

1935

New Powers of the Interstate Commerce Commission over Air Transportation

R. Granville Curry

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

R. Granville Curry, *New Powers of the Interstate Commerce Commission over Air Transportation*, 6 J. AIR L. & COM. 94 (1935)
<https://scholar.smu.edu/jalc/vol6/iss1/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

NEW POWERS OF THE INTERSTATE COMMERCE COMMISSION OVER AIR TRANSPORTATION*

R. GRANVILLE CURRY†

I. INTRODUCTION.

Those unfriendly critics of the Interstate Commerce Commission who have felt satisfaction because of the Commission's loss of jurisdiction over telephone and telegraph companies will be disappointed upon examining the air mail act, approved June 12, 1934, to find to what extent important new powers have been vested in the Commission. For the first time it has been given jurisdiction, though limited in character, over air transportation.

President Roosevelt in urging legislation¹ in respect to air mail suggested that new air mail contracts be let for a period not exceeding three years under competitive bidding and that six months before expiration of contracts so made, the Interstate Commerce Commission should pass upon the question of public convenience and necessity of air mail routes, and thereafter fix a maximum rate of air mail pay on the routes designated.

The bill which was introduced in the Senate sought to carry out these recommendations. The House bill omitted any provision for action by the Commission, the question being left for future legislation in the light of investigation to be made by a special commission provided for in the bill.² The conferees from the Senate and House agreed upon a bill authorizing the Commission to fix rates of mail pay subject to certain restrictions and to exercise certain powers in connection with the continuance of contracts already let under competitive bids.³ The bill as agreed to in conference was passed. It is evidence that in spite of bitter con-

*Reprinted, with permission of the editor, from 1 I. C. C. Practitioners' Journal 324 (1934).

†Formerly first Assistant Chief Counsel, Interstate Commerce Commission; Chairman of the Professional Ethics and Grievance Committee of the Association of Practitioners before the Interstate Commerce Commission, Washington, D. C.

1. Letter dated March 7, 1934, from President Roosevelt to the Chairman of the Senate Committee on Post Offices and Post Roads, Cong. Rec. March 9, 1934, page 4133. In this letter the President said, among other things: "Enactment of legislation along the lines suggested will establish a sound, stable, and permanent air-mail policy. The knowledge that the Interstate Commerce Commission, a judicial body, will hereafter regulate air transportation routes and air-mail pay will remove uncertainty as to routes and mail pay."

2. House Report No. 1428, 73rd Cong. 2nd Sess.

3. House Report No. 1754, 73rd Cong. 2nd Sess.

trovery in a political atmosphere and much publicity on the subject, both the President and Congress have faith in the Commission's ability to deal with the difficult questions of air mail pay.

*Commission's Powers Under New Act:*⁴

The present article is concerned with the Commission's powers under the new act. However, some consideration of the general scheme of the act is necessary to understand the scope of the Commission's authority.

The Postmaster General is given broad powers. He is authorized to award contracts for air mail between such points as he may designate, for initial periods not exceeding one year, to the lowest responsible bidders subject to certain restrictions, including appeal to the Comptroller General as to the responsibility of the low bidder, and review by the Interstate Commerce Commission of the rates of pay. He is also authorized to extend, for a period of not over nine months the ninety-day emergency contracts let under competitive bids called for prior to the enactment of this act, upon agreement by the contractors to be bound by the provisions of the act during the extended period.

At the end of the period of extension of these emergency contracts, and likewise at the end of the initial period of contracts originally let under the act, provision is made for further continuance thereof, not for a maximum term of years, but indefinitely, if such contracts shall have been satisfactorily complied with. Such continuance is subject to such reductions in mail pay and such additional terms and conditions as the Commission may prescribe.

Jurisdiction is conferred upon the Secretary of Commerce in respect to safety requirements. He is to specify the character of equipment to be employed and maintained on each air mail route and the speed, load capacity, safety features and safety devices on airplanes to be used on the route. He is to prescribe maximum flying hours of pilots on air mail lines, and safe operation methods, and to approve agreements by the air mail operating companies and their pilots and mechanics for retirement benefits.

