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THE REPORT OF THE FEDERAL AVIATION COMMISSION: A COMMENTARY

ROBERT KINGSLEY*

Pursuant to the provisions of the Air Mail Act of 1934,¹ a Presidential commission² reported to the Congress on January 22nd, 1935,³ its "study and survey, and . . . its recommendations of a broad policy covering all phases of aviation and the relation of the United States thereto." 102 separate recommendations are made which, with the accompanying discussion and comment, occupy some 250 pages. Because of personal limitations of the writer, the matter relating to military aviation⁴ will not receive comment here; because of necessary limitations of space, only the more vital of the recommendations in the field of civil aviation can be criticized fully.

Although the material is presented under more specific heads, the Commission's conclusions with reference to civil aviation fall under the two basic topics of: (1) commercial air transport and (2) non-transport aviation. It is with the first of these that the greatest interest lies; the specific recommendations concerning the second are colored by, and for their effectiveness are dependent on, those concerning the first.

For the present purposes, the term "commercial air transport" may be defined as covering the carriage of passengers, mail and/or express, for hire, over fixed routes on established schedules, as distinguished from such activities as private flying, aviation instruction, sight-seeing and charter flights and air photography. Since air transport is at present the more important, not only in extent of flying and in financial investment but in public interest, and since it was out of the activities of air transport operations that the creation of the Commission came, it is only proper that this subject should bulk large in the Commission's report.

No one at all interested in aviation in the United States dur-

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1. Act of June 12, 1934, c. 466, §§20 & 21, 48 Stat. at L. 195, 39 U. S. C. §§469r & 469s.

2. Messrs. Clark Howell, *Chairman*, Edward P. Warner, *Vice-Chairman*, Albert J. Berres, Jerome C. Hunsaker and Franklin K. Lane, Jr.

3. See S. Doc. No. 15, 74th Cong., 1st Sess., 79 Cong. Rec., Jan. 31, 1935, pp. 1349-1350.

4. Recommendations Nos. 40-78, pp. 19-28, 119-192.

ing the past years has failed to realize that the problems of commercial air transport have been mainly financial. The technical and scientific problems involved, though of immense difficulty, have been well met without serious public concern, and the recommendations made in the report on that score,⁵ although valuable and essential to a continued effectiveness of aviation, are not likely to become seriously controversial. In the financial field, the Commission reports facts which, as has been said above, have been reasonably well understood for several years—namely that the operation of commercial air transport of the standard and on the scale made possible by the technical capacity of the industry and required by the traveling and mail-using public cannot be maintained without governmental assistance in some form or another.⁶ In various forms, such support has been extended under past methods; that it should be continued seems scarcely open to question—apart from the military value of maintaining a network of airways and a trained and going aviation industry,⁷ there is a general peace-time value to the entire citizenry accruing from a properly organized air transport system; the speedy carriage of the mails, and the expeditious transportation of persons and goods are of importance not only to the individuals directly using the service but to all members of the community with whom such persons have dealings. This is a principle long recognized and applied in the form of the postal deficit on land transportation and in the railroad and canal grants of previous generations; its extension to the field of air transport should not require extended argument.

However, when our attention is turned to the question of the form of such governmental assistance, the problem is not as easy. In the past, such aid has taken three forms: (1) The construction and operation, at the expense of the federal government, of marked and lighted airways equipped with the necessary meteorological and communication service; (2) the construction and operation, at the expense of local municipalities, of airports; and (3) the payment of rates for the carriage of mail exceeding the postal revenues thereon. The first two modes have occasioned little public concern, and have, in the main, been created and extended on a basis of actual need for air transport service by the communities served and the country at large. The third has been the cause of widespread dissatisfaction on the part of both the air transport opera-

5. Recommendations Nos. 90-92, pp. 33, 225-230.

6. See pp. 45-46.

7. Recommendation No. 19, pp. 11, 79.

tors themselves and the public. The Commission has recommended that the first two forms continue without material modification;⁸ its recommendations on the third form propose a complete change in our policy.

In the past, air mail has been carried by virtue of individual contracts with specific carriers, entered into after competitive bidding, and with bids, prior to 1934 at least, made frankly on the basis of cost of service to the operator rather than revenue to the Post Office Department; land-borne mail, on the other hand, has normally been carried by any available public carrier, at rates fixed by governmental action and based roughly on the value of carriage to the postal service. The Commission recommends the adoption of this latter policy with reference to air mail,⁹ suggesting a fixed pound-mile rate of pay within the postal revenue and the use by the Post Office Department of any schedule or line called for by the immediate need of the postal service. As a corollary, it is recommended: (1) that, while all air transport operations be made subject to the holding of a certificate of convenience and necessity, no statutory limit be placed on the establishment of new lines and that the governmental policy be to permit such new operations where their competition will not operate to the mutual destruction of all lines;¹⁰ and (2) that direct financial aid be given by the federal government to such of the lines as (a) are in need of such assistance and (b) whose operations are required for reasons of the general public interest.

