Journal of Air Law and Commerce

Volume 3 | Issue 1 Article 4

1932

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CERTIFICATES OF CONVENIENCE AND NECESSITY FOR AIRCRAFT CARRIERS*

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The regulation by state public utilities commissions of aircraft engaged in the business of transporting persons and property is yet so novel that any deductions I may draw must necessarily be broad, and the facts must be largely taken from my own experience in Illinois. Indeed, it may be that many of you have never heard of certificates of convenience and necessity for aircraft carriers. It is no different from such certificates for other common carriers; that is, they are grants to operate between two or more points and must be supported by adequate service, operating ability and financial responsibility. They are not monopolistic, but in Illinois the old carrier in the field, if responsible, is given first chance to supply any new or increased service required by public convenience and necessity.

In the whole United States but nine states have issued certificates of convenience and necessity to aircraft carriers. These are but sixty-nine in number, and two-thirds of them have been issued in one state, namely, Pennsylvania. The others: Arizona, Colorado, Illinois, Maryland, Nevada, New Mexico, North Dakota, and Wyoming have issued the remainder. Few of such applications have been refused, and Arizona occupies the unique position of having refused more than she has granted. North Dakota issued one without a hearing. At least one certificate has been granted (by Colorado) where there were no intrastate terminals and the operation appears to have been entirely interstate. The application was voluntarily made by the aircraft carrier, and the Colorado Public Utilities Commission took the position that it was compelled to grant the certificate. No reason is assigned why it did not simply refuse to take jurisdiction and dismiss the application. (P. U. R. 1928E, 518.)

For part of the foregoing compilation I am greatly indebted to the Air Law Institute of Northwestern University which has sent a searching questionnaire on this subject to each of the state public utilities commissions. All of us can look forward with

*Paper presented at the First Annual Convention of the National Association of State Aviation Officials, at East St. Louis, December 3, 1931.

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interest to the result of this comprehensive investigation which is now scheduled to appear in the April, 1932, issue of the JOURNAL OF AIR LAW.

The amazing thing is that not more than a dozen orders concerning aircraft carrier regulation have found their way into print. This includes not only the published Public Utility Reports but also such special aeronautical law services as are furnished by U. S. Aviation Reports and the Aviation Law Service of the Commerce Clearing House. It is little wonder that each commission is groping around for the benefit of the other fellow's experience. Those of us who are engaged in this work are in no small measure to blame for this situation.

Even the articles in legal publications are not many on the subject under discussion. Furthermore, they are in most instances too meager to be very helpful. However, I can refer you to three I have found useful: The prophetic one in the January, 1930, issue of the JOURNAL OF AIR LAW entitled "The Certificate of Convenience and Necessity Applied to Air Transportation", "Aircraft as Common Carriers" in the April, 1930, issue of the same publication, and Part II of "State Regulation of Aircraft" in the January, 1930, issue of the Air Law Review.

The lack of activity in this branch of regulatory law appears to be due to three things: First and foremost, the lack of proper state legislation to give jurisdiction; secondly, the desire of commissions to proceed with proper caution in this new form of regulation; and third, the mass of operation problems taking the time and efforts of air transportation companies to the exclusion of other things, or else the reluctance of such companies to be involved in regulation before they are compelled to act.

Failure to have jurisdiction due to the lack of a proper law can only be remedied by the legislative branch in each state. Where such a condition exists the legislature should use great care in amending its public utility act, but each legislature should so act at its next session if air commerce is developing in that particular state or shows any possibility of so doing.

That each commission now having authority to take jurisdiction should proceed with caution is commendable, but in some instances the complete assurance of being absolutely right before acting in the field of air commerce will have to be sacrificed to insure the public safety and good transportation facilities in this pioneering project. It is also the duty of each commission not only to protect the public but also to protect the property and investments

of regular aircraft carriers from unfair and destructive competition by irregular operators. In the motor carrier field this has been held to be a duty imposed by law, and no doubt the same holding will prevail for the aircraft carrier.