The rate of compensation and the working conditions and relations for pilots, mechanics, and laborers employed by the holder of any air mail contract, it is provided, shall conform to the decisions of the National Labor Board.

4. On July 5, 1934, the Commission announced that it had created a Bureau of Air Mail and had appointed as director of this bureau Mr. N. B. Haley, formerly chief of the Loans Section of the Bureau of Finance, and more recently with the Federal Coordinator of Transportation.

The Federal Radio Commission is required to give equal facilities in the allocation of radio frequencies in the aeronautical band to those airplanes carrying mail and/or passengers during the time the contract is in effect.

Thus it will be observed that six agencies of the government are given some kind of jurisdiction over the air mail carriers. In addition, the President is authorized to appoint a special Commission⁵ of five members "for the purpose of making an immediate study and survey, and to report to Congress not later than February 1, 1935, its recommendations of a broad policy covering all phases of aviation and the relation of the United States thereto."

The act also provides, among other things, for disassociation after December 31, 1934, of every air mail contractor from any manufacturer of airplanes, with certain exceptions, and from any other contractor holding an air mail contract. There are provisions against interlocking directors and the holding of contracts by companies having in their employ in a responsible capacity individuals previously combining unlawfully to prevent bids. There is also a restriction against the payment of salaries or other compensation in excess of \$17,500 per year.

The act provides for the designation by the Postmaster General of certain Air Mail routes as primary and secondary routes. He is required to include at least 4 transcontinental routes and the eastern and western coastal routes among primary routes. After October 1, 1934, no air mail contractor is allowed to hold more than three contracts for carrying air mail, and in the case of the contractor of any primary route, no contract for any other primary route shall be awarded to, or extended for, such contractor. Merger or common control of air mail contractors competing in parallel routes is made unlawful.⁶

Both the Interstate Commerce Commission and the Postmaster General are given full authority to examine and audit the books, records, and accounts of the air mail contractors and to require full financial reports.

5. The President has appointed to this Commission Clark Howell, of Georgia, Chairman, Franklin K. Lane, Jr., of California, Albert J. Berres, of California, Jerome Clarke Hunsaker, of New York, and Edward P. Warner, of the District of Columbia.

6. The Postmaster General is forbidden to extend any route over 100 miles. This was evidently provided for to prevent adding substantial route distances without requiring competitive bids. There is also a restriction imposed as to the total route mileage and the total air mail schedules which the Postmaster General may provide for. The purpose of this is apparently to restrict wasteful establishment of routes as the result of political pressure. With this in view it was proposed in Congress that the Commission be given authority to determine the convenience and necessity of air mail routes, but apparently this proposal failed to pass. However, it may be that implied authority so to do may be found in the power conferred upon it in section 6(c) to terminate contracts.

Purpose Includes Encouragement of Air Transportation:

The act evidences a clear intention that all air mail contracts should be the result of competitive bidding; that contracts so entered into should be continued indefinitely, subject to certain conditions; that air mail pay should have a sound basis; and that monopoly in air transportation should be prevented. The intention appears to be that subsidies, or mere gifts, to the air mail carriers are to be discontinued but that the act should be liberally administered to foster sound development of air transportation.

In recommending the legislation, the President stated its purpose:

To protect the public interest and to provide for new contracts on a basis of honest payment for honest service, . . . avoid the evils of the past, and at the same time *encourage the sound development of the aviation industry.*

Although the legislation differs somewhat from his recommendation, here is a definite warning that in dealing with evils in the air service there should not be restrictive regulation that stifles and kills but rather a sympathetic treatment that will encourage sound development of the industry.

II. RAPID DEVELOPMENT OF AIR TRANSPORTATION.

The development of air transportation since the first air mail route was established in 1918 is truly remarkable. For eight years the government itself operated the air mail service. For the next eight years, and until the cancellation of the domestic air mail contracts in February, 1934, private contractors operated the air mail service. In the eight years of government operation, the actual experience gained in meeting the problems of aviation, the advance in safety measures applied, and the establishment of night flying contributed greatly to the progress of air transportation.⁷

During the eight years of government operation the miles flown were 10,737,060 and 8,484,396 pounds of mail were carried.⁸

In the eight years of private operation the development was even more phenomenal. The private operators in these eight years flew about 17 times as many miles and carried about 5 times as much mail as the government did in the preceding eight years.⁹

7. Report of Hon. Joseph B. Eastman, Federal Coördinator of Transportation, Senate Document No. 152, 73rd Cong. 2nd Sess., p. 49.

