

1948

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Recommended Citation

Oswald Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & Com. 377 (1948)
<https://scholar.smu.edu/jalc/vol15/iss4/1>

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THE JOURNAL OF AIR LAW AND COMMERCE

VOLUME 15

AUTUMN, 1948

No. 4

THE REVOCATION OF AN AIRLINE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

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THE certificate of public convenience and necessity, a device long familiar in the regulation of public service enterprises, was adopted by Congress in 1938 as the keystone of the structure created by the Civil Aeronautics Act for the federal regulation of air transportation. According to the author of the Act in the House of Representatives, the certificate was intended as an instrument for achieving "security of route . . . and protection against cutthroat competition," which were declared to be the two fundamental needs of aviation at that time.¹

Protection from wasteful competition is sought by section 401 (d) (1) of the Act which provides that a new air transport service may be authorized only if it is found by the Civil Aeronautics Board, after notice and hearing, to be required by the public convenience and necessity.² And in determining whether the proposed service satisfies this

¹ Lea, 83 Cong. Rec. 6407 (1938). See also: Gorrell, *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5234*, 75th Cong., 1st Sess. (1937), 66: "[The air transport industry] requires some orderly procedure, preferably, I personally believe, the procedure of certificates of convenience and necessity already embodied in our Federal legislation as to railroads and interstate motor carriers, which will provide for minimum standards of service to be complied with before business is begun, and will give some protection to existing lines so that momentary, unsound over-competition will not threaten."

² Air carriers which operated continuously from May 14, 1938 until effective date of the Civil Aeronautics Act, upon proof of such fact, were entitled to a certificate of public convenience and necessity for the routes operated unless the service rendered by such carrier during the period was found by the Board to have been inadequate and inefficient. These were the so-called "grandfather" carriers under section 401(a) (1) of the Act.

statutory standard, the Board must consider the declaration of policy which calls for "competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense," and directs the Board, in exercising and performing its powers and duties under the Act, to prevent unfair or destructive competitive practices by air carriers and, in general, to foster sound economic conditions in air transportation.³

"Security of route," or protection against improvident termination of the certificate-holder's operating privileges, is provided by the sections of the Act which specify and limit the grounds upon which a certificate may be revoked. In contrast to a foreign air carrier permit, which may be revoked if the public interest so requires, a certificate of public convenience and necessity may be revoked only for the intentional failure of its holder to comply with its terms, with the provisions of the Act or the Board's economic regulations,⁴ or for non-user.⁵

In its administration of the Act, the Board has respected the limitations which Congress placed upon its power to revoke a certificate of public convenience and necessity and, in the single instance in which it has exercised this power, has acted with the restraint which a responsible agency should exercise in cancelling valuable privileges. Thus, it has stated that it was without power to set aside a certificate because of the discovery of facts which, if they had been in the record of the "grandfather" proceeding, would have led to the conclusion that the applicant had not sustained the burden of proving citizenship during the requisite period.⁶

In a separate opinion issued in connection with an investigation looking to the suspension of a certificate under which operations had not yet been commenced, the present writer, as a member of the Board, took the position that any suspension which the Board might order as a result of such investigation must not be a device for accomplishing the permanent cancellation of the certificate but only a means of accomplishing the temporary postponement of the operation until favorable economic conditions should offer lower costs and higher load factors.⁷

³ Section 2.

⁴ Section 401(h)

⁵ The proviso contained in section 401(g) permits the Board, after notice and hearing, to direct that a certificate shall cease to be effective if service is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or is not operated for a period of ninety days or such other period as may be designated by the Board.

⁶ *Marquette Air.—Grandfather Certif.—Acquisition by TWA*, 3 CAB 111, 112-113 (1941). In its opinion the Board said in part: "Something more is required after a certificate has actually been issued, namely, *clear proof* that our necessary finding that Marquette was a citizen during the 'grandfather' period was erroneous. We believe that we have the power to vacate the certificate if such finding be *clearly* proven to be erroneous, particularly if it be established that we were persuaded to make the finding through misrepresentation or fraud." (Emphasis supplied.)

