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OBSERVATIONS ON THE ECONOMIC REGULATIONS OF THE CIVIL AERONAUTICS BOARD

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THE Civil Aeronautics Board's Economic Regulations are the substantive rules that command certain conduct in connection with the operation of the business affairs of all air carriers which are subject to the terms of the Civil Aeronautics Act of 1938, as amended.¹ The Economic Regulations are distinct from the Board's rules of procedure which describe the steps that must be followed in the conduct of business before the Board, its examiners or its staff.² Violations of the Economic Regulations can be punished under the Act, and the courts can enforce these rules on the request of aggrieved parties or of the Board itself.³ To this extent they are extensions of the Act.⁴ The Constitutionality of such extensions by regulation is well established.⁵

These regulatory extensions of the Act should stem from specific delegations of power to promulgate them. In promulgating Economic Regulations, however, the Board has not sought for definite sources of authority nor has it distinguished between legislation and interpretation. Even though the necessary objectives now reached by loosely derived Economic Regulations could have been achieved through specific authorizations in the Act, the Board has chosen to develop its Economic Regulations from general authorization. As a result the Board's Economic Regulations are productive of difficulties of under-

¹ Act of June 23, 1938, 52 Stat. 973; as amended by various Acts.

² Until July 1, 1949 Rules of Practice in Economic Proceedings were an integral part of the Economic Regulations and appeared therein as Part 285 as "Rules of Practice." They are now known as Procedural Regulations and are divided into two parts: "Rules of Practice in Safety Proceedings" and "Rules of Practice in Economic Proceedings." "Rules of Practice in Economic Proceedings" are contained in Code of Federal Regulations, Title 14, Chapter 1, Subchapter C, Part 302.

³ *Trans-Pacific Airlines v. Hawaiian Airlines*, 174 F. (2d) 63 (1949); *C.A.B. v. Modern Air Transport*, 81 F. Supp. 803 (1949), and *American Airlines v. Standard Airlines*, 80 F. Supp. 135 (1948).

⁴ *Columbia Broadcasting System v. U.S.*, 316 U.S. 407 (1942); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *C. V. Starr & Co. v. Commissioner*, 101 Fed. (2d) (C.C.A. 4th 1939).

⁵ *Norwegian Nitrogen Products v. U.S.*, 288 U.S. 294, 305 (1933); *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

standing, uncertainty as to required conduct and costly challenges to the Board's authority.

THE BOARD'S CHOICE OF AUTHORITY FOR ECONOMIC REGULATIONS

According to the Civil Aeronautics Board,

"Basic responsibility and power with respect to the regulation of the economic aspects of air transportation are conferred upon the Board by Section 205 and the various provisions of Title IV of the Civil Aeronautics Act."⁶

In this statement the Board recognizes that specific regulations cannot be adopted and imposed upon those subject to the Board's jurisdiction by virtue of Sec. 205 alone. Sec. 205 (a) confers general rule-making power in the following terms:

"The Authority is empowered . . . to make and amend such general or special rules, regulations, and procedure pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under the Act."

Specific rules derive validity from individual authorizations set forth in Title IV.⁷ Sec. 205 (a) in itself is so general that it would seem to involve an unconstitutional delegation of legislative powers for want of sufficiently specific standards.⁸ This section acquires precise meaning only in connection with particular directives as to the subjects on which regulations should be issued pursuant to the Act.⁹ The particular directives in Title IV point out the specific interstices which Congress wants filled in by administrative regulation. The Board, it should be noted, does not hold that such particularity is necessary.

Title IV of the Act, plus its derivative Economic Regulations issued pursuant to the general authority of Sec. 205, constitute, ideally, a complete statement of all the rules necessary to guide an air carrier on economic matters subject to Federal regulation. As conceived by the Board, however, the purpose of the printed regulations is limited to supplementing the Act. Its Economic Regulations presently provide only certain rules in addition to those now implicit in the Act, or as it may be amplified by Board decisions. The Act plus the regulations as well as, in some instances, relevant Board decisions, must be read together to determine required conduct. Thus the regulations have

⁶ Annual Report of the Civil Aeronautics Board, 1949, p. 18.

⁷ *Avent v. U.S.*, 266 U.S. 127 (1924); *U.S. v. Grimaud*, 220 U.S. 506 (1911); *Titsworth v. Commissioner*, 73 Fed. (2d) 385 (CCA 3d 1934).

