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FEDERAL AND STATE CONTROL OF AIR CARRIERS BY CERTIFICATES OF CONVENIENCE AND NECESSITY

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The present article is concerned with the following two questions: (1) Extent of the power granted by the Air Commerce Act of 1926 to the Secretary of Commerce to regulate air commerce, particularly to require a certificate as a condition precedent to the operation of air carriers, and (2) If this grant of power was sufficient, whether or not it constituted an exclusive occupation of the field by Congress to the extent that attempted certificates or regulation by State officials, either as to interstate carriers, or as to intrastate operation of interstate carriers would be void.

(1) *Extent of power of Secretary to require Certificate*

Section 3, Regulatory Powers, provides:

> The Secretary of Commerce shall by regulation—
> (a) Provide for registration of aircraft, with a prohibition against registration of foreign aircraft.
> (b) Provide for rating of aircraft as to airworthiness.
> (c) Provide for periodic examination and rating of airmen.
> (d) Provide for examination and rating of air navigation facilities.
> (e) Establish air traffic rules for navigation and as to safe altitudes of flight.
> (f) *Provide for issuance* and expiration, and for suspension and revocation, of *registration,* aircraft, and airman *certificates, and such other certificates as the Secretary of Commerce deems necessary in administering the functions vested in him under the Act.*[1]

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1. Italics ours.

Any study of the foregoing six regulatory features must lead to the inevitable conclusion that Congress intended only to place *safeguards to protect the public* in its use of this new transportation. Certainly, the air commerce as such is not regulated, nor are the carriers themselves restricted as corporations. And noticeable by their absence are those severe and technical restrictions so prevalent in the Interstate Commerce Act, the Boiler Inspection Act and other similar legislation—the latter, of course, being enacted for industries and a mode of transportation already strong and powerful—having an existence of more than one hundred years. In considering the simple regulatory features of the Air Commerce Act every indication points to an intent by Congress to place no restrictions around this transportation in order to insure its maximum freedom of development during a formative period, and in the meantime, to protect and to safeguard the public in a utilization thereof. Beyond such regulation, the Act is impressive by a noticeable failure to provide further restrictions.

Section 3, paragraph (f), providing for the issuance of "such other certificates *as the Secretary of Commerce deems necessary* in administering the functions vested in him under this Act," is the only provision to which authority for the so-called certificates to establish a line may be traced.

But this provision is certainly not a *legislative* mandate. The plain intent of Congress is shown to provide authority if, as, and when, and not until the Secretary deems it necessary to enlarge the number of certificates in order to carry out the provisions of the Act. And since the purpose of the Act is primarily to promote the public safety, the issuance of the certificate to operate a passenger air service route, must bear a direct relationship to public safety—the principal object of the Act. The power to regulate within the scope of the purpose of the Act is a broad one.

The Daniel Ball[2] decision that the highways and instruments of interstate commerce are embraced within the federal commercial power, as well as the commerce itself, has been extended to transportation by artificial highways (locks and dams for slack water navigation)[3]; and applying regulation, not to transportation, but to communication by telegraph, a significant case is *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*,[4] decided in 1878, in

2. 10 Wall. 557, 77 U. S. 566; 19 L. Ed. 999 (1870).
3. See *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; 37 L. Ed. 463 (1893).
4. 96 U. S. 1; 6 Otto 1; 24 L. Ed. 708 (1878).

which the power of Congress, under the commerce clause, to establish and regulate communiciation by telegraph is sustained. The point of interest, from the standpoint of the present discussion, is the following statement in the opinion:

"Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but *they keep pace with the progress of the country, and adapt themselves* to the new developments of time and circumstances."[5]

This statement is entirely inconsistent with a narrow interpretation of federal commercial power limiting it to certain particular forms of regulation for which immediate need of federal authority was felt in 1787, and is in accordance with the suggestion that the circumstances and events, contemporaneous with the adoption of the Constitution, indicate an intention to grant a general power without such restriction.

