I. INTRODUCTION

The California and Texas boundaries are bold lines on the map, unmistakably defining vast, important areas. Vaguer boundaries divide the states' economic regulatory jurisdiction over air carriage from that exercised by the Civil Aeronautics Board (the Board) under the Federal Aviation Act of 1958, as amended (the Act). This jurisdictional frontier is marked, not by a map, but by words in the Constitution, the Act, and decades of decisional law. Yet from these words there seems to emerge a verbal map that calls into question whether the Board, in the recent California-Texas Fares decision, has not encroached upon state territory in the field of economic regulatory jurisdiction over air passenger carriage.

This decision represents a commendable effort by the Board to remedy a serious injustice. Nonetheless, the possibility of a jurisdictional encroachment warrants a close, critical look, for the decision may affect tens of millions of air carrier revenue dollars in some of the nation's most important air traffic corridors, the delicate balance of state-federal relationships, and justice to and among diverse classes of air travel consumers who number in the millions.

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2 Interstate and Intrastate Fares in California and Texas Markets, CAB Order No. 76-7-23 (July 7, 1976) (hereinafter referred to as "the decision").
A. A Disgruntled Passenger Complains.

On August 24, 1971, a man in Washington, D.C., bought a tickets from United for travel from Washington, D.C. to San Francisco, from San Francisco to Los Angeles, and from Los Angeles to Washington, D.C. at a total cost of $345 for the trip. The $345 price included thirty-five dollars for travel between San Francisco and Los Angeles. During his trip the man found that other passengers on the plane between San Francisco and Los Angeles paid only $16.50. He felt that United was unfair to charge him thirty-five dollars for a service identical to that which it furnished to other passengers for only $16.50.

The disgruntled passenger was Ralph Nader. On September 23, 1971, he and the Aviation Consumer Action Project (ACAP) lodged a formal complaint with the Board. It charged "unjust discrimination" by United against Mr. Nader as an "interstate passenger." It asked the Board to order United and the other federally certificated airlines providing intrastate services in California, and pursuing similar practices, to desist from charging "interstate" passengers one fare and "intrastate" passengers another for the same service.

On July 8, 1976, following lengthy proceedings, the Board is-

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8 Informal names of airlines are used throughout this article.
10 ACAP is a nonprofit organization that advocates consumer interests in air transportation.
11 United's practice was alleged to violate § 404(b) of the Act, 49 U.S.C. § 1374(b) (1970 & Supp. V 1975), which provides:
   (b) No air carrier or foreign carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

7 Four years, nine month and fifteen days elapsed between filing of the complaint and issuance of the decision. Order No. 72-9-90, issued September 25, 1972, defined the proceeding to include certain matters in addition to those included in the complaint. Hearing was held before an administrative law judge of the Board. The judge on April 23, 1974, issued an initial decision. It differed in material particulars from that ultimately rendered by the Board. The Board, in reviewing the initial decision, received briefs and, on May 14, 1975, heard argument. On October 29, 1976, the Board adopted Order No. 76-10-138 denying all petitions for reconsideration and establishing February 1, 1977, as the effective date of
sued its decision. It found undue discrimination, not between interstate and intrastate passengers, as charged in the complaint, but between knowledgeable and unknowledgeable interstate passengers. As the remedy, however, the Board ordered equalization of the fares charged interstate and intrastate passengers. The equalization was to be at interstate fare levels, except where competition justified equalization at a lower level.