8. U. S. Air Service, May 1934, page 21.

9. U. S. Air Service, May, 1934, page 21.

During this same time the number of passengers increased from 5,782 in 1926, to 493,141 in 1933, and the passenger miles from approximately 1,445,000 to 173,492,119, while the average fare per mile diminished from about 12c to 6c.¹⁰ The pounds of express increased from 3,555 in 1926 to 1,510,215 in 1933.¹¹

During this period commercial air transportation in the United States made such progress as apparently to excel that to be found anywhere in the world.¹²

III. PAYMENTS BY THE GOVERNMENT TO AIR MAIL CONTRACTORS.

At the beginning of private operation in 1926, following the passage of the original air mail act on February 2, 1925, four year contracts were made under competitive bidding in compliance with the requirement of the act that air mail pay should be a percentage less than postal revenues from air mail. Amendments of the act changed this basis to one of weight,¹³ but with the apparent purpose of continuing to keep payments within postal revenues, and provided for extensions of contracts without increase in the contract rates.¹⁴

In 1930 a distinct change in policy was brought about by the act then passed, commonly known as the Watres act.¹⁵ It provided for the exchange by air mail contractors of their original contracts for route certificates, for ten years from the beginning of service under such contracts, subject to rates of compensation and regulation to be determined by the Postmaster General. Proceeding under this act he called upon contractors to supply passenger service as well as mail service, and adjusted air mail pay upward, since he was not restricted to the contract rates. His purpose was to afford aid to air mail carriers in order to develop passenger transportation. Under this policy, passenger transportation rapidly progressed but the payments were criticized in some quarters as unwarranted subsidies tending to build up monopolies in air transportation to the disadvantage of independent operators and encouraging extravagance in expenditures.

As previously indicated, the Postmaster General in February

10. *The Economics of Air Mail Transportation*, by Paul T. David, page 176, published by The Brookings Institution, and containing an excellent history of air mail service with an interesting discussion of the problems presented. See also Report of Federal Coordinator of Railroads, p. 260, referred to supra.

11. Report of Federal Coordinator of Railroads, supra, p. 260.

12. U. S. Air Service, May, 1934, page 21.

13. 44 Stat. L. 692.

14. 45 Stat. L. 594.

15. 44 Stat. L. 692.

of this year cancelled the domestic air mail contracts and the War Department assumed the task of operating the air mail service.

Shortly before the passage of the air mail act here under discussion in June, 1934, the Postmaster General advertised for bids from private operators and awarded temporary contracts for a period of three months. These contracts are now in effect. The present law, as previously indicated, provides that they may be extended under certain restrictions for an additional period not exceeding nine months. It has been said that the purpose of providing for such extension was to allow time within which the special Commission could investigate the subject of air mail and make its report before the expiration of such contracts.

The contracts just referred to covered 32 routes prescribed by the Postmaster General and were at rates per airplane mile varying from eight to 38 cents.¹⁶ It is estimated that under these contracts the average pay per airplane mile will be less than thirty cents as compared with the previous average of 42 cents under private operation at the time of cancellation of the contracts and 54 cents for the fiscal year 1933, 62 cents for 1932, and 79 cents for 1933.¹⁷

It is further estimated by the Post Office Department that under the present three months contracts the route mileage under the new system will be 28,548 or 3,300 miles greater than the route mileage under the contracts, when annulled, and that 19 additional cities and four additional states will be served.

However, it appears that the aggregate trip mileage of routes flown has been considerably reduced on the theory that in the past unnecessary trips have been made with mail.¹⁸

IV. COMMISSION'S DUTIES UNDER NEW ACT.

Duties in Respect to Awarding Contracts:

The Commission is first mentioned in section 3, paragraph (e), where it is provided:

If on any route only one bid is received, or if the bids received appear to the Postmaster General to be excessive, he shall either reject them or

16. Cong. Rec., May 29, 1934, p. 10,170.

17. Aviation, June, 1934, page 187, reporting a statement by Postmaster General Farley. Annual Reports of Postmaster General.