But the extent of the power granted by the Air Commerce Act of 1926 to the Secretary of Commerce to regulate air commerce, is specifically set forth in Section 3 of the statute. As heretofore enumerated, *these regulatory powers concern measures to effect safe air transportation for the public and to eliminate foreign aircraft from competition. Beyond those phases of operation affecting safety, the Act is silent.* There is no authority for a regulatory commission or body to regulate beyond the expressed provisions of statute. 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. In *American Sugar Refining Co.* v. *Delaware, L. & W. R. R.*,[6] in construing the Interstate Act, it was stated that:

"Acts of the Commission, in the exercise of its administrative functions, must, in order to be effective, strictly conform to those provisions and requirements of the Act by which its authority is prescribed and defined."

This same principle is followed in a later case construing a regula-

5. Italics ours.
6. 207 Fed. 733, C. C. A. 3d Cir. (1913).

tion promulgated by the Interstate Commerce Commission, *W. A. Hover & Co.* v. *Denver & R. G. W. R. Co.*:[7]

"Executive and administrative departments of the government are required to keep within the limits of the power granted them by Congress."

An executive department, the Secretary of the Treasury and the Board of General Appraisers were prevented from enlarging the powers given by the Tea Inspection Act of March 2, 1897, in a case involving commerce, inspection laws and administration of the statute. In *Waite* v. *Macy*,[8] Mr. Justice Holmes, speaking for the court, stated:

"The Secretary and the board must keep within the statute which goes to their jurisdiction."[9]

It is apparent therefore from the form of the delegation of discretionary power to issue "other certificates", that the Secretary of Commerce has been given the *power* to issue certificates to operate. But he must first "deem it to be necessary", and justify his decision, and his action in granting or refusing such certificates, within the purposes of the Act—to wit, promotion of Public Safety.

(2) *Whether the present Certificates issued by the Secretary of Commerce exclude State action*

Finding, as we have above, that the Secretary of Commerce may, if he deems necessary, issue certificates to operate, it is necessary, in order to determine whether states are excluded from also issuing certificates to operate, to consider whether the Federal Government has fully occupied the field opened up by Congress.

The practice of the courts in statutory construction, of closely adhering to long established regulations of administrative departments, and not departing therefrom except upon showing of most cogent reasons, is well established.[10]

The Air Commerce Act provides for the registration and issuance of certificates to airmen and aircraft as a condition precedent to interstate operation.[11] In the normal course of administration this would necessitate a formal application and a formal certificate —both provided by the issuing authority. At the present time.

7. 17 F. (2d) 881, C. C. A. 8th Cir. (1927).
8. 246 U. S. 606; 62 L. Ed. 892 (1918).
9. The case of *Merritt* v. *Welsh*, 104 U. S. 694; 26 L. Ed. 896 (1882) was cited.
10. *Robertson* v. *Downing*, 127 U. S. 607; 32 L. Ed. 269 (1888) and *Robinson* v. *Lundrigan*, 227 U. S. 173; 57 L. Ed. 468 (1913).
11. Sec. 11—(2) and (3).

the Department of Commerce does not provide anything of a formal character. The practice is the same in case of the certificates or letters of authority for a corporation or individual to operate a passenger route. The application therefor to the Secretary of Commerce consists only of a list of printed interrogatories.[12] This interrogatory may be answered and filed *in letter form,* or in list form with a letter attached. The whole procedure is purely informal.

Neither is the certificate which the Secretary of Commerce finally issues as authority for operation formal or final in any respect. In lieu of the usual license or certificate of public convenience, a form letter on the letterhead of the Department of Commerce, Aeronautics Branch, is sent to the applicant.[13] This whole procedure of the Secretary of Commerce—the application with his subsequent letter—constitutes a very timid entry into the powers conferred in the Act allowing him to issue such other certificates *as he deems necessary.* This letter of authority for operation provides on its face that the authority is only granted: *"subject to any state or other local requirement",* and also states: "you are authorized to conduct the service as stated herein * * * *until* such time as authority granted hereby is withdrawn *or* a *Certificate of Authority is issued in your behalf."* Apparently the opinion of the Secretary of Commerce is that air commerce is still in such a formative stage that he deems it unnecessary to issue any formal certificate.

Certainly the provisions in his letter of authority that the right to operate is only given *subject to state or local requirements,* is a warning to the recipient that he must first comply with all state and local provisions. The Secretary of Commerce cannot be deemed to have fully occupied the field the Commerce Act allows him to occupy when the authority he grants is itself made subject to state regulation. Undoubtedly the Secretary of Commerce *might* make his occupation of the field of issuance of certificates to operate cover *all* the safety field. But it seems clear that he has not as yet deemed it necessary to do so.

