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THE CERTIFICATE OF CONVENIENCE AND NECESSITY APPLIED TO AIR TRANSPORTATION

THOMAS H. KENNEDY*

INTRODUCTION

Air transportation¹ in the United States has grown from nothing to a system flying over fifty thousand miles daily within the last decade. The legal aspects of this new development have received considerable thought. Soon after the late war a committee of the American Bar Association undertook the study of proper air legislation. Full consideration over a period of years convinced the Committee on Aviation Law that it would be unnecessary to amend the Federal constitution in order to give the general government power to regulate flying. The commerce clause together with the treaty-making power were believed sufficient authority on which to ground legislation controlling not merely interstate and foreign air commerce but *all* flying within the United States.

In May, 1926, the Air Commerce Act of 1926² was approved. This statute, now in force, provides for the regulation of aircraft and airmen engaged in interstate and foreign commerce and according to a declaration by former Assistant Secretary of Commerce MacCracken—who was charged with air affairs under the act—the air traffic rules promulgated therein apply to *all* flying within the United States regardless of whether the operation is intrastate, interstate, or foreign. It is said by this official that these regulations are exclusive in character, prohibiting any air traffic laws from being

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1. "Air transportation" is here used to identify air operations by established concerns, flying on regular schedule, between fixed termini, over an announced route. This article does not purport to treat of the other great class of air operations, viz., aerial service operators. This last class, consisting of flying school, air taxi, and air photographic services, includes by far the largest number of used aircraft. Records of the Department of Commerce for 1927 show 128 airplanes in air transportation service and 3,150 planes in either private or aerial service use. For 1928, 6,320 planes are listed not of air transportation classification. Possibly less than 500 are now in air transportation work. See "Domestic Air News," Department of Commerce, Washington, No. 50, April 15, 1929.

2. 44 St. at L. 568; U. S. Code tit. 49 ch. 6; Williams "Federal Legislation Concerning Civil Aeronautics." (1928) 76 U. of Pa. Law Rev. 798.

enacted by a state.³ The soundness of this sweeping contention may be questioned and it is doubtful if the courts will uphold an attempt on the part of federal officials to regulate a flight wholly within one state where the aircraft in question has no possibility of contact with other craft flying in interstate commerce. It is thought by some that before long the skies will be so saturated with aircraft operating in interstate commerce that the courts will find as a matter of fact that all flying does affect interstate commerce and so exclusive federal regulation will be sustained.

Air mail operators under the Kelly Law⁴, fly in thirty-eight states, the District of Columbia and to several foreign countries. Although air passenger service is rapidly coming into its own, carrying the air mail forms the backbone of American air commerce and any consideration of air law problems must be concerned to a great extent with conditions encountered by the air mail carriers. With one or two unimportant exceptions the air mail operators engage in either interstate or foreign flying. Of the strictly passenger lines some operate wholly in intrastate commerce, or at least particular divisions of their operations are confined to one state. California has been the scene of such a development. Between Los Angeles and San Francisco there are at this writing four strictly passenger-carrying airlines. The air mail operator carries passengers incidentally in one direction. Two of the strictly passenger lines are divisions of interstate carriers, using terminal airports in common with interstate airlines. The airmail operator carries the mail between these two points as a part of an interstate operation. As to strictly intrastate business undoubtedly the state possesses some regulatory authority even over interstate airlines or lines connecting with interstate carriers *in the absence of federal legislation*⁵ on the subject.⁶ However with the expansion of the air transport business interstate business becomes more and more important and the role of the strictly intrastate operator less so. Federal occupation of the

3. Aviation Magazine (New York), March 14, 1927. Mr. MacCracken is quoted as follows: ". . . the air traffic rules promulgated pursuant to authority contained in the Air Commerce Act of 1926" (reference is here made to Air Commerce Regulations, Department of Commerce, December 31, 1926, as amended March 22, 1927, and June 1, 1928) "apply equally to all air navigation, both civil and military, commercial and non-commercial, and therefore, there is no jurisdiction in any state or local authority to enact any air traffic rules."

4. Contract Air Mail Act, Feb. 2, 1925; amended June 3, 1926, and May 17, 1928, 43 St. at L. 805; 44 St. at L. 692; Pt. I. St. U. S. 70th Cong. 1st Session, p. 594; U. S. Code tit. 39, ch. 13.