18. Cong. Rec., May 29, 1934, page 10,171. Aggregate trip mileage of the routes flown in 1932 was about 34,500,000 miles as contrasted with 28,500,000 under the schedules now provided. It has been estimated that even with an increase of the present schedules to the mileage flown in 1932, an increase of about 25 per cent, there would be an increase of only about 20 per cent in the cost and thus the total would be only about \$9,000,000 annually as compared with air mail pay to operators for the fiscal year 1933 of about \$20,000,000 and of approximately \$14,000,000 for the fiscal year ended June 30, 1934.

submit the same to the Interstate Commerce Commission for its direction in the premises before awarding the contract.

From this section it will appear that if there is only one bid, or if the bids appear to the Postmaster General to be excessive, he has full authority to reject them or he may submit them to the Interstate Commerce Commission "for its direction in the premises before awarding the contract." As a practical matter, he would probably reject the bids if they appeared on their face to be excessive and would call upon the Commission only where the conditions should appear to indicate doubt as to the fairness of the bids and some investigation by an impartial tribunal should appear appropriate.

It will be observed that the Commission's powers are stated in broad terms and might be construed to mean that they extend beyond the mere determination as to whether the bids appeared to be excessive.¹⁹ It is clearly authorized to make at least that determination and to direct that no higher price than that found by it should be accepted. In the case where only one bid is received, the bidder could then be given the option of accepting the lower contract rate, and in the case where all the bids received appear excessive, the Commission would apparently have authority to direct that the bids be rejected as too high or that the lowest of the bidders be awarded the contract if he should accept the reduced contract rate found by the Commission to be proper.

It would seem that the act contemplates that the Commission should exercise this power after an investigation as expeditiously made as possible. There is no requirement for a hearing but no doubt the Commission would give the interested parties opportunity to present their contentions. Under a later section of the act ample authority is given to review at any later time the fairness of the compensation in the contract let.

Power to Fix Air Mail Rates:

By section 6(a) of the act, the Commission is directed to fix and determine "the fair and reasonable rates of compensation for the transportation of air mail by airplanes and the service connected therewith."

In doing this the Commission must:

- (a) Proceed "as soon as practicable" and "from time to

¹⁹ This provision was criticized on this ground during the debates in Congress, Cong. Rec., June 5, 1934, p. 10820.

time." The Commission thus is obligated to assume its duties at once and these duties are continuing. Note also section 6(b) which requires the Commission to make an examination of the fairness of the rates at least once a year.

(b) Make the determination "for *each* air mail route."

(c) Act only "after notice and hearing."

(d) Prescribe the "method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation." The Commission thus has broad discretion in determining the proper method.

(e) Not prescribe rates "in excess of the rates provided for in this Act." The upper limits of the Commission's rate fixing powers are considered *infra*.

(f) Publish the rates prescribed and these "shall continue in force until changed by the said Commission after due notice and hearing."

(1) *Can the Commission Increase the Contract Rates?*—In considering this question, it is to be remembered that under the Railway Mail Act the railroads are required to carry the mail and specific provision is made for fair compensation therefor.²⁰ On the other hand, the air mail act, approved June 12, 1934, contains no requirement that any air carrier transport the mails. It is a matter of contracting voluntarily to do so. Thus it may be argued that if the carrier elects to ask for a contract at a certain rate, he has no just cause of complaint, if he receives no more than that rate.

Section 6(a) directs the Commission to fix and determine "the fair and reasonable rates of compensation for the transportation for air mail by airplane and the service connected therewith over each air mail route, but *not in excess of the rates provided for in this Act . . .*" What the last clause means must be ascertained from other provisions of the act.