B. Are Knowledgeable Consumers Causing Airlines To Engage In Unjust Discrimination?

Since 1949 Californians have enjoyed air service by intrastate airlines, which are not subject to economic regulation by the Board. More recently, service provided under analogous conditions has become available in Texas and Florida. The intrastate airlines have offered a low-fare, one-class service with dense seating in short-haul markets, many of which are heavily traveled. Responding to this stimulus in California and, for a time, in Texas, the federally certificated carriers have offered similar or identical fares in the coach sections of their flights in the same city pairs. They have, however, confined such fares to “intrastate” passengers moving locally between points in the same state.
Knowledge of two basic facts would aid a consumer planning an itinerary to include visits to a number of California cities. First, relatively low cost air passage can be secured for local movement between certain pairs of California points. Secondly, a federally certificated airline will not simultaneously offer to sell both intrastate passage (at the low intrastate fare) and interstate passage to or from a point of junction with the intrastate flight segment involved. The passenger who knows these two facts has historically been in a position to avoid Mr. Nader's fate of being charged an interstate fare higher than the intrastate fare between two cities in the same state.

In California-Texas Fares, the Board concluded that the record demonstrated the existence of unjust discrimination in violation of section 404(b) of the Act, "particularly in California." The discrimination lay, as noted above, not between interstate and intrastate passengers, but rather, between two categories of interstate passengers, "knowledgeable" and "uninformed."

Both classes of passengers involved in the discrimination, the Board contended, fell into the category of "interstate stopover" passengers. It divided the "interstate" passengers subject to its jurisdiction under section 404(b) of the Act into two categories: "stopover" and "through." As the Board explained this distinction:

The first category consists of stopover passengers, i.e., those passengers making brief stops at one or more points en route, such as a passenger traveling from Seattle, Washington, to Los Angeles, California, who might wish to spend a period in San Francisco before continuing to his destination. The second category includes through connecting passengers whose fares are either through fares

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10 Interstate-intrastate fare differentials offered by the same carrier have not been continuously offered in Texas as they have in California. For this reason, the decision focuses its discussion principally on the situation in California.

11 Decision, supra note 3, at 3.

12 The Board's failure to find interstate-intrastate fare discrimination, coupled with its ordering a remedy for a different sort of discrimination, led one airline party, Braniff, to petition for reconsideration of the decision. Mr. Nader had characterized himself as an "interstate" passenger, the victim of "interstate-intrastate" discrimination. Both initially and throughout, the case was focused on such discrimination. For this reason, it was Braniff's view that due process of law would require a limited reopening of the record to permit the parties to address the "knowledgeable-uninformed" dichotomy upon which the Board at last premised the decision. By Order No. 76-10-138, adopted October 29, 1976, the Board denied Braniff's and all other petitions for reconsideration.
(for those making on-line connections) or joint fares (for passengers making interline connections).

The Board went on to elaborate that through passengers were not involved in the discrimination because such passengers generally enjoy lower joint (two-carrier) and through (single-carrier) interstate fares than could be constructed by local fare combinations—even using the lowest intrastate local fares.

The Board then explained its concept of the legal distinction between "interstate stopover" passengers and true intrastate passengers as follows ("Houston businessman" theory):

Thus, for example, if a businessman living and working in Houston, Texas, decides while in Houston to meet first with a customer in Dallas and then with another customer in Chicago before returning to his home in Houston, he should in theory pay the interstate fare for the first leg of his journey, the trip between Houston and Dallas. If, on the other hand, he decides to travel on to Chicago only after he arrives in Dallas, he is moving in intrastate commerce on the first leg of his journey and should pay the intrastate fare for that same Houston-Dallas trip. The distinction lies in the intent of the traveler determined before the commencement of the journey.

Discrimination, the Board said, flows from the fact that some of these "interstate stopover" passengers are knowledgeable and others, uninformed:

While the theoretical distinction between intrastate and interstate commerce presents no conceptual difficulties, the application of the distinction has proved to be accompanied by grave deficiencies in view of the actual workings of the market place. The carriers have no way of knowing a passenger's underlying intent except insofar as the passenger reveals it during the ticketing process, and it is obvious from the record here that a great many interstate passengers are not disclosing the entirety of their travel plans. Hence they are paying the lower intrastate fares for travel which is in fact interstate . . . . It is thus apparent that the more knowledgeable interstate passengers moving in these markets are routinely paying the lower intrastate fares, leaving only those interstate travelers who are unaware of the lower fares (or that they can be obtained simply by pressuring the carrier or by making the reservation for

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13 Decision, supra note 3, at 4.
14 Id.
15 Id. at 5.
the intrastate leg of the journey separately) to pay the higher fares . . . .
We believe that the availability and use of the two differing fare levels under these circumstances clearly creates unjust discrimination with the meaning of Subsection 404(b) of the Act. . . .