5. Italics ours.

6. *Morris v. DUBY* (1927) 274 U. S. 135, 47 S. Ct. 548.

field of regulation may be expected at any time and with the assertive action of the dominant authority much of the regulatory power of the states will pass out of existence. We may justifiably concern ourselves mostly with considerations of federal jurisdiction in this inquiry.

Lawyers whose task it may be to construct the regulatory law of the air may be thankful that the motor surface carrier has just emerged from a stage of evolvemént and that it has caused to be solved many interesting legal questions. Motor stage law should serve as an excellent model for the shaping of air transport law. The law of carriers generally will no doubt be drawn on greatly by the courts in their efforts to fix liability for damage caused by air operations. However the *law of regulation* worked out for the railroads based on social and economic conditions of half a century or more past may be found only partially adequate as a guide to present day needs of public control over air transport. The regulatory principles developed for the motor stage within the last ten years may prove to be much better suited to adoption for the air carrier. It behooves us then to attend some of these recently announced rules. As to motor surface carriers it has been held that the denial by a state of a certificate of convenience and necessity,⁷ to an exclusively interstate carrier is an undue and unreasonable burden on interstate commerce and as such is unconstitutional.⁸ However, states may require an interstate operator to procure a certificate covering intrastate operations unless such a requirement amounts to an unreasonable burden upon interstate commerce.⁹ There is little reason to believe that these rulings will not be applied to air transport. An aircraft operated from point to point carrying passengers or goods is certainly engaged in the same business as a motor stage running along the highways between the same or similar points carrying similar cargo. It is inconceivable that different sets of rules of liability and regulation will be set up for the airline than

7. The nature of the certificate of convenience and necessity is discussed later in this article.

8. *D. E. Lilienthal and I. S. Rosenbaum* "Motor Carrier Regulations" 36 *Yale Law Journal* 163, 179, and cases cited. This article treats the regulatory problems of stage operators and as the material can so easily be applied to the very similar problems of air transport companies all interested in air transport regulation are urged to study it with care.

See also *D. E. Lilienthal and I. S. Rosenbaum* "Motor Carrier Regulation in Illinois" 22 *Illinois Law Review* 47; *Gustavus H. Robinson* "The Interacting Area of Regulatory Authority in Public Utilities" (1928) 76 *U. of Pa. Law Rev.* 548. "Motor Carrier Regulation" note 7 *supra* at p. 180.

9. This rule obtains in the absence of federal occupation of the field. See note 5 *supra* and *Napier v. Atlantic Coast Line R. R.* (1926) 47 *S. Ct.* 207.

for the stage line merely because a different instrumentality is used in carrying out the purpose of the business. In fact to regulate one form of transportation and to leave untouched a rival raises the very interesting constitutional question of equal protection under the law.¹⁰

II.

THE NATURE OF THE CERTIFICATE

The certificate of convenience and necessity was unknown to the common law. It is purely a statutory creation. "In the meager light which the courts have shed upon the legal position of the certificate . . . it seems to be revealed as *sui generis* standing somewhere between a franchise on the one extreme, and a mere license on the other."¹¹ As a statutory creation the certificate in form and effect varies with each statute. An interesting observation in this connection is that a regulatory statute worded to give a commission, or officer, power to do certain specified things by means of a certificate cannot be considered a basis for giving the regulatory authority any other power than that expressly stated within the statute. To illustrate, if a statute gave the Interstate Commerce Commission power to restrict competition between interstate air carriers and required all such carriers to obtain a certificate of convenience and necessity before engaging in interstate air commerce, by no possible authority could the commission control the involved carriers in any other manner, as for example by requiring them to procure a certificate before issuing securities.¹²

The law of most jurisdictions creating regulatory commissions provides for control by the commission over public utilities by means of a certificate of convenience and necessity.¹³ The certificate in its most prominent form is an order permitting the construction, operation, or discontinuance of a public utility. There are various other matters which the regulator may control by the certificate or

10. For the tendency of the courts to include within the scope of regulation all possible types of carriers see *Western Association of Short Line R. Rs. v. The Railroad Commission of California* (1916) 173 Cal. 802. At p. 806 the court says: "And moreover it is not only a matter of common knowledge, but it is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of whose revenues goes by way of taxes to the support of the state."

11. "Motor Carrier Regulation" *supra* note 7 at p. 169.

12. See *infra* note 35.

13. *Collier* "Public Service Companies" (1918) p. 462.

by order, such as issuance of securities, compelling the construction of facilities, or the operation of certain services.