⁸ *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. U.S.*, 321 U.S. 414 (1944); *Schechter Corp. v. U.S.*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *McCulloch v. Md.*, 4 Wheat. 316, 412 (1819).

⁹ *Hampton Jr. & Co. v. U.S.*, 276 U.S. 394, 406 (1928).

¹⁰ This has been accomplished in the note accompanying Part 291 as an interpretation thereof. Examples of "regular" and "irregular" service are given in interpretation of the prohibition against scheduled air flights. This is a very useful and commendable innovation in the Regulations.

the limited objective of stating only a few policy conclusions arising in the furtherance of the Act's requirements with regard to future conduct not specifically dealt with elsewhere. The Board's Economic Regulations could, of course, include both the provisions of the Act and its implementing rules together with any interpretations of general applicability.¹⁰ This would provide a much more useful tool for the regulated industry than the present partial statement which requires recourse to the two main sources.

The Board's publication of Economic Regulations is a partial statement of the power it has exercised. What the Board can put in its Economic Regulations depends upon its authority to make rules. What it wants to put in them depends upon the needs that have been demonstrated to the Board as requiring some regulatory guidance which it is authorized to provide.

Within Title IV Congress has stated the subjects proper to the supplemental regulation of air carriers. Its sixteen sections may be divided into three types of provisions insofar as the authority of the Board to make specific regulations is concerned. First are those provisions which directly authorize or require the Board to make implementing regulations.¹¹ Second are those provisions which regulate air carriers in general terms, without stating in so many words that the Board shall implement them by regulation, but which require some directive by the Board to make them effective.¹² Third are those provisions which are so specific as to require no further substantive regulation to make them effective.¹³ Little difficulty is encountered in determining the legal status of the third category: these are self-executing rules of conduct that can be complied with in accordance with their obvious intent. The first and second categories, however, require some sort of implementing action to impose their penalties or to make their meaning clear to those whose conduct is to be guided by the statutory requirements.¹⁴

It has been contended that different rule-making action must be taken with respect to the first and second categories, and that different sanctions may be imposed with regard to a violation of a regulation

¹¹ *E.g.*, Sec. 401(b): "Application for a certificate . . . shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulations require." Equally specific directives are found in Secs. 401(f) and (k), 402(d) and (e), 403(a), (b) and (c), and 405(e) and (m).

¹² *E.g.*, Secs. 401(g), 402(f), 403(d), 405(f), 406(a) and (b), 407(a), (b), (c) and (d), 410, and 416(a) and (b).

¹³ *E.g.*, Sec. 401(a) prohibiting any carrier from engaging in air transportation unless the Board has issued a certificate authorizing such transportation. Also: Secs. 401(c), (d), (e), (h), (i), (j), (l), (m) and (n), 402(a), (b), (c), (g) and (h), 403, 404(a), (b) and (c), 405(a), (b) and (c), 406(c), (d), (e) and (f), 407(e), 408(a), (b), (c), (d) and (e), 409(a) and (b), 411, 412(a) and (b), 413, 414 and 415.

¹⁴ *Federal Crop Insurance Co. v. Merrill et al.*, 332 U.S. 380 (1947); *Columbia Broadcasting System v. U.S.*, *supra*.

depending on the authorization behind the action.¹⁵ The specific rule-making provisions of the first category are said to confer true legislative power, while any regulations made pursuant to a less specific directive are interpretative only. The Attorney General's Committee on Administrative Procedure in its Report¹⁶ recognizes a distinction between interpretations and substantive regulations as follows:

"3. *Interpretations.*—Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected, for if there is disagreement with the agency's view, the question may be presented for determination by a court . . .

"4. *Substantive regulations.*—Many statutes contain provisions which become fully operative only after exercise of an agency's rule-making function. Sometimes the enjoyment of a privilege is made conditional upon regulations, as, for example, where Congress permits the importation of an article upon such rules and regulations as the Secretary of the Treasury may prescribe . . . In such instances the striking characteristic of the legislation is that it attaches sanctions to compel observance of the regulations, by imposing penalties upon or withholding benefits from those who disregard their terms. Thus these substantive regulations have many of the attributes of statutes themselves and are well described as subordinate legislation."