⁷ Order Serial E-337, Docket 2564, adopted March 3, 1947. (Concurring opinion of Ryan, Vice Chairman.)

A proceeding, Docket 3500, recently instituted by the Board to investigate the

And in the sole case in which the Board has revoked a certificate for failure of its holder to inaugurate service within a reasonable period, it did so almost 2½ years after the issuance of the certificate after having repeatedly granted the carrier's requests for extensions of time in the proceeding.⁸

RECENT CALLS FOR REVOCATION

The most vigorous challenge thus far presented to the protected status of the certificate of public convenience and necessity occurred recently upon reconsideration of two new route cases — *Kansas City-Memphis-Florida*⁹ and *Mississippi Valley*¹⁰ Cases. In proceedings in which more than one applicant seeks new route authorizations the Board first determines whether the public convenience and necessity requires a new service and then, in the event this question is answered in the affirmative, selects the applicant which is to operate the proposed service. The selection of the carrier is frequently the only issue in reconsideration proceedings. This was true in the two cases referred to where the legal question was squarely presented whether the Board possessed the statutory power to reconsider its decision issuing a certificate to an air carrier, and, upon such reconsideration, to revoke the certificate which, by its own terms, has already become effective.

For some years an affirmative answer to this question had apparently been assumed by numerous unsuccessful applicants in new route proceedings who sought, by their petitions for reconsideration, to have the Board reverse its original determination as to the carrier which should perform the services in question, to revoke the authorizations originally granted and to issue to the petitioners certificates of public convenience and necessity authorizing them to perform the service. While the Board has never granted the relief requested by such petitions, its legal power to do so had not been challenged until recently when, in the *Kansas City-Memphis-Florida Case*,¹¹ Chicago and Southern Airlines, Inc., through its counsel, vigorously resisted the petitions for reconsideration which sought revocation of the certificate which the Board in its original decision had issued to it, contending that, upon the merits, the original decision should be left undisturbed and that the Board was without

question whether the public interest would be advanced by the transfer of certain routes from National Airlines to Delta Air Lines and Pan American Airways was interpreted by some as action inconsistent with the Board's traditional view of the sanctity of a certificate. Of course this interpretation is without validity since the Board does not and has never claimed the power to compel the transfer of a route from one carrier to another. Any recommendation resulting from such investigation would be purely advisory and would require for its fulfillment the voluntary action of the affected parties.

⁸ *Tri-State Aviation, Revocation of Certificate*, 4 CAB 100 (1943).

⁹ Docket 1051 et al., decided July 23, 1948. The Board's Rule of Practice (285.11) permits any party to petition for rehearing, reargument or reconsideration of any final order of the Board in a proceeding. Such petition must be filed within thirty days after service of the order sought to be vacated or modified. Petition may be filed by leave of the Board after such thirty-day period upon a showing of reasonable grounds for failure to file the petition within the prescribed period.

¹⁰ Docket 548 et al., decided July 23, 1948.

¹¹ Docket 1051 et al., decided September 30, 1947.

power under the Civil Aeronautics Act to withdraw the authorization which it had lawfully given and to designate another applicant to perform the proposed service.

A majority of the Board, in a supplemental decision upon reconsideration, reaffirmed the previous grant to Chicago and Southern upon the merits and found it unnecessary to discuss the legal question which had been presented; the majority did, however, express "grave doubt" as to the Board's power to revoke, upon reconsideration, a certificate which had been issued and made effective at the time of the original decision. The two dissenting members of the Board, who felt that a carrier other than Chicago and Southern should have been certificated to operate the Kansas City-Memphis route, stated that they did not share the doubt entertained by the majority as to the Board's power to select a different carrier.¹²

This article will undertake to discuss the validity of the position that the Board is without power under the Civil Aeronautics Act to revoke, in a reconsideration proceeding, a certificate which has been granted in its original decision in compliance with the requirements of the statute and which by its own terms purports to be effective from the date of such original decision.¹³

THE POSITION OF CHICAGO AND SOUTHERN

Chicago and Southern had based its position on the fact that the certificate by its own terms had become effective at the time of its issuance in the Board's original decision and could not be revoked except for intentional violation of some provision of the Civil Aeronautics Act. It relied upon sections 401 (g) and 401 (h) of the Act. Section 401 (g) reads as follows:

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the . . . (Board) . . . shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the . . . (Board) . . . shall certify that operations thereunder have ceased: Provided, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the . . . (Board) . . ., or if, for a period of ninety days or such other period as may be designated by the . . . (Board) . . ., any such service is not operated,

¹² In the *Mississippi Valley Case (Kansas City-St. Louis Service)*, Docket 548 et al., in which the supplemental decision on reconsideration was issued concurrently, the same legal issue had been raised. A majority of the Board concurred in an opinion reaffirming the original decision upon the merits, while Ryan, Vice Chairman, concurred in the adoption of the order "on grounds related to the statutory power of the Board to revoke Mid-Continent's certificate under the facts of the present case."

¹³ The present article does not question the power of the Civil Aeronautics Board to set aside a certificate which has been issued in disregard of statutory or constitutional requirements.

the . . . (Board) . . . may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.”¹⁴ (Emphasis supplied to indicate the language pertinent to the present discussion.)

Section 401 (h) sets forth the procedure by which a certificate may be altered, amended, modified, suspended or revoked. It reads as follows:

*“The . . . (Board) . . . , upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the . . . (Board) . . . , with an order of the . . . (Board) . . . commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the . . . (Board) . . . to have been violated. Any interested person may file with the . . . (Board) . . . a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.”*¹⁵ (Emphasis supplied to indicate the language pertinent to the present discussion.)

The parties which opposed Chicago and Southern's view did not claim that statutory cause for revocation under section 401 (h) was present in the proceeding and, of course, the procedural requirements which must precede any revocation thereunder had not been fulfilled. Unless some section of the Act, therefore, could be said to confer upon the Board the power to revoke the certificate which it had previously issued to Chicago and Southern in that proceeding, that carrier's position would appear to be sound.

POWER TO SUSPEND OR MODIFY ORDERS

Section 1005 (d) of the Act has been urged as a statutory basis for the revocation of a certificate upon reconsideration. It is difficult to derive such power from the language of that section. The section provides that “except as otherwise provided in this Act, the . . . (Board) . . . is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper.” The power to suspend or modify obviously does not include the power to revoke. In this connection it is significant that the language of section 401 (h) clearly distinguishes between a suspension or modification and a revocation and requires a different showing for a revocation than is required for a suspension or a modification. Moreover, section 1005 (d) deals with orders, not certificates, and an order is not to be confused with a certificate.¹⁶

¹⁴ 52 Stat. 989 (1938), 49 U.S.C.A. §481 (g) (Supp. 1946).

¹⁵ 52 Stat. 989 (1938), 49 U.S.C.A. §481 (h) (Supp. 1946).

¹⁶ The intention of Congress to draw a distinction between the two is also indicated by section 1005 (e), which requires compliance with “any order, rule, regulation, or certificate” issued by the Board.

Thus in *United States v. Seatrains Lines, Inc.*,¹⁷ the United States Supreme Court held that the Interstate Commerce Commission lacked authority under an almost identical provision of the Interstate Commerce Act¹⁸ to revoke the certificate of a common carrier by water, saying in part:

"Nor do we think that the Commission's ruling [revoking the certificate] was justified by the language of Section 315(c) which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' That the word 'order,' as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act. Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. But as the Commission has said, as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding."

The Court's decision is of particular significance in view of the fact that Part III of the Interstate Commerce Act, providing for the regulation of common carriers by water, contains no provision comparable to section 401 (g) of the Civil Aeronautics Act which provides that every certificate shall continue in effect until suspended or revoked as specifically provided by the statute. It is true that the *Seatrains* decision contains a dictum indicating that the restrictions upon the revocation of water carrier certificates under the Interstate Commerce Act became operative after the certificate was finally granted and the time for rehearing had expired. This qualification, however, must be considered in the light of the fact that the Act under review expressly provided for a rehearing — a provision which is absent from the Civil Aeronautics Act — and did not contain a provision similar to section 401 (g) of the Civil Aeronautics Act.