III.

HISTORY

Massachusetts was the first state to adopt a public utility act. The purpose of the statute was to control public utilities and to protect the public from the evils of competition and monopoly.¹⁴ In *Idaho Power and Light Company v. Blomquist*¹⁵ the court traces the development of certification in the following language:

"The first general steps taken by the legislatures in their attempts to correct existing difficulties between public service companies and the communities which they served, were to provide for rate regulation in order that the consumer might be protected in cases where there was no competition. Competition was looked upon as a regulator and rate regulation was accepted as a protection to the public. Competition between public utility corporations led to rate wars in which each company tried to get the advantage or destroy the other and usually resulted in the destruction of one of the competing corporations or a division of the territory between them (or) in the consolidation of such corporations. Statutes to prevent such consolidations and to prevent the division of the territory have been enacted . . . and experience shows that there can never be competition in matters of this kind."

14. Mass Rev. Laws ch. 121 sec. 33, Amend. Sts. 1903 ch. 164, p. 125. Knowlton, C. J.: "Our statutes are founded on the assumption that to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same streets would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time and the interference with pavements, street railway tracks, water pipes, and other structures. *Weld v. Gas & Electric Light Commissioners* (1908) 197 Mass. 556, 84 N. E. 101.

Holmes, J.: "The legislature may think that a business like that of transmitting electricity through the streets of a city necessitates transaction of that business by a regulated monopoly and that free competition between as many companies and persons as may be minded to put up wires in the street and try their luck is impractical. *Attorney General v. Walworth Light & Power Co.* (1892) 157 Mass. 87, 31 N. E. 482.

"Experience proved that business rivalry in the public utility field was bad both for the companies and the public so the policy of discouraging rather than encouraging competition between public service companies was adopted." Spurr "Guiding Principles of Public Service Regulation" (1924) p. 31.

15. (1914) 26 Idaho 222, 141 p. 1083.

"That case was decided in 1837. Then 'competition is the life of trade' was accepted as a guiding maxim of economics. That maxim has long since been rejected so far as it applies to public utilities. Uncontrolled competition is now regarded as destructive of such utilities." *Baltimore & Ohio R. R. Co. v. Road Commission of West Virginia* (1927) 104 W. Va. 188.

Some authorities on public utility law have attempted to make a distinction between public utilities which are "natural monopolies" and those not "naturally monopolistic." For the first class they advocate public regulation limiting competition while for the last class they hold that public convenience and necessity does not require service by one or a few operators but rather that the open field is desirable. The line of demarcation between the so-called "natural monopolies" and their antithesis is not altogether clear. Perhaps physical characteristics of the utilities to be classified determine their status. If a telephone company is involved it is a "natural monopoly" because it must have a large and easily recognized physical plant in the form of pole lines and cables in the streets. A railroad would be a "natural monopoly" because of its right of way, rails, buildings, etc. The physical plant is great and the public convenience and necessity will not permit of its needless duplication. However the adherents of the natural-unnatural division say that tug boats are not of the natural monopoly class. The reason supposedly is because no large capital outlay is represented in the fixed plant of a tug boat system. Following this what appears to the eye test a telegraph company would be classed a "natural monopoly" while a radio operator paralleling the telegraph company and rendering exactly the same kind of service would very probably be classified as "unnatural monopoly." The wire company would be protected from competition by other telegraph companies but not from identical competition from one or many radio companies. The radio carrier would receive no protection from competition from the few or single telegraph companies nor from all radio operators choosing to enter the field. The air transport operator likewise would fail to receive public protection from competition because no examining board would be able to see a very great fixed plant. Moreover the railroad from which the paralleling air operator was drawing considerable business would be protected from undue rail competition but not from air competition.

The fallacy behind the "natural-unnatural monopoly" theory is the assumption that the public has an interest in its own protection from the evils of duplication of facilities of public utilities when the facilities are composed largely of a quickly discernible fixed physical plant and that it has no interest in its own protection from the evils of duplication when the plant is not extensive, apparent, or immovable. Surely the public must pay for the waste attendant on duplication of a comparatively small one million dollar radio apparatus, just as much as it must pay for waste accruing from the duplication of a

rambling, comparatively large street railway valued at a million dollars. If the public has an interest in eliminating competitive waste in businesses affected with a public interest then actually it matters not what kind of a physical plant the business employs.