Section 3(a) provides, "that in no case shall payment exceed 40 cents per airplane-mile." It further provides that the base rate of pay which may be bid and accepted shall in no case exceed $33\frac{1}{3}$ cents per airplane-mile for transporting a mail load not exceeding three hundred pounds and that payment for transportation shall be at the base rate fixed in the contract for the first three hundred pounds or fraction thereof plus one-tenth of such base rate for each additional one hundred pounds of mail or fraction thereof. Section 3(c) provides that in case a route is extended by

20. 39 Stat. L. 425; *Railway Mail Pay*, 56 I. C. C. 1.

the Postmaster General "the rate of pay for such extension shall not be in excess of the contract rate on that route."

In view of the specific provisions in section 3 as to the rates to be provided for in the contracts, the proviso in section 6(a) that the rates fixed by the Commission shall not be in excess of the rates provided for in this act may be fairly interpreted as meaning that the Commission in fixing reasonable rates of compensation cannot go above the rates provided in the contracts but can only reduce the contract rates.

Paragraph (b) of section 6 lends support to this conclusion, in that it provides for at least a yearly review of the rates in order to be assured that the contract holder makes no unreasonable profit therefrom. There is no provision that the Commission has a corresponding duty to protect the contract holder from unreasonable losses under his contract.

Paragraph (c) of section 6 furnishes further support to the interpretation that the Commission may reduce but not increase contract rates. It provides that contracts let or extended under the act shall under certain circumstances be continued in effect for an indefinite period "subject to any reduction in the rate of payment therefor . . . as the said Commission may prescribe."

The legislative history and statements by those in charge of the bill are recognized as aids in the interpretation of a doubtful statute.²¹

While no light is shed on this question by the conference report or by the debates in the Senate,²² the statements by Congressman Mead, Chairman of the committee on the Post Office and Post Roads and a member of the conference committee, made in explanation and defense of the conference report, are significant. In no uncertain terms he said, "We permit only the downward revision of rates paid for air mail service."²³

Congressman Dobbins, a member of the conference committee, likewise said, "this law provides for revision of rates by the Interstate Commerce Commission in only one direction—downward." He further said, "It is not necessary, in order to protect these corporations against their own folly, that we guarantee them a rate more than that for which they say they can carry this mail and carry it at a profit."

It is also to be observed that Congressman Kelly of Pennsyl-

21. *Duplex Printing Co. v. Deering*, 254 U. S. 443, 474; *F. T. Com. v. Raladan Co.*, 283 U. S. 643, 650.

22. Cong. Rec., June 5, 1934, pages 10817-10852.

23. Cong. Rec., May 29, 1934, page 10173.

vania in speaking against the conference report said, "The Interstate Commerce Commission is given authority only to reduce the rates under the contract bid. They cannot fix a fair rate which will cover the actual carriage of the air mail. They are held down to the contract bid for all time."²⁴

One of the reasons given for thus limiting the Commission's authority was that it would prevent contractors "from bidding a ridiculously low rate" so as to perpetrate themselves in a contract and later have their rate of pay increased by the Interstate Commerce Commission.²⁵

It seems probable that the act will be interpreted to mean that the Commission cannot prescribe rates in excess of the contract rates. Much can be said both for and against this as a general policy but in view of the hardships which may result to contractors who may have entered into contracts in good faith and made large investments, this is a matter which should receive careful consideration by the special commission appointed under the act, with a view to recommending legislation designed to remove this limitation on the Commission's power to fix air mail rates.

(2) *Standards of Rate Making.*—Section 6(e) provides that in determining fair and reasonable rates of compensation for air mail transportation, the Commission shall give consideration to:

- (a) The amount of air mail so carried,
- (b) The facilities supplied by the carrier,
- (c) Revenue and profits from all sources,
- (d) "Other material elements."

In connection with these factors no doubt Congress intended that the Commission should take into account, among other things, the number of flights scheduled, the distance covered, operation at night or in the daytime, the character of country traversed, whether mountainous or otherwise, fog and snow conditions, speed required, and the exacting requirements of mail service. Generally speaking it would appear fair to apply the general standard of cost of the service, including a reasonable return on the property devoted to the service, and the value or worth of the service to the Government and to the public.