TERMS, LIMITATIONS AND CONDITIONS IN CERTIFICATES

Nor does it seem reasonable to conclude that, since Chicago and Southern's certificate incorporates by reference the Board's Economic Regulations, including section 285.11 which provides for the filing of petitions for rehearing, reargument or reconsideration,¹⁹ the certificate

¹⁷ 329 U.S. 424, 432 (1947).

¹⁸ "The Commission may suspend, modify, or set aside its orders under this chapter upon such notice and in such manner as it shall deem proper." 54 Stat. 946 (1940), 49 U.S.C.A. §915(c) (Supp. 1946).

¹⁹ The certificate authorizes Chicago and Southern to engage in air transportation subject to "the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules and regulations issued thereunder . . ."

itself contains a provision for its revocation upon reconsideration. For while the Board possesses power under the Act to impose terms, limitations and conditions in certificates, any limitation or condition thus imposed which was inconsistent with the express provisions of section 401 (g) would be invalid.

Authority for this proposition is found in *Smith Bros. Revocation of Certificate*,²⁰ cited with approval by the Supreme Court in the *Seatrain Case, supra*, in which the Interstate Commerce Commission denied petitions seeking revocation of a motor carrier's certificate and held that despite the self-executing forfeiture terms which it contained, the certificate continued in full force and effect unless and until terminated by the Commission in accordance with the provisions of section 212 (a) of the Motor Carrier Act; this section contains language which is almost identical to the provisions of sections 401 (g) and 401 (h) of the Civil Aeronautics Act.²¹ The Commission said at p. 472 of its opinion:

"In our opinion the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, *but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding. *To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the Act.*" (Emphasis supplied.)

Upon such authority it must be concluded that the Board's general power to attach terms, limitations and conditions to a certificate does not confer upon it the power to impose a condition that a certificate may be revoked if a petition for reconsideration is seasonably filed; such a condition would be clearly inconsistent with the terms of section 401 (g) and would, therefore, be invalid.

REHEARING AND RECONSIDERATION

It is recognized that in the cases cited above, the revocation proceedings were instituted some months after the certificates had become effec-

²⁰ 33 M.C.C. 465 (1942).

²¹ "Certificates . . . shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate . . . may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule,

tive and during the intervening period there had been pending no petitions for reconsideration of the orders granting the certificates. Careful analysis of the pertinent statutes, however, makes it clear that no legal significance is to be attached to this difference in the facts presented by these cases and the case recently decided by the Board. There is conspicuously absent from the Civil Aeronautics Act any express provision for rehearing, reargument or reconsideration such as is contained in the Interstate Commerce Act.²² The only provision for reconsideration has been made by the Board itself in section 285.11 of the Economic Regulations, pursuant to the general powers granted by the Act to issue regulations which are necessary for the performance of its powers and duties.²³ While there can be no doubt of the Board's power under these general provisions to provide in proper cases for a reconsideration of its decisions,²⁴ that general power may not be used to nullify an express provision of the Act.²⁵

It is also recognized that in its administration of the Communications Act of 1934 the Federal Communications Commission has, on at least one occasion, in response to petitions for reconsideration of its previous decision in a proceeding, set aside an order granting to one applicant a permit for the construction of a radio broadcasting station and after further proceedings granted the same authorization to another applicant.²⁶ In view of the significant differences between the Civil Aeronautics Act and the Communications Act of 1934, the practice of the Federal Communications Commission cannot be considered authority for the proposition that the Board may, upon reconsideration, revoke an effective certificate previously issued in the same

or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate . . ." 49 Stat. 555 (1935), 49 U.S.C.A. §312 (a) (Supp. 1946).

²² 54 Stat. 915 (1940), 49 U.S.C.A. §17(6) (Supp. 1946).

²³ Sections 205(a) and 1005(d) of the Act.

²⁴ *American Air., Mail Rates*, 3 CAB 770, 772-773 (1942). See also: *Helvering v. Continental Oil Co.*, 68 F. (2d) 750, 753 (App. D. C. 1933), cert. den. 292 U.S. 627 (1934).