The theory underlying the limiting of competition between public utilities is that competition results in duplication of investment which in turn is transmitted to the public in the form of higher rates. In order to secure to the public minimum rates and to provide a stabilized public service public policy has dictated monopoly or quasi-monopoly regulated by the state. Regulation of the respondent industries is carried out by the regulating authority by means of the certificate of convenience and necessity, as well as by other forms of orders.

"Although common enough in state public utility legislation, until the Transportation Act, 1920, amending the Interstate Commerce Act, this expedient (the certificate of convenience and necessity) had apparently not been employed in the regulation of interstate commerce. By paragraphs 18, 19, and 20 of sec. 1 of that act Congress required all carriers under the jurisdiction of the act to secure such a certificate before extending their old lines or constructing new ones, or before acquiring or operating a railroad or extension; the same requirement was laid down before any carrier might abandon any part of its line."¹⁶

The Air Commerce Act of 1926¹⁷ requires no certificate of convenience and necessity for operation over a federal airway but on the other hand specifically provides: "The Secretary of Commerce shall grant no exclusive right for the use of any civil airway, airport, emergency landing field, or other air navigation facility under his jurisdiction."¹⁸ This provision seems to state the policy of the federal government in the case of air navigation as directly opposed to its policy toward interstate railroads, and the general policy of the states with regard to public utilities and some other businesses subject to monopoly-enforcing regulation. As to air transportation competition is to be encouraged, while as to other regulated enterprises competition is either restricted or banned in toto. The reason

16. "Motor Carrier Regulation" supra note 7 at p. 167.

"Certificates of convenience and necessity were required in the case of railroads before the necessity of providing against competition was appreciated. The commissions were supposed to grant the certificate if certain requirements with respect to safety of operation and sufficiency of equipment were complied with . . . The present commissions may refuse certificates if they conclude that the public convenience and necessity do not require the new enterprises. They may grant them if they determine that the public will be benefited by such action." *Spurr* "Guiding Principles of Public Service Regulation" p. 34.

17. See supra note 2.

18. Stats. at L. 568, sec. 5, d.

Congress made this exception to the general rule is evident, viz., its desire to give free rein to the development of this new industry. However once air transportation is securely established there is every reason to believe that the national legislature will reverse itself and fix for air transportation the general rule applied to regulated business, the rule of controlled monopoly or quasi-monopoly. It is admittedly the policy of the United States to encourage aviation and if history can be trusted to repeat itself, it will soon become evident that by permitting ruinous competition between air transport companies aviation is not being encouraged but is rather being devitalized and stunted in growth.¹⁹

IV.

REGULATING AIR TRANSPORT BY THE CERTIFICATE

The present policy of American governments tends to restrict unlimited competition between public utilities.²⁰ If the air transportation business is a public utility, it can be reasonably supposed that sooner or later the restrictive force of government will be exercised to limit the number of air lines and reduce to some extent com-

19. One of the first examples of direct competition in American air transportation is that on the airway between San Francisco and Los Angeles, California. During the summer season of 1929 there were in operation over this route one mail, assenger and express operator and four passenger operators,—five operators giving almost identical service. The tendency to undercut each other's rates early became manifest. During the summer season of 1928 the one-way fare between San Francisco and Los Angeles ranged from \$45 to \$50. During the summer season of 1929 the air fare between these two points ranged from \$22.00 to \$32.50. During 1928 and 1929 some interests proposed state legislation giving the Railroad Commission of California authority to require certificates of convenience and necessity for air common carriers operating on fixed schedules over established routes. On account of the vigorous protests against such legislation on the part of some of the interested carriers, the proposal was dropped. The Railroad Commission now has authority to regulate rates of "railroads and other transportation companies" by a constitutional provision. California Constitution, art. 12, secs. 20-22.

Speaking of proposed federal legislation seeking to regulate motor surface transportation, Attorney-Examiner Leo J. Flynn for the Interstate Commerce Commission says: "The public interest and national welfare are fundamental in legislation affecting transportation. In the administration of regulatory laws when there is conflict between public interest and private interest, the former is paramount and the latter must give way. Railroads have no more economic right to any traffic than had canals and stage coaches which opposed the construction of railways on the ground that they would take traffic already being carried on the canals and highways. *But economically wasteful rivalries which marked the past should be avoided for, in the end, the public must pay.*" (Italics ours.) Examiners Report on Motor Transport" (Jan., 1928) 84 Railway Age 269, 274.