The blame for the discrimination was thus lifted from the airlines, who "have no way of knowing" what is going on, and placed squarely on the shoulders of the knowledgeable consumers who allegedly lack candor and "are not disclosing the entirety of their travel plans."

The Board next rejected a suggestion by Continental that the Board order the carriers to inform the passengers of the availability of the intrastate fares, saying: "The difficulty with this solution is that it knowingly leads to the treatment of interstate trips as intrastate trips, contrary to fact." Instead, the Board said, "[W]e have concluded that these discriminations can be corrected only by eliminating the fare differentials themselves." The Board conceded that its chosen remedy for discrimination between two descriptions of interstate passengers could raise the fares charged intrastate passengers who are not subject to the Board's regulatory jurisdiction. The Board, however, found absolution for any such side effect in the Shreveport* and Wisconsin Passenger Fares** decisions of the United States Supreme Court.*

In prescribing the lawful, single interstate fare to be charged for local movement over intrastate segments, the Board designated "the rates . . . established for operations throughout" the federally-certificated airlines' "domestic systems generally"*** but allowed for

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*Id. at 6.
**Id. at 10 n.26.
***Id. at 10.

21 The California PUC and NARUC unsuccessfully contended in petitions for reconsideration that the Board has invalidly applied these cases. A discussion of this point is beyond the scope of the present article.
22 Decision, supra note 3, at 11-12. It is not clear whether the Board's order outlaws the interstate jet commuter fares described supra note 9 or requires that they be separately justified. The decision directs that the fares be "constructed in accordance with Order No. 74-12-109." Paragraph 8 of Order No. 74-12-109, which contains the fare formula, concludes with the following sentence:
In connection with the filing of tariffs required by this paragraph, the carriers may, without economic justification, maintain each class
the submission, as exceptions to the general rule, of "competitive fares" in markets served by intrastate carriers.\textsuperscript{23}

C. The Decision Will Have Major Impact On Airlines, Consumers, And Federal-State Relations.

The decision cites estimates by the airline parties that for the Board to order equalization of the interstate and intrastate fares will cause revenue losses to the airlines. These losses are stated as either $10,000,000 or $28,000,000 annually, depending on the level at which equalization occurs.\textsuperscript{44} The decision gives the carriers an \textit{option} to match intrastate carrier fares, or not to do so, or to do so selectively and partially. There is thus a major potential impact on consumers, both stopover and true intrastate according to the Board's construction of these categories.

In fiscal 1975, through but two of the various California city pairs which receive federally certificated air service, over one million passengers moved on the federally certificated airlines alone for through or stopover change of planes.\textsuperscript{25} The fares to be paid in the future by many of these passengers will be determined or influenced by the decision.

The decision directly shrinks the jurisdictional sphere of the state agencies in intrastate common carriage. It deprives the states of effective regulatory control over fares paid by both knowledgeable stopover and true intrastate passengers using federally certificated carriers solely within the state. Moreover, it impliedly asserts federal jurisdiction over transportation by intrastate airlines of knowledgeable interstate stopover passengers presumably de-

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\textsuperscript{22} Decision, \textit{supra} note 3, at 13; At this writing, the time for filing petitions for judicial review of the decision has not expired, and it appears likely that the state agencies may in fact file petitions for such review.