²⁵ The Texas Court of Civil Appeals has held that an order of the Railroad Commission granting a certificate to a motor carrier was final and could not be set aside upon rehearing, for which provision was made in the Commission's rules of practice. *Smith v. Wald Transfer & Storage Co.*, 97 S. W. (2d) 991 (Tex. Civ. App. 1936).

²⁶ *WBNX Broadcasting Co., Inc., et al.*, 4 Pike & Fischer Radio Regulation 205 (decided April 7, 1948). In *Black River Valley Broadcasts v. McNinch*, 101 F. (2d) 235 (App. D. C. 1938), cert. den. 307 U.S. 623 (1939), a construction permit was issued to the plaintiff, and within the 20-day period prescribed by section 405 of the Communications Act of 1934, a petition for rehearing was filed by another party to the proceeding. In upholding the lower court's decree dismissing for want of equity the plaintiff's bill to enjoin the Commission from holding a *de novo* hearing on several related applications, the Court of Appeals for the District of Columbia pointed out that the timely filing of the petition for rehearing, as prescribed by statute, was "a matter of right, as distinguished from a matter of grace, and required action and determination" (p. 239); since it "stayed the proceedings and reopened the case . . . no rights accrued to the plaintiff as a result of the order originally granting that permit" (p. 240). Other language of the Court at pp. 241 and 242 of its opinion indicates clearly that under the provisions of section 405 of the Communications Act, which has no counterpart in the Civil Aeronautics Act, ". . . the permit . . . had been tentatively issued . . ." and ". . . there was no final grant of a permit or license to plaintiff . . ."

proceeding. Not only does the Communications Act contain a specific provision for rehearing²⁷ and subsequent reversal, both of which are absent from the Civil Aeronautics Act, but it contains no provision comparable to section 401 (g) of the Civil Aeronautics Act or section 212 (a) of the Motor Carrier Act,²⁸ that a certificate shall continue in effect until modified or terminated in the manner specifically prescribed by statute.

Moreover, by its very nature a license issued under the Communications Act of 1934 is so fundamentally different from a certificate of public convenience and necessity issued under the Civil Aeronautics Act that it would be unreasonable to assume that the Board possesses the same power of revocation which is exercised by the Federal Communications Commission. As the United States Supreme Court pointed out in *Federal Communications Commission v. Sanders Brothers Radio Station*:²⁹

"The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

"Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

In contrast, the policy of the Civil Aeronautics Act is one of controlled competition and a certificate of public convenience and necessity provides its holder with protection against uneconomic competition. In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause³⁰ and not pursuant to a mere change of mind on the part of the Board.

To hold that the Board has the statutory power to revoke, on reconsideration, a certificate of public convenience and necessity which has

²⁷ 48 Stat. 1095 (1934), 47 U.S.C.A. §405 (Supp. 1946). This section specifically provides that if, in the judgment of the Commission, after rehearing ". . . it shall appear that the original decision, order or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly."

²⁸ Footnote 21, *supra*.

²⁹ 309 U.S. 470, 475 (1940).

³⁰ The insecurity of the status conferred by the possession of a license issued under the Communications Act of 1934 is further illustrated by the fact that it is revocable not only on grounds similar to those specified in section 401(h) of the Civil Aeronautics Act, but also for reasons "which would warrant the Commission

already been issued and become effective by its own terms would seem to convert into meaningless words the express language of section 401 (g) which declares that "each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided" Under such an interpretation a certificate, which by its own terms became effective on January 1, might not in actual fact become effective until several months thereafter when judgment was entered upon reconsideration of the case. Indeed, it could be argued that no certificate would ever become finally effective since the Economic Regulations permit petitions for rehearing, reargument and reconsideration to be filed within thirty days of the order sought to be vacated or modified or, for good cause shown, *at any time after the decision*. Such an interpretation would obviously "contribute an intolerable uncertainty to the finality of any right granted."³¹

PROBLEMS IN STATUTORY CONSTRUCTION

In an attempt to avoid such a result, it has been argued that although a certificate may be issued and by its terms purport to be effective on the date of its issuance, the certificate nevertheless cannot bear the stamp of finality until the period for the filing of petitions for reconsideration has expired or until a judgment has been entered after reconsideration of the case; in other words, that the certificate, under such circumstances, is issued and made effective subject to the Board's rule of practice covering reconsideration and rehearing. Such a construction of the Act seeks to resolve the conflict between the specific provision contained in section 401 (g) of the Act and the general provision contained in section 205 (a) (from which derives the Board's power to establish its rule of practice permitting a reconsideration of its decisions) by subjecting the specific mandate of the statute to a general statutory provision.