Air transportation companies have had many problems to solve, first as to operation, and second as to finances, especially with the falling off in aeronautical investments. However, such companies have for the most part appeared not to give adequate attention to the legal side of their problems and some have had legal advice that has steered them away from being common carriers as long as possible. This latter attitude has been carried so far that some of these companies have made themselves ridiculous in the numerous provisions recited in their long and formidable looking tickets and also in their advertising in which they have insisted upon the fiction that they are private carriers, and at the same time have held themselves forth in every other way so as to be in law common carriers. This of course cannot last much longer because these companies either will obtain different legal advice or else have the knowledge jammed down their throats by unfavorable court decisions resulting in the payment of large sums of money for damages to persons and property where the courts have swept aside the verbose ticket provisions as against public policy and have held these air transportation companies to the responsibility of common carriers. Such a decision might have a serious effect upon the insurance carried by the aircraft company.

If an air transportation company is in fact a common carrier it should be willing to accept such responsibility; and in so doing it will obtain the advantages of such a legal status if a certificate of convenience and necessity is obtained. And it is no small advantage to have a well established business protected from the inroads of competition by irregular operators, to say nothing of the increased marketability of the stock of a corporation so protected.

The last General Assembly in Illinois passed an act creating the Illinois Aeronautics Commission, delegating to it the duties of seeing that all aircraft and all air men have appropriate Federal licenses, that air beacons, air schools, airports and air navigation facilities have State licenses, and the promulgation of rules and regulations. This supervision of aeronautics is specifically said "not to be in conflict with the authority of the Illinois Commerce Commission to supervise and regulate public utilities." In other words the regulation of aircraft common carriers was left in the

hands of the body that regulates all other public utilities, and such provision was necessary in order to avoid any controversy about the constitutionality of each act. Also, it is obvious that in order to properly protect aircraft carriers and their termini, the utilities body must do all the regulating in order to protect the safety of airports from high tension lines, telephone wires and the obstructions of other utilities already under the control of the utility commissions.

The Illinois Commerce Commission Law, originally passed in 1913 and amended in 1921, contains no specific mention of aircraft or the transportation of persons and property via the air, but the following are excerpts from Sections 8 and 10 of this act:

"8. *The Commission shall have general supervision of all public utilities, . . . shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted.* It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the Commission and with the charter and franchise requirements."

10. *"The term 'public utility,' when used in this Act, means and includes every corporation,* company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever . . . *that now or hereafter:*

"(a) *May own, control, operate, or manage, within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property* . . .

"(b) *May own or control any franchise, license, permit or right to engage in any such business.*

"The term 'common carrier,' when used in this Act, includes . . . every corporation, company, association, joint stock company or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever, *owning, operating or managing any such agency for public use, in the transportation of persons or property within the State."*

It was and is the view of the Illinois Commerce Commission that the foregoing provisions give jurisdiction over aircraft carriers. There is good authority for this in Illinois and elsewhere where other utilities not named in the act have been concerned. So far the carriers themselves have taken the same view. In addition the Illinois act is very similar and sometimes identical with

that of a number of other states. As the air commerce business in Illinois began to expand beyond mere carriage of the mails and took on intrastate features the Illinois Commerce Commission began to study the problem. Seeking to use the deliberateness necessary in a new field and seeking to inform itself fully it participated in most of the legal conferences concerning aircraft regulation, and in addition it studied the methods of operation of companies flying in Illinois and in other states. Shortly after the first of this year it decided to take jurisdiction of these carriers under its act, and by a coincidence a new company about to start business in Illinois applied at that time for a certificate of convenience and necessity.

The situation was unusual because the new company, Century Air Lines, Inc., proposed to operate an entirely intrastate air line on a large business basis between Chicago and East St. Louis, two cities on the opposite borders of Illinois. Prior to this time it was rather loosely said that the only purely intrastate lines existed in California; and of course Century maintains its Illinois operation as part of an interstate system running from Chicago to terminals at Detroit, Cleveland and Toledo. In any event Century proposed to start a new operation entirely within the borders of Illinois. It frankly said it wanted to be a common carrier, and offered a ticket about the size of the ordinary railroad ticket and with as little printed matter thereon; and it applied for a certificate of convenience and necessity to operate between the cities of Chicago and East St. Louis, heretofore mentioned, with stops at the intervening cities of Springfield, Bloomington and Peoria.

This territory was at the time being served by a number of railroads and bus lines and by the Universal Division of what is now American Airways, Inc. This existing air service carried the mail between Chicago, Illinois, and St. Louis, Missouri, and offered such intermediate passenger and express service at Springfield and Peoria as the two daily mail runs afforded. However, before any hearing was held Peoria dropped out of the picture due to lack of adequate airport facilities.