As has been said above, these recommendations are in line with our past policy toward railroads and canals, both of which types of transportation were in receipt of immense grants from public funds at a time when their economic situation was comparable to that of air lines at the present time; it is further in accord with the policy of the present administration in the field of the merchant marine.¹¹ Taken in connection with the recommendation relating to administration of governmental control, presently to be discussed, it would have the immense advantage of removing the problem of financial assistance from the field of partisan politics while, at the same time, it made available more and better facilities for the prompt movement of the mail. The

8. Recommendations Nos. 8 & 37-39, pp. 10, 17, 59-60, 111-117. The only significant suggestions are that the federal government assume the cost of construction and operation of airport lighting and that it construct and operate airports in the several national parks.

9. Recommendations Nos. 3, 10 & 11, pp. 9, 10, 49-51, 63-66.

10. Recommendations Nos. 2, 5 & 6, pp. 9, 10, 48, 57-58, 61-62.

11. See Pres. Roosevelt's message of March 4, 1935. H. Doc. No. 118, 74th Cong., 1st Sess., 79 Cong. Rec., March 4, 1935, pp. 2956-2957, 2994-2995.

recommendations would seem to be a most happy solution of an outstanding difficulty, and it is greatly to be hoped that they will meet with approval of the Congress.

The recommendations just discussed obviously require the existence of some governmental agency to determine the questions of: (1) the propriety of the issuance and revocation of certificates of convenience and necessity; (2) the propriety of extending direct financial aid to a particular air line; (3) the amount of such aid and the terms on which it would be granted; and (4) the pound-mile rate to be paid for carriage of air mail. As the Commission points out, these questions are not new to American governmental activities, and our past policy has been to allocate their solution to non-partisan commissions, quasi-judicial in character. Such a body the Commission recommends for this field.¹² As aids in the performance of its duties, both to provide essential data and to safeguard the public against improper practices, subsidiary powers of inspection and control over fiscal policy of air transport operators are proposed.¹³ Again, these recommendations proceed along lines well tested by past experience in other fields of transportation and commend themselves as a wise solution of the problem.¹⁴

One further field of authority the Commission proposes to grant to the regulatory body—namely an assumption of the activities now performed by the Department of Commerce in the matter of licensing of aircraft, mechanics and pilots and the establishment of minimum standards for aircraft.¹⁵ The advisability of this recommendation seems open to some question. The problems involved are technical and in the main executive, not judicial; their solution does not depend on matters of policy but on scientific knowledge. The Commission argues that, since these requirements will affect the financial operations of the carriers and, thus, the problem of granting financial aid, they should be made subject to the same authority. To the writer, the argument lacks persuasiveness. The financial necessities of the carriers will be affected by many factors, of which these are only part. Most of the others will, of necessity, lie outside the scope of activity of the regulatory body—or, indeed, outside the field of any governmental control. No good reason therefore appears for selecting this one group and assigning them to a body not particularly adapted to

12. Recommendation No. 102, pp. 243-247.

13. Recommendations Nos. 4-17, pp. 9-11, 39, 52-76, 243-247.

14. It probably is unnecessary to add that the approval expressed in the text may be subject to an occasional query as to some of the minutiae of the subsidiary recommendations.

15. Recommendation No. 18, pp. 11, 77-78.

their solution. Nothing in our past experience gives basis for any fear that an independent establishment of such requirements by the Department of Commerce would operate to impose arbitrary or unreasonable restrictions on the freedom of action of the carriers or of the regulatory body. It would seem that we could count on the continuance of the past policy, whereby a considerable option was permitted above the line of absolute safety requirements, and absolute minimums would surely be no lower under one authority than the other. In fact, the tendency probably would be for the Department of Commerce to permit greater freedom of choice than would the regulatory body.