\textsuperscript{23} Decision, \textit{supra} note 3, at 13 n.31.

receiving the latter airlines by posing as true intrastate passengers. The finding in the decision that the number of these dissemblers using federally certificated airlines is not *de minimis,* in the absence of any quantitative information in the record, implies a readiness to find that they are similarly not *de minimis* as a fraction of the traffic using the intrastate carriers. Such a finding would subject the latter carriers to a federal certification requirement, ending the intrastate status that has been accorded to them for well over twenty-five years. The decision may also have a direct and immediate competitive impact on the intrastate airlines. The fare flexibility afforded the federally certificated airlines in the interest of allowing them to remain competitive with the intrastate carriers, permits them to offer low fares to interstate traffic which the intrastate airlines are prohibited from carrying.

The decision will stand as an important precedent in the resolution of federal-state air transport issues, of which a number have surfaced recently. In Congress, pending "deregulation," "regulatory reform" and other bills are challenging the form and elasticity of traditional "intrastate" concepts. At the Board, federal-state conflicts are simmering in the *Lake Tahoe Service Investigation* and in a third party enforcement complaint against ticketing practices of one intrastate airline, Pacific Southwest Airlines (PSA), submitted by United to the Board in late 1975. The decision in *California-Texas Fares* may thus significantly affect airlines, consumers, and the relationships between the states and the federal government.

D. There Is A Big Difference Between Through and Stopover Passengers.

Just who are the through passengers? They pay the lowest fares of all. The Board's decision defines them solely in terms of the low fares they pay. It correctly observes that the lowness of these fares,
in comparison with possible combinations of local interstate and intrastate fares, deprives through passengers of any claim to status as section 404(b) discrimination victims.58

Aside from the difference between through and stopover fares, however, it is also important to understand the difference between the purpose of a through and of a stopover passenger. Through passengers, often also called "connecting" passengers, generally seek the most rapid possible movement between two given points. To illustrate, the two points may be designated A and C. Travel between them is accomplished by change of flights, and perhaps carriers, at B. It is generally accepted that the through or connecting passenger has no activities planned at B other than the transfer, and that anything the passenger does at B will be incidental to the movement between A and C.

In law, as in commercial fact, a trip between A and C via a connection at B is recognized as one continuous trip. When A is in one state and B and C are both situated in a second state, the intrastate location of the B-C segment cannot change the character of that portion of the trip to anything but one portion of an interstate (A-C) trip. Thus, the interstate character of through traffic moving over combined interstate and intrastate air segments was not an issue in California-Texas Fares, and is too well-settled for controversy.59

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58 The current (November 1976) fare structure in fact results in some through passengers receiving free transportation over intrastate California segments. Material aspects of this structure are under investigation in the pending Domestic Common Fares Investigation, CAB Docket No. 27,330. The technical causes of the free transportation are (1) common fares to and from different California points now applicable between these points and points in the eastern United States, and (2) permission to the airlines under the decision in Domestic Passenger Fare Investigation, Phase 4, CAB Order No. 74-12-108 (Dec. 27, 1974), to hold joint and through fares—those offered via through routings involving a change of plane—to levels authorized for nonstop and other single-plane routings, in order to permit the change-of-plane routings to compete effectively.

For example, a Philadelphia-San Francisco coach fare for nonstop service on United's flight 67 is $198 including tax. The same fare is available for a routing from Philadelphia to Los Angeles on United flight 99 and a fifty-five minute connection to United flight 887 from Los Angeles to San Francisco. Since the fare on United flight 99 nonstop from Philadelphia to Los Angeles is likewise $198, the trip from Los Angeles to San Francisco is "free." Official Airline Guide (N. Am. ed. Nov. 15, 1976). Such bargains are available to through but not to stopover passengers.

The Board, however, posited as the basis underlying its decision that the second category of passengers—the stopover passengers—are also to be regarded as interstate in character. The Board described these stopover passengers as "those passengers making brief stops at one or more points en route, such as a passenger traveling from Seattle, Washington, to Los Angeles, California, who might wish to spend a period in San Francisco before continuing to his destination." This language seems possibly misleading in two respects: the reference to "brief" stops "en route" and the term "destination." The difficulty with the term "brief" is that there is no record or other basis for applying the term to stopovers. The terms "en route" and "destination," as used, assume facts to be explored, and thus seem to beg the question of the interstate or intrastate status of stopover passengers, as will be shown.