This interpretation flies in the face of a fundamental canon of statutory construction which requires that whenever a general statutory provision appears to be in conflict with a specific provision of an act, the general must surrender to the specific provision. As early as 1883, the United States Supreme Court described this principle as a "well settled rule"³² and it is universally accepted today. Applied to the type of case under discussion, the principle would require that the rule of practice governing reconsideration and rehearing shall be subjected to the specific provisions of section 401 (g) and not the reverse.

in refusing to grant a license on an original application . . ." 48 Stat. 1086 (1934), 47 U.S.C.A. §312(a) (Supp. 1946).

³¹ See: *Manhattan Coach Lines, Inc. v. Adirondack Transit Lines*, 42 M.C.C. 123, 126 (1943).

³² See: *Townsend v. Little*, 109 U.S. 504, 512 (1883). See also: *United States v. Board of Commissioners of Osage County*, 193 Fed. 484, 490 (C.C.W.D. Okla. 1911); *United States v. Mattio*, 17 F. (2d) 879, 880 (C.C.A. 9th, 1927); *Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co.*, 73 F. (2d) 333, 335 (C.C.A. 6th, 1934).

Thus construed, the Board's rule of practice would permit reconsideration and rehearing in all certificate cases, excepting only those in which the Board had, in accordance with the requirements of the Act, issued a certificate which, by its own terms, was made effective immediately or on such a date as to preclude a reconsideration.

It is true that, under this construction, the Board's original decision in the excepted class of cases would possess finality. The exercise of such a power, however, could not be regarded as anomalous in view of the unique character of the Civil Aeronautics Act under which national security and other considerations at times may call for expeditious action by the Board in the establishment of urgently needed air transport services. Moreover, this discretionary power of the Board to give finality to its original decision in the ordinary case which is subject to reconsideration by ordering that the certificate shall become effective immediately is no more unusual than the right of a party to such a proceeding at his option, in effect, to confer finality upon the Board's original decision by seeking judicial review immediately, without petitioning for reconsideration — a course which is open to him under section 10 (c) of the Administrative Procedure Act.³³

POWER TO CORRECT MISTAKES AND IMPOSE CONDITIONS

It has been contended that this construction of the Act is inconsistent with certain of its previous actions in withdrawing, without compliance with the requirements of section 401 (h), authorizations previously granted by mistake and in imposing, upon reconsideration, restrictions which limit the privileges conferred by certificates issued and made effective at the time of the Board's original decision in the proceeding. The validity of such contention appears to be questionable. Clearly, an authorization granted by mistake is null and void from the very beginning and the error may be rectified by an order entered *nunc pro tunc*.³⁴ In such cases there is no valid certificate to be revoked. In the *Kansas City-Memphis-Florida* and *Mississippi Valley* cases it was not claimed that the certificates were issued to Chicago and Southern and Mid-Continent as a result of inadvertent error, as in *Pan Am. Airways, North Atlantic Route*,³⁵ and *Latin American Air Service*.³⁶

It is true that in a few cases the Board, in response to petitions for reconsideration, has modified a certificate issued in its original deci-

³³ This subsection provides in part: "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application . . . for any form of reconsideration . . ." 60 Stat. 243, 5 U.S.C.A. §1009 (c) (Supp. 1946).

³⁴ "There is nothing to preclude an administrative agency from correcting by a *nunc pro tunc* action inadvertent errors made in putting into appropriate documentary form the decisions taken by such agency." *Pan Am. Airways, North Atlantic Route*, 7 CAB 849, 852 (1947).

³⁵ 7 CAB 849 (1947).