Reference has just been made to the requirement in section 6(e) that the Commission take into account the carrier's "revenue and profits from all sources." Paragraph (b) of the same section, which imposes the duty upon the Commission to review

24. Cong. Rec., May 31, 1934, page 10169.

25. Congressman Dobbins, Cong. Rec., May 29, 1934, page 10171.

at least once a year air mail rates of compensation to prevent unreasonable profits, provides that the Commission "shall take into consideration all forms of gross income derived from the operation of airplanes over the route affected."

It is thus clearly contemplated that in determining the air mail rates the Commission should give consideration to the fact that a carrier making profits from its passenger and express business may not require as relatively large contribution toward overhead expenses and return on its property used in the service as a carrier which is operating its passenger and express traffic at a loss.²⁶ The situation is somewhat analogous to that of high-rated commodities, such as automobiles, moving by railroad. The rates paid on such commodities contribute more toward taking care of the expenses of the railroad and a fair return on its property than certain other commodities like sand and gravel which because of competition and other conditions can contribute relatively little. This in railroad rate making is a well recognized principle.²⁷

Thus even if it be the purpose of the act to prevent the payment of subsidies to air mail contractors, there is no prohibition against the fixing of mail pay rates by the Commission which are relatively more in the case of a carrier operating at a loss on its other business than the carrier operating at a profit. In this limited way and subject to the contract rate as a maximum, the Commission may exercise its powers to foster and encourage the sound development of air transportation. However, a proper coordination of rail and air transportation is a matter to be considered.

Just as in railroad rate-making there is no formula to apply mathematically, so in solving the problem of fair and reasonable air mail rates there must be the reasonable exercise of discretion based upon many facts and conditions but subject to the general proviso that whatever is done must be in the public interest.

(3) *Railway Mail Pay*.—Section 6(b) provides for use of the administrative methods and procedure followed by the Commission under the Railway Mail Pay Act in ascertaining rates for air mail so far as consistent with the provisions of the Air Mail Act. The Commission has handled the intricate question of railway mail pay in a number of cases and has given much study to

26. Congressman Dobbins speaking in support of the bill and arguing against a pound-mile rate of pay said: "Some lines have heavy passenger traffic, which enables them to support their overhead costs without requiring much help from airmail revenues, while on other lines there is practically nothing to be transported except the mails." Cong. Rec., May 29, 1934, p. 10171.

27. *Northern Pac. R. R. Co. v. North Dakota*, 236 U. S. 585, 598.

the problem.²⁸ Its decisions show that the problems involved have been carefully studied and dealt with comprehensively and constructively.

After considering the question as to whether railway mail pay should be determined on the basis of weight or space, the Commission, largely because of practical difficulties involved in weighing the mail, adopted the space basis as the method to govern. This is a question which the Commission will be called upon to decide in respect to air mail. The conflicting opinions on the subject and the differences in the transportation performed make it essential that the question be carefully considered *de novo*.²⁹

The situation of the smaller railway lines in the railway mail pay decisions by the Commission may be of particular interest to some of the smaller air mail carriers, in that railway lines less than 100 miles in length were dealt with separately and given larger increases in railway mail pay than the large lines. For example, in 56 I. C. C. 1, decided in 1919, the Commission prescribed higher rates for the short line railroads than it prescribed generally, increasing the rates of short lines between 50 and 100 miles in length twenty per cent and short lines less than 50 miles in length fifty per cent over the rates provided for the trunk lines. On a general reexamination of railway mail pay rates in 1928 (144 I. C. C. 675), the Commission granted a general increase of 15 per cent in the rates of the trunk lines and an increase in rates of about 80 per cent in the rates of separately operated short lines not exceeding 100 miles. This was in "recognition of the greater expense per unit, the short haul, small volume, and preponderance of service in