It is thus contended that the significance of regulations differs with the authorizing language of the law. The compilers of the regulations published in the Federal Register recognize this contention to some extent in their statement of the authority for published regulations appearing in the Code of Federal Regulations.¹⁷

So far as the Board's own actions are concerned, however, there is no distinction by separate sets of regulations or other distinguishing labels between the two types or of the authority relied upon in promulgating any particular regulation.¹⁸ The Economic Regulations contain both types without distinction.

¹⁵ *Treasury Regulations and the Wilshire Oil Case*, Elsworth C. Alvord, 40 Columbia L. Rev. 252; *Hesslein v. Hoey*, 91 F. (2d) 954 (CCA 2d 1937), cert. denied, 302 U.S. 756 (1937); *Walker v. U.S.*, 83 F. (2d) 103 (CCA 8th 1936); *Helvering v. Safe Deposit Trust Co. of Baltimore*, 95 F. (2d) 806 (CCA 4th 1938).

¹⁶ Senate Document No. 8, 77th Cong., 1st Sess., p. 27.

¹⁷ A typical statement is at the head of Part 201 of the Economic Regulations: "Authority: §§201.1 to 201.5 issued under Sec. 205(a); 52 Stat. 984, 49 U.S.C. 425. Interprets or applies Sec. 401, 52 Stat. 987, 49 U.S.C. 481." The distinction is apparently made between "interprets" and "applies," the former clarifying existing meaning and the latter providing true supplementing legislation.

¹⁸ Cf. the regulations of the Wages and Hours Administrator: C.F.R., Tit. 29. Chapter V has two subchapters. Subchapter A is titled "Regulations"; Subchapter B is "Statements of General Policy or Interpretation Not Directly Related to Regulations." It is declared to "clarify . . . the practices and policies which will guide the administration and enforcement of the Fair Labor Standards Act." The introductory statement also says that before the Portal-to-Portal Act of 1947 interpretations were "only advisory, so far as the rights and liabilities of employers and employees were concerned, because the courts alone had the authority to make legally binding interpretations." The Administrator also issues "orders" which are in format like regulations, but are addressed to specific industries or trades.

There is some support for the Board's position. It has been held that there is no fundamental distinction between interpretation and legislation in the work of an administrative agency.¹⁹ This proposition can be demonstrated logically and by analogy with precedent pertaining to the powers Congress derives from the Constitution.²⁰ But it is not so clear in the Board's case, because of what appears to be a specific legislative intent on the part of Congress to limit legislative type rule-making powers to those situations in which the formulation of a regulation has been specifically indicated. The legislative history of the Act does not make this explicit. The language of the Act itself, however, contains specific statements directing or permitting the promulgation of a regulation in some cases as distinguished from other specific directives in the Act which lack such a mandate. Different types of regulatory action, with differing legal consequences, would appear to be called for. The Act is fairly specific as to the ends to be achieved by regulation and by order and as to the means to be used by the Board. Little is left to implication. A complete job of legislative regulation can be accomplished within the words of the Act, as augmented by regulations on the subjects concerning which rule-making has been specified, and by interpretation of order as to the residue.

Such an interpretation of the sources of regulatory power would not permit the Board to perform some actions which derive from a less literal interpretation; but it is arguable whether any such actions would further the authorized purposes of the Act. Whatever the merits of the argument for a strict interpretation, the Board has in fact accepted a "liberal" interpretation of its rule-making authority. It has adopted regulations deriving authority from sections of the Act having no specific regulations-directing language.

For example, Parts 251 — *Prohibited Interests, Interlocking Relationships* and 261 — *Filing of Agreements* rely on Sections 409 and 412 respectively for authority. Neither section requires any action subject to such rules or regulations as the Board may prescribe or says anything about implementing regulations. Section 409 prohibits certain inter-company relationships by its officers or directors. Section 412 (a) requires the filing of certain specified types of agreements. Section 412 (b) requires the Board to disapprove *by order* those agreements that are "adverse to the public interest or in violation of the Act." The regulations in these Parts undoubtedly provide useful tools for carrying out the Board's responsibilities, but they are neither an interpretation nor a rule of action implementing the Act. Part 251 establishes a procedure for obtaining approval of a prohibited relationship: it does not prohibit or prescribe conduct as a true economic regulation does. Its objectives can be accomplished by resort to authority under

¹⁹ *Implied Regulatory Powers in Administrative Law*, Hans J. Morgenthau, 28 Iowa L. Rev. 575.