1. How "brief" is a stopover?

Stopovers are regulated by carrier tariffs, not by the Act or regulations thereunder. These tariffs do not limit the maximum duration of a stopover. Since no maximum is specified, there is no definitional guarantee of brevity. The tariffs do provide a minimum period of four hours, and thus assure a substantial interruption as a prerequisite to the assessment of stopover charges such as those paid by Mr. Nader.

912 (9th Cir. 1934), cert. denied, 294 U.S. 723 (1935) and numerous cases cited in section II of this article, infra).

Decision, supra note 3, at 4.

The domestic passenger rules tariff applicable to the transportation at issue currently provides (September 1976), in pertinent part:

Rule 5 . . . Stopover means a deliberate interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination.

Rule 100 . . . [S]topovers will be permitted . . . only upon payment of the combination of applicable fares . . . .

A stopover, as used herein, will occur when a passenger arrives at an intermediate or junction transfer point either: [*] On a flight of any carrier and fails to depart from such intermediate or junction transfer point on — [*]

(a) the first flight on which space is available; or

(b) the flight that will provide for the passenger’s earliest arrival at intermediate or junction transfer point(s) or destination point, via the carrier and class of service as shown on the passenger’s ticket. Provided, however that in no event will a stopover occur when the passenger departs from the intermediate or junction [sic] transfer point on a flight shown in carrier’s official general
Thus, unless a passenger affirmatively desires to delay his transit between point A and point C for four hours (or more, depending on schedules), he will not be classified as a stopover but rather as a through passenger. The duration of the stopover at point B is constrained only by the limitations on a ticketing agent's ability to reserve space beyond a certain time in the future\footnote{In a proceeding involving consideration of international stopover authority (international stopovers have generally been permitted free, i.e., at no charge in excess of the through fare over the applicable routing) an administrative law judge noted:} and not really by that, since the agent can write up the post-stopover flight stage as "open."

There thus appears no ready basis in law, rules or tariffs to support the CAB's conclusion that the duration of passenger stays at stopover points is "brief" in comparison with that of stays at other points called "destinations." The decision does not identify an evidentiary basis for such a characterization.

2. To what "destination" is a passenger making stopovers at both ends of an intrastate segment "en route"?

The concept of destination is significant in determining the character of traffic. It will be seen from the discussion of Supreme Court decisions\footnote{See sections II, III infra.} that the significant destination has always been the destination of intent, and this factor has been regarded as particularly important where the destination on the waybill or ticket differed from the intended destination, as it often does.

What is the significant destination of a stopover passenger? As described earlier herein, Mr. Nader's trip was "from Washington, D.C., to San Francisco, from San Francisco to Los Angeles, and from Los Angeles to Washington, D.C." We must infer from the schedules and/or service patterns as departing within four hours after his arrival at such point.

\textit{AIRLINE TARIFF PUB. CO., LOCAL AND JOINT PASSENGER RULES TARIFF NO. PR-6 (CAB No. 142).} The clarity of the above rule would appear to be aided by transferring the word "either" from the location of the first to the second asterisk.