20. Thomas P. Hardman "The Changing Law of Competition in Public Service" W. Va. Law Quart, April, 1927, p. 219.

petition in this field of endeavor. If such regulation is inevitable, and for the sake of argument it will be assumed so, what kind of regulation will best serve the public, which also asks the question, what kind of regulation will best serve the industry for the public wants a strong and flourishing aeronautical industry.

Is the air transportation business a public utility and subject to regulation as such? In the case of carriers, if the carrier holds itself out to accept for transport all comers to the limit of its facilities, then it is classified a common carrier²¹—the most easily recognized public utility—and is subject to the most rigorous forms of regulation.

Air mail operators are of course subject to regulation by the federal government under the constitutional authority of Congress to establish postoffices and post roads. As a practical matter, the postoffice department can, and does, regulate air mail contractors by the terms of the contract. The air transport operators engaged in interstate commerce have been regulated by the Air Commerce Act²² and this regulation is imposed upon the theory that they are engaged in an operation comprehended by the commerce clause of the constitution.²³ However, if the business is in fact that of a private carrier the legislature cannot by mere declaration nor definition transform the private carrier into a common carrier and it is settled law that a private carrier cannot be regulated as a public utility by the states, for to do so would amount to a transposition of the private carrier into the class of common carriers amounting to a violation of the Fourteenth Amendment of the United States Constitution as a taking of private property without due process of law.²⁴ Neither can the federal government by legislative fiat convert

21. Calif. Civ. Code sec. 2168; *Michigan Public Utilities Commission v. Duke* (1925), 266 U. S. 570, 45 Supreme Court 191 (See infra note 23); *Terminal Taxicab Company v. Kutz* (1915), 241 U. S. 252; *Wolf v. Industrial Court* (1922), 262 U. S. 522; *Gustavus H. Robinson* "The Public Utility Concept in American Law" (1927) Harv. Law Rev. 277.

22. See supra note 2.

23. "The power of Congress to regulate the instrumentalities or agencies of transportation grows out of its power to regulate commerce and is not limited to commerce by a common carrier, private carrier, or by an individual for his own purpose," Examiners Report on Motor Transport supra note 18, at p. 276.

24. *Michigan Public Utilities Commission v. Duke* supra note 20.

The plaintiff was engaged in the operation of motor trucks between Detroit, Michigan, and Toledo, Ohio. He had three contracts to haul automobile bodies between the two cities. He did not accept any other shipments from any other shippers, confining his business entirely to that derived from the three contracts. The Michigan statute sought to define such an operator a common carrier and to subject him to the authority of the Michigan Public Utilities Commission. The United States Supreme Court held the act void. Butler, J.: "Plaintiff is a private carrier . . . He does not undertake

a private carrier into a common carrier without violating the due process clause of the Fifth Amendment.²⁵

It follows that an air line operating in interstate commerce, if it restricts its business to that of a private carrier, may not be

to carry for the public and does not devote his property to any public use. (The Act) would make him a common carrier and subject him to all the duties and burdens of that calling and would require him to furnish bond for (that purpose) . . . It is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking property for the public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment."

In *Frost v. R. R. Commission* (1926) 271 U. S. 583, 46 Sup. Ct. 605, 610, the Supreme Court of the United States reversed the holding of the Supreme Court of California. The State court had held that all of the conditions precedent to operation imposed upon common carriers might also be imposed upon private carriers. Such an imposition was held by the court of last resort to be merely one way of converting private carriers into public utilities.

In "Motor Carrier Regulation" supra note 7, at pp. 176, 177, 178, the authors point out that although the decisions in the *Duke* and *Frost* cases prohibit the states from imposing all of the regulations of public utilities upon private carriers, still there is no holding that a requirement of a certificate of convenience and necessity for a private carrier would of itself amount to a conversion of a private carrier into a common carrier. It is argued that if a certificate of convenience and necessity were required of private carriers in order that the highways might be kept clear of irresponsible machines and drivers, such a requirement would be a valid exercise of the state police power and could not do violence to the Fourteenth Amendment. However if the reason for the imposition of certification were to protect established common carriers in their business, to guard them from unregulated competition, it is to be doubted that such regulation would be sustained. The state can go far in protecting the public's safety and health but when it seeks to impose regulation upon a business purely to protect another business, or the public, from competitive evils its regulatory authority is definitely limited and it must confine its prohibitions to businesses quasi-public in nature or at least affected with a public interest. Private carriers are not of this group. See also *Washington v. Kuykendall* (1927) 275 U. S. 207, 48 Sup. Ct. 41; and *Haynes v. MacFarlane* (1929) 78 Cal. Dec. 92, 279 Pac. 436.