²⁰ *McCulloch v. Maryland*, *supra*.

Section 407. Part 261 stems from Section 412(a) which is so specific as to be self-executing. If details regarding the method of filing contracts are required, either a procedural regulation or informal instructions regarding the form and manner of filing the required contracts would be appropriate.

In adopting regulations without specific authority or in misplacing its requirements in the Economic Regulations, the Board has possibly assumed (1) that some regulation was essential, (2) that the regulation was germane to the general objectives of the Act, (3) that fine distinctions were not its function and/or (4) that if any regulated person did not like the regulation he could present the matter to a court in a challenge of the Board's authority.²¹

Not only the Board but the courts seem to be opposed to the strict interpretation suggested here. The courts have held that an express grant of power to make rules in several instances and the lack of such grant in other instances is not conclusive proof of the intention to withhold power to make rules unless there is a clear legislative intent to preclude regulations.²² This does not close the door on the matter because a clear legislative intent to preclude can be inferred in this case. It is doubtful that the present Supreme Court would so find, however. In the N. B. C. case it has stated:

"True enough the Act [Communications Act of 1934] does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field that was both new and dynamic . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers."²³

The same court could say the same thing about aeronautics under the Act. Mr. Justice Frankfurter could say of the strict interpretation argument, as he said in the N. B. C. case, that Congress would have frustrated

". . . the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of specific manifestations of general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which is the dominant pace of its unfolding."

This is heady talk: Congressional action as "specific manifestations of general problems" and an industry with a "dominant pace" to "its

²¹ See: *Manhattan Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

²² This seems contrary to the general rule of statutory construction that where a statute expressly states the situations where a regulation may be promulgated, it thereby negates authority to make regulations in situations not expressly mentioned. See: 50 Am. Jur. *Statutes*, Sec. 244; and 59 C. J. *Statutes* for references to the application of the maxim "expressio unius est exclusio alterius" in statutory interpretation.

²³ *N.B.C. v. U.S.*, 319 U.S. 190 (1943); also *C.A.B. v. State Airlines*, 338 U.S. 574, p. 576 (1950); *American Airline v. C.A.B.*, 178 F. (2d) 903 (1949).

unfolding." These are tough things to be accused of frustrating and no Congressmen want to be accused of stereotyping. The loose-constructionist approach would appear to be the "dominant" one; and the Board, with apparent Supreme Court encouragement, is well within the limits of sound discretion in acting accordingly with regard to its rule-making powers under the Act.

It can therefore be safely assumed that, with respect to future regulatory activity, the Board will not be governed by strict rules of relevance as to its authority to put out legislative regulations. The Board will feel free to issue regulations on any subject that is in any way related to the subjects covered by the Act. "Implied" powers will be relied upon.

This is the basis upon which regulations are prepared and explains, no doubt, such regulations as Part 224 which compels air carriers to carry personnel without charge when they are "acquainting" themselves "with problems affecting air traffic control." This is also the basis for Parts 290 through 296 which extends exemptions to specified air carriers from certain sections of the Act and regulations on condition that an elaborate scheme of rules is followed. These exemptions "on condition" are in effect a whole subsidiary set of regulations which have no status whatever under any specific terms of the Act.

It is not meant to imply by the foregoing that the broad objectives sought by the Board cannot be accomplished or are to be frustrated by a strict rule of relevance in interpreting authority. Other means than an Economic Regulation are available, and Economic Regulations deriving from other sections of Title IV may be more appropriate in some cases. It is contended that the Board has a responsibility to rely on specific authorizations and to avoid vague and tenuous allocations of authority. The latter result in time-consuming and costly disputation both in the courts and before the Board and its examiners. A policy of following close rules of relevance will produce less litigation, a more solid basis of law observance requiring less enforcement activity and a more lucid and coherent set of regulations would lead to easier enforcement. Purely as a technical and practical matter, the present haphazard formulation and location of Economic Regulations, or what are in effect Economic Regulations, results in unnecessary difficulties for both the Board's staff and the air carriers. The importance of a sound policy regarding the formulation of Economic Regulations is obvious when it is considered that each regulation—either through the imposition of direct costs on airlines or through the limitations of their opportunities for gain—can strike directly at the financial position of an air carrier. Each regulation can create an increased need for public subsidy.

