems and the needs of the communities. I have put them in this order, because I believe they come in this order, for, if the systems are adequate, the needs of the communities can be met.

When I was with the Board, I had the opportunity to inaugurate a series of studies on the weaker carriers with the aim of getting some knowledge of their weaknesses, whether these weaknesses lay in route patterns or management, and what could be done about them. But the legal traditions immediately seized upon that effort. Instead of studies, they had to be investigations. And competitors under the whip of their lawyers insisted we could not benefit from these studies or utilize them in route or rate decisions, unless they could be mercilessly torn to pieces by cross-examination. The result, I gather, is that these investigations have now been buried, because their handling has become too difficult, too likely to create "error" for some gowned tribunal to pounce upon. And yet what more sensible way is there to approach this problem. The United States has underwritten these systems and it must continue to perform the underwriter's function—liquidate at the best figure or else make it possible to operate at a reasonable cost.

The emphasis upon communities comes second. I say this deliberately and with the public interest at heart, for the public interest is not served, as the residents of Long Island or Vermont can testify, by poor transportation facilities. To weaken a system internally by extending a new airline into its territory, when an exchange of trackage and air rights will adequately meet the needs of the communities, is wrong. Or to refuse to extend a system into territory of a competitor, when the competitor can stand it and the extension is absolutely necessary, is equally wrong despite the fact that more service is not required by the communities involved. The efficiency of the systems is the heart of route planning.

There may well be too many systems, and means must be found for their better integration. As the history of the railroads abundantly illustrates, some propulsive force from outside is necessary if real progress is to be made. This is more markedly true in the airlines where frequently the competition is less between systems than personalities —personalities as colorful and ambitious as any that our railroad his-

tory developed. In the Route 68 case, I thought it possible within the Act to find such a force in control over the bases of exchange and sale, but my colleagues thought otherwise. But so long as mail pay remains what it is, the price of an inefficient system will remain too high to permit reasonable integration with another system, and the program of merger and consolidation will remain at a standstill.

Criticism of the air route system developed by this adversary, litigious process too frequently directs its barbs towards the result and not the processes which make such a result inevitable. A portion of the industry alleges too much competition has been introduced: This is true. Another portion upbraids the Board for introducing too little competition. This also is true. These are, of course, patent self-serving declarations by the various airlines. They point to certain facts but produce no answers. Nor has an answer to this problem been forthcoming. The PAPC's suggestion that an overall national plan should be evolved puts the cart, I believe, before the horse. The most productive answer, in my judgment, is to think and plan in terms of systems. If plans could be evolved for the future of Northeast, Colonial, Pennsylvania Central, Continental—to mention a few—in the light of available traffic resources—plans calling for expansion, contraction, or merger—we might have one foot on the bottom rung of the ladder. Route issues, on the other hand, are no problem for systems such as Eastern or American or United. For, except in so far as these systems have to be expanded to service certain new public needs, their patterns present no problem. For, if systems such as these cannot be operated at a reasonable cost, the problem is not routes but is either management or the rate structure of the whole industry.

The deficiencies of the present adversary process are to be found not only in the ultimate results. It is time-consuming, and the time is spent too often on unimportant details. Records so old that they reflect an earlier era are purported to be the basis for action. And if the process works as it should, a doctrinaire and not a business judgment is the outcome. We would hardly dare to handle loans from the Reconstruction Finance Corporation on this basis, and yet I venture that a more thorough realistic basis underlies the loaning judgment than, say, the extension of Western Air Lines to Mexico City, Eastern to San Juan, or Chicago and Southern to Kansas City.

Indeed, the remarkable thing is that the process has worked as well as it has. From the standpoint of community need both nationally and internationally, there are few gaps in our route pattern so far as passenger traffic is concerned. Cargo is a horse of a different color. But system-wise the pattern has its outstanding weaknesses. System-wise too often it has been traded rather than engineered. Lobbying directly and indirectly has therefore gained a hold that is worrisome, and recent events make plain what was heretofore an open secret of the industry, that advance notice of decisions could be had. But

these are passing phases. The real difficulty is statutory—a debilitating mail pay theory and an adversary technique that makes underwriting judgments difficult to attain.

To evolve a different approach is not easy. But I do think the Congress is entitled to say to civil aviation what it has said even to military aviation – prepare and work within a budget. This would involve, in turn, the imposition of budgets, so far as mail pay is concerned, upon the airlines. There would, of course, be bankruptcies but a commercial world without failures that have to be paid for is not to be found this side of paradise.

It may be that we can prolong this era of not accounting for results. The threat of war may permit the substitution of a military for a civil economy. The industry may be able to defer casting up its accounts until the international peril is over. But, were it not for this fact, it would be wise for the industry to insist upon some system of national budgeting before the demand will arise in other less friendly quarters. There are no figures today of any reliability with regard to the cost to the taxpayer of the service with which he is provided. And not even the propaganda of the "dynamics inherent in air transportation" will forever shut out an analysis of these facts. "Wings for a nickel" is nice for the crowd and perhaps as profitable to the gladiators as the circuses at Rome, but only a proper accounting would tell the public that the slogan is either true or fundamentally false.

In a sense the issue of routes for passenger traffic is a dying issue. Its decease will be mourned by those at the aviation bar who have trafficked handsomely in it in the past. Rather it is operations that now comes to the fore. How can we best operate the system that has been created, is the real question at issue. And this involves the standing of the different systems, rates, equipment, and safety. But routes can never quite be forgotten. The development of equipment alone calls for their constant rewriting. And systems must be brought to some kind of internal balance. The very shift in the nature of the problem may forcibly evolve a different type of technique—of planning rather than adjudication, of less reliance on legal shibboleths and more attention to the public return to be had from public investment. It still will require a broad gamble to be made by the public, but after all these years the extent and nature of that gamble and the portion of it that the public, as against private groups, should bear ought to be capable of being made more precise. Otherwise a change in public temper may dry up not only private but public funds, and a more serious blow to the future of air transportation cannot be imagined.

An overhauling of the basic concepts of the Act consequently seems to be demanded. It must go further than the resolution of certain bureaucratic difficulties, which, I am afraid, is about all that the

PAPC has suggested in this particular field. Are we still prepared to give the CAB or some similar agency a blank check, and, if so, is it wisest to continue to resolve these issues through the building of records and the haranguing that then ensues? I have acquired my doubts as to the validity of this method of administration transplanted to a field where subsidy looms so large and leads to consequences and attitudes awry with our traditional theories of private enterprise. I think so more because I have learned to have an appreciation of the drive and energy and even sacrifice of men in the field of aviation. The system should reward qualities of that character. But it will do so only if its policies are sharply black and white and not the dull, deadening grey of an outworn paternalism.