³⁶ 6 CAB 857 (1946).

sion by restricting the operating privileges which it conferred.³⁷ While it is possible that in taking such action the Board exceeded its powers under the Act, its statutory power to do so had never been placed in issue and was apparently assumed by the parties to exist. It may also be said that the imposition of a restriction is a modification and not a revocation, *pro tanto*, of a certificate.³⁸ The Act itself clearly shows that Congress intended to treat modification and revocation as two fundamentally different things; thus, it empowers the Board to modify a certificate if the public convenience and necessity so require, but it prohibits the revocation of a certificate for any reason other than intentional failure of its holder to comply with its terms or the provisions of the Act or the regulations issued by the Board thereunder. No certificate may be revoked on grounds of public convenience and necessity, although such grounds will support a modification of its terms. This distinction has always been observed by the Board, for while it has on several occasions modified an effective certificate by imposing a restriction, in the ten years of its existence it has never undertaken to revoke a certificate upon reconsideration and authorize another carrier to perform the service.

CONCLUSION

In summary, it seems necessary to conclude that section 285.11 of the Economic Regulations providing for reconsideration of Board decisions, if construed as an instrument for the revocation of a certificate of public convenience and necessity which was already lawfully issued and by its own terms in effect, would constitute an invalid exercise of the Board's rule-making power since it would be inconsistent with the express terms of sections 401 (g) and (h) of the Civil Aeronautics Act. The Board has a duty to construe, if practicable, the Act in such a manner that its component parts will be consistent with each other and every provision given full effect.³⁹ It would seem to be a clear violation of this basic principle of statutory construction if the

³⁷ For example, in *Cincinnati-New York Additional Service*, 8 CAB 152 (1947), the Board in its original decision in effect authorized TWA to conduct nonstop service between Cincinnati and Washington. In its supplemental decision upon reconsideration, issued on October 20, 1947, TWA's certificate was amended to require that Columbus or Dayton be served on all flights which serve Cincinnati and Washington. Again, in the *North Central Case*, 7 CAB 639 (1946), the Board amended United's certificate for route No. 1 by adding Milwaukee as an intermediate point and so worded the certificate as to make possible one-plane service between Milwaukee and Washington. Upon reconsideration, it further amended United's certificate to provide that Milwaukee and Washington shall not be served on the same flight: *North Central Case*, Docket 415 et al., decided July 22, 1947.

³⁸ In the *Caribbean Area Case*, Docket 2246 et al., decided July 20, 1948, the Board said at pages 24-25 of its mimeographed opinion: "It is our opinion that the power to alter, amend, or modify a certificate, in whole or in part, when the public convenience and necessity so require, carries with it the right to impair the authority under such certificate either by completely eliminating a point or by imposing a condition which results in restricting the service that may be rendered."

³⁹ See: *Ringling Bros.-Barnum & Bailey C. Shows v. Sheppard*, 123 F. (2d) 773, 775 (C.C.A. 5th, 1941); *Market Co. v. Hoffman*, 101 U.S. 112, 116 (1879); *Iglehart v. Iglehart*, 204 U.S. 478, 485, 27 S. Ct. 329 (1907).

Board were to construe a rule of practice of its own creation, deriving from a general statutory provision, so as to nullify the specific mandate of Congress which declares that a certificate, once issued and by its own terms made effective, shall continue in effect until revoked for statutory cause.

This view of the law does not mean the frustration of the Board's ability to reconsider its decisions in certificate cases; it does mean, however, that the Board in implementing its power must act in a manner which will not contravene the specific provisions of sections 401 (g) and (h) of the Act. The Board in a particular reconsideration case, without creating the legal problem raised in the *Kansas City-Memphis-Florida Case*, may retain full power to reconsider a decision granting a certificate of public convenience and necessity by providing that such certificate shall not become effective until the period for filing petitions for reconsideration has expired or until the Board shall have disposed of any petitions for reconsideration which have been filed within the period prescribed by the rule of practice. By thus fixing an appropriate prospective date on which the certificate would become effective, the Board would be entirely free to reconsider and to revoke a certificate *before it had become effective*, thereby avoiding any conflict with the express requirements of section 401 (g). In concluding its opinion in the *Kansas City-Memphis-Florida Case*, the Board indicated its intention of reserving such freedom to itself by stating that "in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case."