In a few weeks after Century Air Lines, Inc., had filed its application, American Airways, Inc., filed an application for a certificate of convenience and necessity to operate between Chicago, Peoria, Springfield and to cross the Illinois-Missouri state line at a point just north of St. Louis, Missouri. Upon the motion of the two air transportation companies the two cases were heard together and each company stipulated that they would agree, insofar as such was permissible, that certificates should issue to each of

them in accordance with their respective applications. At the hearings three railroads appeared, two having filed written protests, but as the cases progressed the railroads dropped out one at a time, and finally all had formally withdrawn.

It is doubtful if the last railroad would have ceased to object, but it was sold before the cases were concluded, the new owner took immediate possession and then formally withdrew the protest of its predecessor. This is most interesting because the companies involved included two of our most important air transportation corporations and four of our largest and best railroad systems. The receiver and former president of the last railroad to withdraw, a man with fifty years railroad experience, testified in substance that there was no public convenience and necessity to be served, that his railroad had an investigation of ten years standing of the air transportation business, and that the time was not yet ripe for it, but on the other hand he said freely that his investigation showed him that the air commerce business was here to stay. Then he concluded with this significant thing, namely, that if a certificate was to be granted his road wanted the opportunity to establish the service and obtain the certificate for itself. It was rather contradictory, but the very earnest expression of a railroad man old in experience and trying to save what had once been one of the country's first and finest railroads lines.

On August 26, 1931, certificates of convenience and necessity were granted to Century Air Lines, Inc., and American Airways, Inc., respectively, and the public has, ever since the hearings were well under way, enjoyed the best of air service in Illinois. The only common terminal points of these two lines are Chicago and Springfield. On June 25, 1931, National Air Tranport, Inc., filed its application for a certificate of convenience and necessity to operate an air line between Chicago and Moline, Illinois, again involving an intrastate business between two cities on the opposite borders of Illinois. The applicant was and is furnishing the only common carrier air service between the points mentioned, and at the hearings only one railroad appeared from among the number of other carriers serving the same territory. There were no objections to the application, and the certificate was granted on October 7, 1931. Now approximately 5,000 miles are flown daily on 650 miles of airways by aircraft common carriers in Illinois with an average passenger load of 2,500 persons per month. The pilots are competent and old in experience and the equipment used includes a variety of the safest and most luxurious known. The

Illinois lines connect by air or by air-rail or air-bus with 47 states and with Canada and Mexico. The business of each carrier has shown a gradual increase and each carrier, I believe, is pleased that it has come under public utility regulation.

The position of the Illinois Commerce Commission is that air transportation is an art which renders an entirely different class of service from that rendered by other common carriers, and this was one of the bases upon which each of the three certificates heretofore mentioned was granted. Its position also is that the art will develop better under understanding and sympathetic regulation, and, too, the convenience and the safety of the public must be served by some regulation. It is the law in Illinois, as heretofore said, that certificates of convenience and necessity are not grants of monopoly, although the oldest operator in the field is given first chance to establish the new and additional service provided it can show the proper operating ability and adequate financial responsibility. And so certificates were granted to Century Airways, Inc., and American Airways, Inc., using routes partially the same, not only because the respective applicants agreed to this but also because the competition appeared to be healthy rather than ruinous.

Each of these various phases, sometimes one and sometimes another, other commissions have recited in their respective orders from time to time. In Colorado (P. U. R. 1930E, 308) to Pikes Peak Aircraft, Inc., a certificate was granted and one denied to United States Airways, Inc., between the same terminals because the former company chose the safer route even though a bit slower. However this very significant paragraph appears in the order:

"It is regrettable that at this early stage of development of airplane service in our State a certificate may not be issued to each of the applicants herein. But they both agreed at the hearing that there is not enough business between Grand Junction and Denver to warrant the operation of two lines between those cities."

The Nevada Public Service Commission (P. U. R. 1928D, 854) granted certificates to three applicant companies between the same points in that state, and at the same time protected a certificate previously granted to a fourth company, Boeing Air Transport, Inc., by establishing "home ports" for all four and announcing the following priority rule with reference to each:

"Any operator shall have a priority or preference of two hours at his 'home port' over any operator away from his 'home port.' This means no

certificate holder in this state may proceed with passengers or property from any point other than his 'home port' and which is the 'home port' of another certificate holder until after a period of two hours has elapsed from the time the request for transportation is received unless he shall in the meantime secure from the operator or operators at whose 'home port' he is located a waiver of the provisions of this rule."