25. In the *Pipe Line cases* (1914) 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459, esp. *U. S. v. Uncle Sam Oil Co.*, the oil company had a refinery in Kansas and oil wells in Oklahoma with a pipe line connecting the two which it used to the exclusion of all others. Holmes, J.: "By act of Congress of June 29, 1906, c.3591, 34 St. at L. 584, the Act to Regulate Commerce was amended so that the first section reads in part as follows: 'That the provisions of this act shall apply to any corporation or any person engaged in the transportation of oil or other commodities except water and except natural or artificial gas by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act.' Thereafter the Interstate Commerce Commission issued an order requiring the appellees . . . being parties in control of pipe lines, to file with the Commission schedules of their rates and charges for the transportation of oil." The court, speaking through the same Justice, held: "The control of Congress over commerce among the states cannot be made a means of exercising powers not intrusted to it by the Constitution . . . It would be a perversion of language considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line

regulated to the extent of a common carrier. There is, however, some reason to believe that an utility which is strictly speaking non-public may be regulated²⁰ by a certificate similar to one of convenience and necessity. For example, a bank commissioner may pro-

to its own refinery for its own use and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to its use at the end." The Chief Justice in a concurring opinion states his views on the subject as follows: "The view which leads the court to exclude (the Uncle Sam Oil Company from the operation of the act) is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. It seems to me that the business carried on is transportation in interstate commerce within the statute. But despite this, I think the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the Fifth Amendment, since to apply it would amount to a taking of the property of the company without compensation."

In the *Tap Line* cases (1914) 234 U. S. 1, 58 L. Ed. 1185, the question of the right of the federal government to regulate certain railroads was raised. The test laid down by the Supreme Court was: Are the roads common carriers? If so, regulation was proper; otherwise not.

In *U. S. v. Union Stock Yards* (1912) 226 U. S. 286, the Chicago Union Stockyards were held subject to regulation because they were a part of a system of common carriers.

In *Wolf Packing Co. v. Court of Industrial Relations* (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 756, the Supreme Court speaking through Mr. Chief Justice Taft laid down the general rule: "The mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation is justified."

In cases cited in supra note 23 and in other cases, the U. S. Supreme Court has held that states are limited by the Fourteenth Amendment from converting a private carrier into a common carrier and as the Fifth Amendment is a similar restriction on the federal government as to due process of law, it is only logical to assume that a similar limitation will be held to control Congress whenever a test case arises.

Attorney-Examiner Flynn introduces the interesting term "contract carriers" as a companion of common carriers and private carriers in his very able report to the Interstate Commerce Commission on Motor Transport Regulation, "Examiner's Report on Motor Transport" supra note 18, p. 271.

26. "Congress has the power to regulate interstate commerce by private carrier or contract carrier:" "Examiner's Report on Motor Transport" supra note 18 p. 276 and see supra note 22 as the basis for this statement. The point may be conceded that Congress has this power but the extent of the power is not unlimited. As to the varying degrees of regulation which are permissible, see *Wolf Packing Co. v. Court of Industrial Relations* supra note 22; *Tyson v. Banton* (1926) 273 U. S. 431, and comment thereon in *Maurice Finkelstein*, "From *Munn v. Illinois* to *Tyson v. Banton*" (1927) 27 Col. L. Rev. 769. In the recent case of *Liggett v. Baldrige* (1928) 49 Sup. Ct. 57, the United States Supreme Court held that a statute of Pennsylvania requiring ownership in pharmacies not already established to be vested in licensed pharmacists was void as an unwarranted invasion of property rights guaranteed by the Fourteenth Amendment. Holmes and Brandeis, J. J., mildly dissented.

A state statute regulating the price of gasoline is invalid. *Williams v. Standard Oil Co.* (1928) 49 Sup. Ct. 115; *Fairmount v. Minnesota* (1926) 274 U. S. 1.

In *Ribnik v. McBride* (1928) 277 U. S. 350, a majority held that legislation of the state of New Jersey providing for regulation of fees to be charged by employment agencies unconstitutional. An employment agent was held to be a broker and as in the case of *Tyson v. Banton* (1926) 273 U. S. 43, the court had held a ticket broker exempt from rate regulation, the same rule

hibit the opening of a bank by withholding his approval if he believes the public convenience and advantage will not be served by such opening.²⁷ The business of banking may be distinguished from that of private carrier as to its public aspects, however, for banking affects the business structure of the whole community²⁸ while that of private carrier does not of necessity have such effect.