POTENTIALITIES OF ECONOMIC REGULATIONS AND
INTERPRETATIVE STATEMENTS

The United States Supreme Court has said,

"The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."²⁴

A comparison of the amount of space taken up by the Board's regulations with that of its case reports, of the time spent by the Board on the consideration and adoption of regulations with that spent on decisions, and the number of personnel devoting full time to the study and preparation of Regulations (one attorney) with those engaged in individual case work would not lead to the conclusion that the Court's advice was being followed by the Board.

There is a great need for regulations among the regulated members of the industry as against decision by case adjudications. An eloquent statement of this need by a practitioner in the communications field has been made as follows:

"The trouble with federal administrative tribunals, . . . as I see, is not with the procedure used in adopting regulations but rather that the legislative method of making law is not used enough. They rely too heavily on the slow, cumbersome and uncertain judicial method, the so-called gradual process of 'inclusion and exclusion' from case to case, in arriving at principles, in a word, in arriving at more definite sub-standards of a vague statutory standard such as 'public interest, convenience or necessity' . . .

"It is precisely by the legislative method that a body of experts working in a specialized field can make the greatest contribution toward 'filling in the gaps' of the legislative policy (or lack thereof) fixed by Congress. Dealing intensively and continuously in a narrow field they learn (or should learn) rapidly what rules of conduct are needed . . . Why is it that administrative agencies are so backward about exercising these powers? Why do some of them shy away from an attempt to work out definite rules in advance, so that the citizen may be advised of his rights and duties and all citizens may be treated uniformly? Why do they insist, to so large extent, on importing all the excess baggage of the common law case method from the courts? I fear that in part at least the reason is that the case method involves less day-by-day effort and postpones the occasion when Beowulf must grapple with the monster of fundamental principles."²⁵

The extent to which the Board provides guiding rules is a matter within the discretion of the Board. It can respond to facts shown to exist or to facts it observes and experiences. Equally, it can ignore them until they indicate urgent problems. The facts can be presented to it by interested persons in a formal hearing. In such a case the speed of its response and the thoroughness with which it acts are

²⁴ *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947).

²⁵ *Federal Communications Procedure*, Louis G. Caldwell, 7 *George Washington L. Rev.* 740, pp. 757-758.

matters over which it has complete control and discretion. They are qualitative matters and no legal responsibility to act in a prescribed way (within the ambit of existing authority) can be shown nor do parties have any rights to the promulgation of a specific type of regulation.

Present procedure necessarily results in considerably less than a comprehensive coverage of the field. Up until recently, for example, the Board had not issued any regulations governing charter and special services and it is doubted if anyone had a right to a regulation on the subject regardless of the confusion such a failure to act may have created.²⁶ It is recognized that there are strong pulls away from controlling by regulations. In my opinion the Board can legally refrain from issuing any regulation, or issue only meagre regulations to implement the Act.

In effect, formal Economic Regulations are avoided by case-by-case regulation by the Board itself or by staff give and take in correspondence and conferences with representatives of the air carriers. Where there are a variety of circumstances to be dealt with which can not be perceived in advance this is desirable and necessary. This is invariably the case where the problems are new, and the methods used by the airline industry new and changing. Its problems were at one time varying and specialized in nature. Future problems could not be foreseen nor could their nature be gauged accurately by the Board or the industry. In the absence of experience or necessary foresight the case-by-case method is a legitimate way of crystallizing tentative judgments into rules.

These pressures away from the use of regulations, notwithstanding, it is believed that there are compelling reasons of public interest, if not of law, which impose a responsibility to resort to a more intensive use of regulations and specific interpretations for defining conduct. A statement, attributed to Charles Evans Hughes, fortifies this conclusion:

"The greatest assurance against an unsound rule of law is a machinery by which its nature is made known and whereby any departure from its uniform enforcement will be revealed to public gaze. This is provided to a considerable degree by the legislative method, and is not provided by the case-to-case method. The latter permits the agency to avoid stating the principle which it is really applying and to conceal discriminations in the verbiage of findings and conclusions of fact."