28. The two most important decisions are *Railway Mail Pay*, 56 I. C. C. 1, and *Railway Mail Pay*, 144 I. C. C. 675.

29. In applying the space basis, in the railway mail pay cases, the Commission first sought to allocate all direct expenses and revenues to the passenger service and to allocate other items in conformity with its general formula as to separation of revenues and expenses between the freight and passenger services, including in the latter the mail and express services. Then based upon information gathered from operation over a test period and other data, the Commission allocated car miles and car foot miles of operation in cars employed exclusively for one service to the service to which it was assigned. The space in combination and mixed cars was then allocated to each service according to the space used, except that space authorized for mail was regarded as space used. The unused space in these cars was apportioned in proportion to the space used. Ratios thus obtained for (a) passenger service proper, including baggage and miscellaneous, (b) express and (c) mail, were applied to expenses, and the ratios of expenses so derived were used to apportion investment in road and equipment, except items directly allocated. From the total expenses apportioned to mail, and the total revenues for mail, the net railway operating income or deficit was determined and this was compared with an estimated return of 5.75 per cent upon the proportion of the investment in road and equipment allocated to mail service. These results, in connection with other factors, were considered in arriving at a proper rate to prescribe. *Railway Mail Pay*, 56 I. C. C. 1; 144 I. C. C. 675; 192 I. C. C. 779.

small units" for the short lines, as compared with the larger roads (p. 708).

It is further to be observed that the Commission did not fix the railway mail pay rates on the theory that the carrier might theoretically provide special motor cars or certain types of equipment which might be used exclusively in the mail service and perhaps at lower rates but dealt with the actual equipment in use. This may be pertinent in considering the suggestion that air mail carriers should be paid on the basis of small planes which might hypothetically be used exclusively in air mail service at less cost.

(4) *Air Mail Expenses Within Postal Revenues*.—As previously indicated, an effort was made at the beginning of private operation of the air mail service to restrict the compensation for such service, namely, air mail pay, within postal revenues received from such service, but this after a short time was found to be impracticable. Section 6(e), however, provides that the Commission "shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." It was the evident hope of the legislators that by that time air transportation would be able to pay its own way without the aid of relatively large profits from air mail and the department would be able to operate the air mail without a deficit.

At least until July 1, 1938, there is a clear legislative intent that considerable liberality should be granted in the fixing of air mail rates, in order that air transportation may not suffer. Congressman Mead, Chairman of the House Committee, construed this section as permitting a subsidy until July 1, 1938.³⁰

In so far as the Commission's duty requires the bringing of air mail pay within the postal revenues its task will be rendered more difficult and complex. Experience in the past under the original air mail act has shown this to be true. It would appear that

30. Congressman Mead in referring to the provisions here under consideration said: "The Senate bill eliminated the subsidy when the present contracts were extended. The House conferees insisted that there should be a continuation of the subsidy policy until such time as the weaker lines were able to stand upon their own feet. As a result, subsidy payments where necessary are permissible until July 1, 1939. That will give this commission some opportunity to study the question of the subsidy." Cong. Rec., May 29, 1934, page 10173.

The word "subsidy" is used some times in different senses. For example, if the mail pay to the carrier is greater than the postal revenues from the service, this has been called a subsidy. The more appropriate use of the word would be to describe an excess of mail pay over the fair value of the service rendered by the carrier, measured by the cost of the service and a reasonable return on the property used in the service and the value of the service to the Government and to the public.

what the Commission should be called upon to determine is not the relationship of postal revenues to air mail pay but the extent to which, if at all, such pay exceeds what the air mail service is reasonably worth. In so far as aiding weaker carriers until July 1, 1938, under this section is concerned, the restriction that rates cannot be increased above the contract rates would appear to be a serious limitation.

Authority to Continue Contracts:

Section 6(c) provides:

Any contract which may hereafter be let or extended pursuant to the provisions of this Act, and which has been satisfactorily performed by the contractor during its initial or extended period shall thereafter be continued in effect for an indefinite period, *subject to any reduction in the rate of payment therefor, and such additional conditions and terms, as the said Commission may prescribe*, which shall be consistent with the requirements of this Act; but any contract so continued in effect *may be terminated by the said Commission* upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable.

It is also provided that the contractor may terminate the contract upon sixty days' notice and that upon the termination of any contract in accordance with the act the Postmaster General may let a new contract for air mail service.