If a community should become so dependent upon the operations of a private carrier that irregular operations or abandonment of its services would work serious harm on the public welfare, it might be held that the carrier was so affected with a public interest as to be subject to some kind of regulation, at least as to sufficiency of service. Such a carrier would be put to it to maintain that its character was "private" rather than public, however. The regulation of insurance companies²⁹ and grain elevators,³⁰ while not public utilities in the strict sense, has received judicial sanction.

There is no case to be found holding that a carrier otherwise private becomes public or a common carrier by operating under a contract with the United States government to carry the mails. In fact in *A. T. & S. F. Ry. v. United States*³¹ it is held that a carrier of mails is not, as such, a common carrier but is "an agency of the government."

In view of *Michigan Public Utilities Commission v. Duke*³² and *Hissem v. Guran*³³ it may easily be held that an air mail contractor

was applied here. In his dissent Mr. Justice Stone laid down his idea of the true test of a "business affected with a public interest," page 360: "Such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." Holmes and Brandeis, J. J., concur in this dissent.

27. *Bank of Italy v. Johnson* (1927) 200 Cal. 1, 251 Pac. 784.

28. "The business of banking is a proper subject of regulation under the police power of the state because of its nature and the relation it bears to the fiscal affairs of the people and the revenues of the state and the police power of a state extends even to the prohibiting of engaging in the business of banking except upon such conditions as the state may prescribe." *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112; 7 Corpus Juris 480.

29. In *Merchants Mutual Liability Insurance Co. v. Smart* (1925) 267 U. S. 126, 69 L. Ed. 538, it was held that a state could regulate insurance companies at least so far as to prevent them from committing wrongs or injustices in the exercise of their corporate functions. See also *German Alliance Insurance Co. v. Kansas*, 323 U. S. 89 and comment thereon in *Tyson v. Banton*, supra note 25.

30. *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. Ed. EE; *Budd v. New York* (1892) 143 U. S. 517; *Brass v. N. Dakota* (1894) 153 U. S. 391

31. (1911) 225 U. S. 640, 649.

32. See supra note 23.

33. *Hissem v. Guran* (1925) 112 Ohio St. 59, 146 N. E. 808. An Ohio statute defined as common carriers all operators of motor vehicles using public

confining his activities *entirely* to carrying the mails is a private carrier. Such an operator would carry for one party only and could in no way meet the test of a common carrier; viz., one holding himself out to carry for all comers to the extent of his capacity. Once established as a common carrier, the operator's obligations are far reaching. Earnings above a fixed rate of return may be impounded by the government.³⁴ Once the obligation to serve all is incurred, it is not to be given up at will but the service entered into may be restricted, extended, or abolished by the state. Air mail contractors who have not already subjected themselves to comprehensive regulation may well consider if it would not be to their advantage to limit their business to flying the mails under their government contracts, thereby laying the foundation of a classification as a private carrier, which, in turn, would secure for them the probabilities of minimum regulation. Engaging in general freight, express or passenger business apart from, or in conjunction with, mail carrying will constitute the carrier a public utility if passengers and goods are accepted indiscriminately. Operation under a contract with an express company would undoubtedly be taken by the courts as evidence of a service similar to that rendered where only a mail contract was employed.

Assuming that most air transport operators have already committed themselves to common carriage, what type of regulation by means of the certificate should be imposed? As the policy of the government appears to discourage competition between public utilities, the first step might be taken in the direction of limiting or prohibiting the direct paralleling of air lines.³⁵ To date there is no

highways who transported persons or property or both as a business. The defendants were regular operators of motor trucks over certain routes, carrying dairy products destined to certain dairies, consigned by regular shippers. These operations were based on certain contracts with the dairy companies and no other business was handled. The operators did not hold themselves out to haul for all comers. The court held the operators were private carriers and that they could not be regulated by the state as common carriers.

34. "Control of a business 'affected with a public use' may include . . . control by 'recapturing' excess earnings." *Robert Hale "Non-cost Standards in Rate-making"* 36 *Yale Law Jour.* 66; *Dayton-Goosecreek Ry. Co. v. United States* (1923) 263 U. S. 456, 44 Sup. Ct. 169.