\footnote{In a proceeding involving consideration of international stopover authority (international stopovers have generally been permitted free, i.e., at no charge in excess of the through fare over the applicable routing) an administrative law judge noted: At the present they [the foreign flag airlines] are able to permit a stopover for 1 year since, under IATA rules, the tickets of the IATA carriers are valid for such a period of time. Transatlantic Route Renewal Case, Reopened, 46 C.A.B. 75, 100 (1966) (Recommended Decision of Examiner Keith). But tickets may be reissued for different flights, and unused coupons for portions of domestic stopover itineraries can be cashed. As to international stopovers, see section IV.B. of this article, infra.}

\footnote{See sections II, III infra.}
fare Mr. Nader paid, as recited, that he planned activities in both Los Angeles and San Francisco, each requiring more than four hours away from the airport. Which, then, was Mr. Nader's destination? First, Mr. Nader had a ticketed destination of Washington, D.C., the same as his origin. All round trip ticketed passengers—a large percentage of total passengers—have ticketed destinations identical with ticketed origins. A technical contention is possible that a round trip is interstate in character throughout if it passes through airspace outside the state of origin. The argument ignores commercial realities, and it is clear that the Board does not in California-Texas Fares rely on such a theory. The Board does not seem ordinarily to regard the ticketed destination as the economically significant destination of a passenger. The statistical air traffic data base compiled under Board supervision, and relied upon as the principal evidentiary basis in certification and other proceedings before the Board, uses other definitions of

33 Mr. Nader's itinerary is noteworthy in that he could break his journey at either of the California cities and it would become his destination for fare purposes, so long as he did not require a stopover at the other. This was the case because a fare of $155, including tax, was available on United for Washington-Los Angeles via San Francisco and an identical fare was available for San Francisco-Washington via Los Angeles. AIRLINE TARIFF PUB. CO., LOCAL PASSENGER FARES TARIFF No. PF-10 (CAB No. 136). In the situation where one visited city is considerably more distant than another from the passenger's point of ticketed origin, such a routing choice would not be available. For instance, in the Board's Seattle-San Francisco-Los Angeles itinerary example, see decision, supra note 3, at 4, only Los Angeles could be visited for a substantial period without paying a stopover charge. There would be a stopover charge for a protracted visit to San Francisco even if the passenger turned around at Los Angeles in less than the four hours provided in the tariff rule, supra note 32. But both Mr. Nader's trip and the Board's example have in common an inferable purpose to conduct significant non-incidental activities at each end of the intrastate segment, and the payment of a substantial sum for the privilege.

34 The reference to destination in the domestic rules tariff stopover definition seems to refer to this ticketed destination.

Rule 5 . . . "Destination (Applicable only to BN and PA) means the ultimate destination of the passenger's journey as shown on the ticket." AIRLINE TARIFF PUB. CO., LOCAL AND JOINT PASSENGER RULES TARIFF No. PR-6 (CAB No. 142).

35 The technical basis is the Act's definition of interstate air transportation, in pertinent part, as "between places in the same State . . . through the airspace over any place outside thereof," § 101(21), 49 U.S.C. § 1301(21). The technique is to equate "between places" with "to and from the same place." Such a rationale might with some validity be applied to sight-seeing flights. Otherwise, it seems for the most part a negation of the commercial significance of air transportation, which is a means of rapidly moving persons and things from one place to another place—a characteristic recognized in the language employed by the framers of the Act.
destination. These definitions are presented in the forms of calculations and comparisons to be performed with the tickets sampled in compiling the data. They are not accompanied by any economic rationalization for the results produced. The presentation occupies three large, well-filled pages, including eighteen examples of different types of itineraries and their classification in terms of origin and destination.

Application of these standards to Mr. Nader's trips, for example, involves use of three different intermediate definitions of destination (D1, D2 and D3), calculation of the "track," and comparison of one-half the track with the various "D" numbers. The end result is to identify San Francisco—not Los Angeles—as Mr. Nader's westbound destination and as the origin of his eastbound return. The description of this calculation shows immediately that there is no consideration of the passenger's intent. More importantly, the determination does not reflect the most significant objectively classifiable datum—the duration of stays in the respective points visited.

To summarize, it is somewhat misleading for the Board in its decision to describe stopovers as "brief" stops "en route" to a "destination." In Mr. Nader's case, such an analysis implies significance to his visit to one California city (San Francisco?) and brevity and insignificance to his activities at the other (Los Angeles?) without any evidentiary support. The significant, classifiable knowledge we have about Mr. Nader's purposes, and those of all the stopover passengers involved in the decision, is that they plan important activities in each California point visited; activities which cannot be concluded in less time than four hours, and which may require days, weeks or months. We know that these passengers pay a substantial sum for the right to visit each city.