Having reached the conclusion, as above, that the Secretary of Commerce, acting under the authority delegated by Congress, has not fully occupied the field of issuing certificates to operate, it

12. See Editor's Note at the conclusion of this article, and see page 253 of this issue.

13. See Editor's Note at the conclusion of this article, and see page 233, footnote 12, of this issue.

follows that the states may at least occupy that portion of the field which the Federal Government has left untouched.

Railroads must obey state laws or orders prescribing the frequency and character of intrastate passenger service, interstate passenger trains may be required to stop at intrastate points to provide service to other intrastate points; the use of existing tracks and equipment may be regulated to provide intrastate freight service; the states may authorize or require construction or continued operation of spur, industrial, team, switching or other side tracks, even for the purpose of interstate transportation, and states may even order construction of minor station facilities.

Although *Congress has assumed exclusive control of safety devices on locomotives and cars,* installation of automatic train control, hours of service of employees, and transportation of explosives, yet *other forms of safety regulation* may be prescribed by the states. States can require protection or elimination of grade-crossings. Other permissible forms of state safety regulation are full-crew laws, laws regulating hours of service of employees not engaged in the movement of interstate trains.

In the maze of the various and numerous functions over which the federal and state governments exercise powers which overlap, the question of determining the need for uniformity on behalf of the public is of importance. In the air field there has developed need for uniformity. Congress must be the one to decide as a matter of legislative policy the extent to which it will assert its constitutional supremacy over state action. Where Congress has declared the necessity of uniform regulation by enacting such a law the judgment and discretion of Congress is accepted by the Supreme Court.

The *necessity* of uniform regulation is not questioned by the court. Congress has comprehensive power to regulate interstate commerce, which power is assumed to embrace the right to declare that a particular subject of such commerce shall receive a uniform system or rule of regulation. The Air Commerce Act of 1926, in its express terms, falls very far short of accomplishing this result. In it Congress has asserted some of its constitutional supremacy in the field of safety. But as to certificates to carry passengers Congress is silent leaving that field to the Secretary of Commerce to legislate by regulation if he deems best. And in that field the Secretary has not yet acted. That falls short of the doctrine laid

down in *Southern Railway* v. *Railroad Commission of Indiana,*[14] where the Court observed:

"The exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. * * * Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supercede existing and prevent further legislation on that subject."[15]

If the Secretary of Commerce had used the powers reposed in him by the Air Commerce Act his certificates might be held to occupy the field so that state certificates would be void. But the law and facts do not bring aviation under the above doctrine even in the field of safety certificates—which is the purpose of the Air Commerce Act.

Conclusion

By way of summary it is submitted that: (1) The extent of the power granted by the Air Commerce Act of 1926 to the Secretary of Commerce to regulate air commerce extends only to safety. He can, as an incident to carrying out the public safety purposes of the Act, require a certificate as a condition precedent to the operation of air carriers. Congress has delegated to him the power to issue regulations going that far if he deems it necessary to promote safe flying. However, in the absence of the Secretary of Commerce acting there is no legislative determination that such certificates can be required and consequently the Congress has not occupied that field. The Secretary of Commerce has not yet deemed it necessary to require a certificate as a condition precedent to the operation of air carriers. He has taken a few timid steps in that direction. The letter he issues is not a certificate. He specifically so states when he writes the letter.

(2) This half way step toward issuance of a certificate in view of the absence of definite legislation on the subject cannot be deemed to be an "occupation of the field" by Congress or the Federal Government. Consequently certificates or regulations by State officials either as to interstate carriers or as to intrastate operation of interstate carriers are not void. The above statement

14. 236 U. S. 439; 59 L. Ed. 661 (1915).
15. Pages 446-7.

is, of course, subject to the usual restriction that the activities of the State in requiring certificates shall not in any given case constitute an interference with or a burden upon strictly interstate commerce.

[EDITOR'S NOTE: Supplementing this article, the author included three documentary exhibits, as follows: (1) Extracts from Legislative History of the Air Commerce Act of 1926. This has been omitted. (2) Federal form and procedure in applying for a Certificate of Authority. This document appears, in connection with another study, at page 253 of this issue. (3) Federal form of temporary Letter of Authority, which may be found at page 233, footnote 12, of this issue.]