One further problem in this field remains: should the regulatory body be one intimately co-ordinated with those governing other forms of transportation or should it be independent. On this point the Commission says:

The need for such a commission to deal with certain problems of aviation seems to us clear. The work that it would have to do is so specialized and so extensive that we make strong recommendation that it should be either a separate and wholly independent body or a quasi-independent division of an over-all commission or group of commissions dealing with all phases of transportation. We do not believe that all of the manifold function of regulation and of assistance which the government should exercise with respect to civil aeronautics can be properly assigned to any existing body that already has other duties of the most pressing and arduous nature, even though it be possessed of as splendid a reputation and tradition as those of the present Interstate Commerce Commission. Speed of regulatory action seems an essential in dealing with an art that undergoes such constant and rapid change. Speed can only be obtained through placing authority with a group that will specialize in this particular field until they acquire an understanding of its problems that will make repeated preliminary explanation of the fundamentals unnecessary. It cannot be attained by piling a new and highly specialized group of questions on top of an already crowded docket of quite a different order¹⁶

Having concluded that the task was one for commission treatment, we proceeded to search for a commission among those now existing which might be capable of assuming the new duties pertaining to civil aviation. Among the commissions now existing the only possible repository for these responsibilities would seem to be the Interstate Commerce Commission. We have given elsewhere . . . our reasons for feeling that in spite of the eminence, long experience, and well-established doctrine of that body, it is inappropriate that the control of civil aeronautics simply be relegated to the Interstate Commerce Commission as now constituted. There would seem to us to be great danger that through the placing of an additional burden upon an already overloaded agency delay might be caused where promptness and certainty of action are of the utmost importance, and that in the formative stage of a

16. P. 53.

new regulatory doctrine there might be an inevitable feeling for analogies with other forms of transportation where such analogies may be superficially attractive but valid only in a very limited degree and actually misleading beyond that point. . . .

Difficulties that are grave or even insuperable for the moment, however, may become minor or disappear entirely with the passage of time and the acquisition of experience. We think it of the utmost importance that the fundamental doctrine relative to commission control of civil aviation and the allocation of direct aids by commission decision should be developed without becoming involved with the troubles of other forms of transport. Those who develop it should have access to a complete record of the experience of other regulatory bodies and should draw heavily upon it, but they should not be too continuously under the influence of the analogy of the current applications to other forms of transport of a doctrine already developed. Once the commission regulation of aviation is well established upon a secure footing; once the general type of problem that arises has been discovered and means for its solution in particular cases devised; then coordination with other instrumentalities of transport may indeed appear as the paramount need. By that time the work of regulating aeronautics should have developed to the point where it will be able to come into the merger of commission interests on equal terms, instead of entering as a junior partner to accept the principles already determined by the seniors.¹⁷

To this proposal, the President, in his letter of transmittal to the Congress, dissented, saying:

The Commission further recommends the creation of a temporary Air Commerce Commission. In this recommendation I am unable to concur. I believe that we should avoid the multiplication of separate regulatory agencies in the field of transportation. Therefore, in the interim before a permanent consolidated agency is created or designated over transportation as a whole, a division of the Interstate Commerce Commission can well serve the needs of air transportation. In the granting of powers and duties by the Congress orderly government calls for the administration of executive functions by those administrative departments or agencies which have functioned satisfactorily in the past and, on the other hand, calls for the vesting of judicial functions in agencies already accustomed to such powers. It is this principle that should be followed in all of the various aspects of transportation legislation.¹⁸

The President's position is, of course, sound as a matter of long range policy, and is in accord with the action taken by the last Congress in the creation of a coordinated Communications Commission. The latter analogy, however, points more directly toward the wisdom of the Commissions recommendation, since the pioneer work of regulating radio communication was done under a separate body and the function was not transferred to a unified body until

17. Pp. 244-245.

18. S. Doc. No. 15, 74th Cong., 1st Sess., 79 Cong. Rec., Jan. 31, 1935, pp. 1849-1850.

this stage had passed and there was in existence, in the language of the Commission, "a doctrine already developed." It is possible that the present Congress may proceed along the lines proposed by the Report of the Federal Coordinator of Transportation for 1934¹⁹ and establish a properly coordinated regulatory body. If it does, the difference between the Commission and the President will not be of serious materiality, since there could be sufficient independence thereunder to meet the Commission's requirements. If, however, the carrying out of that proposal is to be delayed, the adoption of the President's recommendation in preference to that of the Commission would appear to be a matter of grave concern. If the regulatory machinery is to be effective, its operation cannot wait upon the decision of an already too long accrued docket of the Interstate Commerce Commission; while the temptation to subordinate the needs of air transportation and the interests of the public dependent on that form of transportation to the supposed necessities of the owners of railroad securities might well prove to be too great to be resisted.

19. H. Doc. No. 89, 74th Cong., 1st Sess. The report expressly leaves open the matter of coordination of air transport regulation (pp. 18-19), but that accompanying bill provides for a division to control that field.