Such an understanding of the differences between the characteristics of the through and stopover passengers distinguished in

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Once the trips are extracted from a stopover ticket such as Mr. Nader's pursuant to the directions described above, the stopover and through passengers are intermingled as fungible statistics. No means of distinguishing the two categories is provided, for the element of duration peculiar to stopovers is not recorded. Thereafter, when the data are used in Board proceedings, it may often be assumed without question that the statistics all relate to through passengers.
the decision provides the foundation for a review of judicial decisions which bear on the character of these descriptions of traffic as either "interstate" or "intrastate."

II. THE SUPREME COURT CASES WHICH HOLD TRIPS INTERSTATE IN SPITE OF STOPS RELY ON THROUGH AS OPPOSED TO STOPOVER NATURE OF THE INTERRUPTIONS.

Over the years, the Supreme Court has had many occasions to distinguish between continuous interstate or international and broken intrastate or domestic movements and has rendered helpful and informative opinions on both sides, depending on the facts of each case. For the most part, cases have arisen from challenges to state authority to levy personalty taxes on goods, or to regulate their carriage, on the ground that the goods were "in commerce" constitutionally subject to taxation or regulation only by Congress.\(^{39}\) The CAB, however, has recognized in \textit{California-Texas Fares}\(^ {40}\) as well as in a number of past orders\(^ {41}\) that the principles evolved in this line of precedent apply across the line of the distinction between goods and passengers, and to the statutory determination whether a passenger is in "air transportation" as well as to the constitutional question whether he is "in commerce."\(^ {42}\)

\(^{39}\) "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. Personal property taxation and state regulation cases turning on this clause cite each other interchangeably.

\(^{40}\) "The traditional test, adopted from Sprout v. South Bend, 277 U.S. 163, 178 (1928) by the Board in Eastern Air Lines, Inc., Enforcement Proceeding, 40 C.A.B. 745, 746 (1964) is that ". . . the destination which was intended by the passenger when he begins the journey and which was known to the carrier and for which he purchased a ticket determines the character of the trip.' As Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166, 171 (1922) makes clear, however, the movement is interstate, given the requisite intent, whether or not that intent is communicated to the carrier or is reflected in the itinerary stated on the ticket."

Decision, \textit{supra} note 3, at 5 n.11.

\(^{41}\) See section IV.A. of this article, infra.

\(^{42}\) Generally, movement in interstate commerce has been held taboo for state regulation or unapportioned, \textit{ad valorem} property taxation even in the absence of action by Congress. Movement affecting interstate commerce has been held subject to state regulation unless Congress has taken preemptive action. The definition of "air commerce" in the Act includes "any operation . . . of aircraft which . . . affects . . . interstate . . . commerce." Act, § 101(4), 49 U.S.C. § 1301(4) (emphasis supplied). Air commerce is the concept governing the scope of safety regulation under Title VI of the Act, and is effective to preempt state
A. Sheep-Driving Or Sheep-Grazing?

Making a steady nine miles per day, Kelley's sheep grazed their way across Wyoming from Utah to Nebraska. Mr. Rhoads, County Assessor of Laramie County, Wyoming, assessed them for taxes. In considering whether the sheep were subject to taxation, the Court said:

The question turns upon the purpose for which the sheep were driven into the State. If for the purpose of being grazed, they are expressly within the first section of the [taxing] act. But if for the purpose of being driven through the State to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit . . . .

It thus appears that the only purpose found for which this herd of sheep was being driven across the State was for shipment . . . . The fact that the sheep may not have lost flesh, or may even have gained flesh, during their transit through the State, is impertinent, unless the primary purpose of their being driven there was for grazing."