This paragraph apparently is what is left of the proposal in section 6 of the original bill in the Senate that the Commission should determine the public convenience and necessity for all air mail routes and that "said Commission shall have power to grant a three year extension of contracts to contractors found by the Commission to be giving good service, or it may advertise for bids as herein provided and for the same term; but new routes shall only be let upon competitive bidding."

From the language of the present act it appears clear that after a contract has been let under the act or has been extended pursuant thereto it may thereafter continue indefinitely, unless terminated by the Commission or by the contractor. The duties of the Commission are not defined but it would appear that its duties included the determination whether the carrier during the initial or extended period of the contract satisfactorily performed its contract and the prescription of additional terms and conditions

of the contract,³¹ if this be found reasonable and in the public interest. Also it would, of course, have the duty of determining whether there should be any reduction in the rate of payment. If the Commission should be of the opinion that the contract had not been satisfactorily performed, or that for some other reason consistent with the act, it should be terminated, the contractor and other interested parties would be entitled to a hearing and notice thereof. Thus continuance of the contract would be safeguarded by investigation of the Commission and arbitrary termination thereof, if attempted, could be prevented. While the Postmaster General is authorized by section 19 to cause contracts to be cancelled for wilful non-compliance with such contracts or the law, it seems probable that even in such cases he would ask the Commission to act under section 6(c).

A question of interpretation is whether under its broad powers the Commission may terminate a contract for the reason that the route is believed to be not justified by public convenience and necessity. As previously indicated this express authority was urged in order to prevent, among other things, the establishment of wasteful routes as the result of political pressure or otherwise.

These provisions of the act may prove to be far more important than they would appear to be upon first reading.

Duties in Respect to Accounts:

The Commission under section 6(b) is vested with the same powers as the Postmaster General may exercise under section 10 of the act with respect to the keeping, examination, and auditing of accounts of mail contractors and it is authorized to employ special agents or examiners to conduct such examination or audit.

Probably there is no more important provision in the act than that which the Commission has in respect to the accounts of air mail contractors, since it will not be able intelligently to perform its duties under the act unless the facts are available from accounts carefully designed to show costs, properly kept by the contractors, and carefully checked by the Commission's own representatives. Forms of accounts following to some extent the Commission's classification of railroad accounts have for some time been prescribed by the Post Office Department and collaboration between these two governmental agencies should be helpful in improving this system.

31. Note that passenger service was specified by the Postmaster General under similar authority to prescribe terms and conditions in the Watres Act, passed in 1930.

The Department, apparently from lack of funds, has not had the accounts checked.

The Commission's task is complicated by the provisions of section 15 restricting, after October 1, 1934, the number of contracts and routes of any one contractor and by the provisions of section 7(a) requiring, after December 31, 1934, the disassociation of air mail contractors from other interests.

In view of the Commission's affirmative duty to proceed as soon as practicable to determine fair and reasonable air mail rates, it seems probable that one of the first steps that it will take will be to provide for an intensive study of air mail costs during a test period and to lay the foundation for a satisfactory accounting system and a proper checking thereof. It has the power to require full financial reports.

A question of policy confronts the Commission as to whether and to what extent it will make public the financial results of operation of carriers by air mail. In view of the practice followed in respect to railroads, it seems probable that the Commission will adopt a rather broad policy of publicity.

V. CONCLUSION.

The authority conferred upon the Interstate Commerce Commission in respect to air mail carriers would seem to afford an exceptional opportunity not only to deal with the difficult and important problem of air mail but to show the capacity of the Commission to deal in a constructive way with a form of transportation over which it has never before exercised any jurisdiction whatever. The task calls for a fresh viewpoint. The manner in which it is performed may be of importance in determining to what extent other forms of transportation shall be placed under the jurisdiction of the Commission.³²

Those of us who have had experience in handling cases before the Commission and are acquainted with its methods do not doubt its ability to administer these new functions constructively and fearlessly.

32. In an article by Mr. William E. Berchtold in the June 1934 issue of the *North American Review*, he opposed the Commission as the agency to deal with air mail transportation. He said, among other things: "The more logical suggestion would be the setting up of a new commission to handle air transport, thereby taking it out of political control without fastening the millstone of senile railroad philosophy around its neck."