35. The legislature of a jurisdiction has the authority necessary to restrict competition between corporations clothed with rights, powers and franchises to serve the public. Sullivan, J.: "All property is held subject to the power of the state to regulate or control its use in order to secure the general safety, health and public welfare of the people. There is nothing in the constitution (of Idaho) that prohibits the legislature from enacting laws prohibiting competition between public utility corporations." *Idaho Power & Light Co. v. Blomquist*, see *supra* note 14. ". . . the power of the legislature to regulate the services of public utilities may be exercised through a commission, although the constitution is silent on the subject." *People v. Colorado Title & Trust Co.* (1918) 178 Pac. (Colo.) 6, P. U. R. 1918 A 546.

federal legislation limiting competition between air carriers by certification or by any other means.⁸⁶ There is no authority for a regulatory commission to regulate beyond the expressed provisions of statute.⁸⁷ The federal rule is enunciated with regard to the scope of the power of the Interstate Commerce Commission. That body has no right to control any enterprise not expressly, and constitutionally, placed under its administration by statute. And in controlling such designated callings its regulation must be strictly in accordance with the provisions of the statute.⁸⁸

The interests of the air transport owners would be adequately protected, and no doubt enhanced, by the enactment of a statute giving the federal government, through some administrative body, authority to issue to some common carrier interstate airline a certificate of convenience and necessity for exclusive operation over a given route. If the statute were carefully framed the regulatory power could not legally extend its control in any other manner over the certified (or non-certified) concerns. With this protection the established and governmentally-protected lines would be permitted to develop freely without ruinous inroads being made upon their resources by uncontrolled competitors, which unhappy condition may be expected if the present policy of laissez-faire is continued.

It may be said confidently that the public interest demands regulation of air transportation seeking to eliminate wasteful com-

36. See supra note 17.

Recently several states have exercised regulatory powers over common carriers by air, among which are Nevada, Arizona, and Pennsylvania. The California Railroad Commission has authority to regulate rates of air transport common carriers by constitutional grant. California Constitution art. 12, secs. 20, 22. The Illinois Commerce Commission Act gives that body authority to regulate operators of "property used for or in connection with the transportation of persons or property." Commerce Commission Act of June 29, 1921. See *D. E. Lilientahl and I. S. Rosenbaum* "Motor Carrier Regulation in Illinois" 22 Illinois Law Review 47, 52.

37. "Guiding Principles of Public Service Regulation" supra note 13, at pp. 17, 18: "If a commission is given jurisdiction over common carriers, this does not mean it may regulate all common law carriers but only those lines of business (constitutionally) designated common carriers in the statute creating the commission."

38. In *American Sugar Refining Co. v. Delaware, etc., R. R. Co.* (1913) 207 Fed. 733, the court said: "So far as carriers are subjected by the (Interstate Commerce) Act to the administrative authority of the (Interstate Commerce) Commission which it establishes, that authority must be strictly pursued. In other words, acts of the Commission in exercise of its administrative functions must in order to be effective, be strictly (in accordance with) those provisions and requirements of the act by which its authority is prescribed and defined." Acc.: *Hoover v. D. R. & G. W. R. R.* (1927) 17 Fed. (2d) 881; *N. Y. C. R. R. v. United States* (1925) 13 Fed. (2d) 200, reversed on other grounds in *U. S. v. N. Y. C. R. R.* (1926) 272 U. S. 451.

petition. Speaking of the similar subject of regulating motor surface transport Attorney-Examiner Flynn says:³⁹

"It is not a question of whether any particular transportation agency shall prevail or be given advantage. Ruthless, inexorable economic laws will eventually determine that, no matter what attempts may be made to impede or interfere with natural progress. The readjustment or readaptation of transportation facilities should be made with the least possible economic waste. Regulatory legislation and administration should have the single purpose of improving transportation."

The Interstate Commerce Commission is undoubtedly in as good a position as any arm of the government to administer control over interstate airlines. However, there is nothing to prevent the lodgment of this authority in any other federal agency.

39. "Examiner's Report on Motor Transport" *supra* note 18, at p. 276.

The Attorney-Examiner closes his consideration with the following generalization: "There should be a wise and farsighted coordination of all existing transportation agencies—land, water, and air. The nation's transportation machine must be kept at its highest efficiency so as to advance the prosperity of the country and promote the happiness and welfare of its citizens in peace, and in order that it may be prepared to respond as a tremendous factor in the national defense in time of war."