The purpose of a regulation or an interpretative statement is to inform the industry in detail as to the conduct the Board expects it to follow in those cases in which regulations are authorized. A regulation

²⁶ A regulation was proposed January 18, 1950, 15 F.R. 298, by Notice of Proposed Rule Making, Draft Release No. 42, and February 15, 1950, 15 F.R. 827, Draft Release No. 42-A. A regulation on this subject has recently been adopted as Part 207 of the Economic Regulations, 16 F.R. 2700, March 28, 1951. Over a year elapsed before action was taken on the draft proposal. The authorization to regulate the subject has been in the Act since 1938.

is a quick method of discharging such a responsibility with equality of treatment to all persons in the same situation. The cumbersome and uncertain case-to-case judicial method of arriving at principles is not a satisfactory way of meeting a responsibility to solve such problems as, for example, informing the industry of conditions of public interest which justify an authorization for a temporary suspension of service or for a change in tariffs on less than the required number of days' notice. A decision and an order do not advise each and every member of the industry in advance of his right and duties, and he is not assured equal treatment with his competitors. The judicial method only informs the participants in the case.

The so-called irregular air carriers, for example, until recently had to go to the Page Airways Inc. Investigation decision and to the Investigation of Nonscheduled Air Services decisions²⁷ in order to determine some of their duties. From these decisions they had to abstract general principles as announced in connection with the facts in those cases and apply them to their own situation. Is it any wonder that they have, in the past, been uncertain — as they professed to be — as to their duties; and, having a lot of money tied up in their venture, that they gave themselves the benefit of any doubts in applying a general principle to themselves? Temporary success with this procedure led them to invest more, they continued with no clear interpretation of the Act to guide them, until now the activities of some of them appear to be nothing but transportation bootlegging.

The feeder line operator is another party who may be bedevilled by uncertainty as to the law applicable to him. A feeder is generally one whose certificate has a duration of three years and requires stops at all points named therein.²⁸ Uncertainty exists both as to the time and manner of renewal of such certificates — obviously a matter of some importance to those having an investment in equipment and having management responsibilities for such a line. An applicant for a route knows he is only being given a three year life when a decision is rendered on his application and that during such period his "experiment" will be "watched" by the Board.²⁹ It is believed that the Board could fulfill its responsibility to be of service to the public and to investors if it would announce in advance its conditions for extending approval of temporary local service.

The Board also allows a six-month period for getting feeder operations under way before the three years period begins.³⁰ This too could be announced by a general statement instead of stating the principle from time to time in Board decisions. This period may be further extended upon "appropriate showing" (not otherwise defined) to

²⁷ 6 C.A.B. 1049, 1061.

²⁸ *Rocky Mountain States Air Service*, 6 C.A.B. 695 (1946).

²⁹ *Texas Oklahoma Case*, 7 C.A.B. 481 at p. 528.

³⁰ *New England Case*, 7 C.A.B. 27.

the Board that new equipment is not yet ready. This is still another rule that is buried in decisions.

In two early cases the Board stated its opinion that

“the legal restrictions contained in Sec. 408(b) of the Act prohibit as a matter of law the entrance of a surface carrier into air transportation . . . unless such authorization would promote the public interest by enabling the surface carrier to use aircraft to public advantage in its operation.”³¹

This would appear to be a flat rule of interpretation regarding a statutory standard which guides the Board in determining whether public convenience and necessity require the issuance of a certificate under Sec. 401 (d) (1) of the Act. The rule was made final in *American President Lines et al., Petition*.³² A general announcement of this principle by interpretative regulation would forewarn the industry in this regard.

These cases, as well as others which could be cited, indicate that the Board's procedure occasionally has unfortunate results. For lack of published principles, air carriers are forced to hazard their own guesses as to what would constitute acceptable performance and the ultimate results can be inimical not only to the carriers but to the public interest. The intrinsic construction of the Act argues for coherent economic regulations closely derived from specific authorizations. The practical effects of proceeding without such a set of regulations evidence the necessary shortcomings of an alternative course.

A need for more regulations in certain areas is consistent with a need for more strict observance of the authority to promulgate differing types of regulations. Once an authority clearly has been shown to legislate by regulation, the authority can be exercised with thoroughness and detail as to the required conduct. Once a need has been shown for an interpretation of the Act by the establishment of policy and guiding principles, they can be stated by further regulation. It is therefore suggested that the potentialities for more regulation through the Economic Regulations could be exploited with benefit to the industry through a more complete understanding of what conduct the Board expects and advance statement of what policies and interpretation the Board expects to follow in the future administration of the Act.

³¹ *American Export Lines, Control—American Export Airlines*, 3 C.A.B. 619 (1942).

³² 7 C.A.B. 799, March 19, 1947.