There has been some question as to the soundness of this arrangement, but it certainly cannot be denied that it was an artful way of developing as much air transportation as possible. Furthermore, the companies involved agreed to the order.

Nevada, in a case not strictly involving aircraft, has also asserted in strong language the theory that "aeroplane transportation is an entirely different class of service in point of time and convenience" (Re: Pickwick Stages P. U. R. 1930A, 404 at 406). And in the same case at page 405 there is found the following language:

"The controversy has seemed to revolve around the possible injury to the railroads on the one hand or the possible benefit to the stage lines on the other, neither of which is our chief concern. We do not consider what will injure the railroads or benefit the stage lines *but rather what will be the ultimate maximum benefit to our state.*"

In Pennsylvania, where the greatest experience in these matters has been had, a certificate was denied to Battlefields Airways, Inc. (P. U. R. 1929A, 476) where the application was strongly contested by Gettysburg Flying Service, Inc., which already had a certificate to serve the same territory (P. U. R. 1928B, 287) because the Pennsylvania Commission felt that the granting of the second certificate would be "the creation of unnecessary and destructive competition" which "could not and would not be a contributing factor in the development of commercial flying service in Pennsylvania. . . . Common carrier transportation by aircraft must be developed for some time at least by and through private enterprise which should not be required to struggle for an existence in the competitive field under conditions as existing in this case." However, it must be noted that the Pennsylvania Commission rather backed up on itself in the last paragraph of its order which reads as follows:

"If, however, in any similar proceeding it appears that the application of the non-competitive principle is not in the interest of and would not foster and encourage aviation, the principle will not control. This commission desires in every way possible under its regulatory powers and duties to encourage the growth and development of commercial air service."

California, while it has not yet taken jurisdiction in this field, granted in the face of great opposition a certificate of convenience and necessity to a motor carrier to operate a passenger stage between a city and a certain airport because "such service was a necessary incident to the development of air transportation, *which should be especially encouraged.*" (P. U. R. 1931A, 398.) Aircraft common carriers should embrace the opportunity of obtaining the advantages of regulation when such an attitude prevails.

Michigan in Re Kohler Aviation Corporation (P. U. R. 1930B, 242), apparently without opposition and certainly without much discussion of the subject, took jurisdiction over a securities issue of the Kohler corporation because it was an aircraft common carrier. Otherwise the Secretary of State's office would have handled the qualification of the issue. The Michigan Public Utilities Commission has also done this in at least two other cases.

Nebraska and New Hampshire have likewise partially entered the field by adopting rules and regulations covering the licensing and operation of commercial aircraft. Possibly other states have too, but lack of available data has not permitted me to find out about them.

All commissions have been extremely cautious in the matter of rates for aircraft common carriers. In fact the rate schedules filed by the companies have been generally accepted by the commissions upon the theory that the business is not yet old enough to permit any intelligent conclusions about a rate base. As to time and service schedules some action has been taken, but with such consideration that no operating company has had cause to complain.

What other states have done about inspection I do not know, but in Illinois we have so far felt that our inspections were as necessary to teach ourselves as to protect the public. The Illinois Commerce Commission has not cited any aircraft carrier for any failure in its operation, and does not intend to do so if it can be avoided—and it can be if the present cooperation continues. So far every suggestion made to one of our regulated companies by the Aviation Supervisor of the Illinois Commerce Commission has been carried out promptly and efficiently.

So also Illinois has contented herself thus far with the following provision in each order:

"IT IS FURTHER ORDERED that the Certificate of Convenience and Necessity hereinabove ordered to be issued is granted subject to the regulations and air traffic rules now existing or which may be promulgated either by this Commission or any other duly authorized governmental agency."

Of course a set of rules and regulations for aircraft carriers is necessary, and so we have found already, but the companies flying in Illinois can be assured that they will not be adopted without first an opening hearing in which all concerned will have full opportunity to be heard and make suggestions. And even then the first set, with but a few special exceptions, will only concern procedure before the Commission in the matter of applications, hearings, change of schedules, reports, etc.

My conclusions on this subject are that the regulation so far has been exceedingly sound and that it should continue in the same careful manner; that all aircraft carriers should cultivate this attitude on the part of the Commissions; and that each Commission should make a special effort to see that its orders reach the regular channels of publication so that every other Commission may have the benefit of this knowledge. To further this cooperation the Illinois Commerce Commission will supply each of your requests insofar as its experience extends.