The Court thus held Wyoming's tax invalidly applied. In so doing, it stated and applied a recurring test: Was the principal purpose movement in interstate commerce, and was the alleged interruption—in this case, grazing—incidental to the movement? The Court found that the sheep were indeed moving in interstate commerce. In order for them to move on foot across five hundred miles of Wyoming, it was necessary that they, incidentally, graze.

B. Transfers Incident To Travel, Or Reticketings In An Effort To Take Advantage Of Local Rates, Do Not Break An Interstate Trip.

Following Kelley, a line of cases developed more fully the types of pauses that would not result in breaking an interstate journey. Without exception, the factors relied on by the Court were the

regulation of safety in U.S. airspace. The economic regulatory concept of air transportation, in contrast, does not embody the expansive "affecting" formula. See Texas Int'l Airlines, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972). Thus, whether a particular activity is "in air transportation" is governed by principles similar to those determining whether a movement is in commerce under the Commerce clause.

Kelley v. Rhoads, 188 U.S. 1 (1903).

Id., at 7-9.
same as today seem to characterize the movement of through air passengers, in contradistinction to stopover passengers. A series of brief quotations from the opinions will serve to illustrate the development of the doctrine:

[T]he wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. . . . In other words, the manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission.45

[H]ere, a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination.46

The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. . . .47

Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. . . .48

The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.49

[W]hile there was no through-rate and no through-route, there was in fact a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation.50

Where commodities are in fact destined from one state to an-

48 Id., at 130.
other, a rebilling or reshipment en route does not of itself break the continuity of their movement or require that any part be classified differently from the remainder. As this court has often said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.61

The coal was in the course of transportation to another state when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended.63

Goods transshipped (passengers connected) or double-billed (passengers double-ticketed) solely for the purpose of movement in commerce remain in commerce despite incidental or paper interruptions. Their status is continuous and interstate, like the conceded status of through air passengers making connections over intrastate segments, discussed in California-Texas Fares.

C. The Supreme Court Seems To Disclaim The Board's "Houston Businessman" Theory.

The "Houston businessman" example given by the Board to illustrate the distinction between "interstate stopover" and "true intrastate" passengers has been quoted earlier.63 It compares the "interstate" Houston businessman—the methodical individual who plans business in both Dallas and Chicago while still in Houston—with the casual, loose "intrastate" Houstonian who puts together a deal in Dallas and only then decides to jet off to Chicago. The decision seems to urge that this distinction, which allegedly "presents no conceptual difficulties," arises from the "historic definition of interstate commerce."64 A principal citation given for these and related propositions is Baltimore & O.S.W.R.R. v. Settle.65

Settle belongs to the line of cases noted above, holding that when the essential character of a movement is through, as determined by its purpose, efforts by the device of multiple billing at intrastate rates to obtain for that movement a more favorable rate

61 Western Oil Ref. Co. v. Lipscomb, 244 U.S. 346, 349 (1917).
65 See section I.B., supra.
64 Decision, supra note 3, at 5.
66 260 U.S. 166 (1922).
than that applicable to the through trip under I.C.C. tariffs will fail. The case embodies a clear exposition of the principles under discussion, but breaks no new ground. Importantly, though, Settle does seem to dismiss the Board's "Houston businessman" theory that the formation, at the outset of travel, of an intent to complete a series of movements necessarily renders the series in legal contemplation one continuous movement: "The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed to be part of it, even though some further shipment was contemplated when the original movement began." As will appear, other opinions seem uniform in their unwillingness to adopt a "Houston businessman" theory holding any movement intended at the outset of an itinerary to be "continuous."

D. Safety Stops Do Not Interrupt An Interstate Journey.

There is what might be termed a safety corollary to the incidental rule. It would have been unsafe for Kelley to drive his sheep across Wyoming without ever allowing them to graze. Safety is always incidental to movement.

A month after the Settle decision, Chief Justice Taft delivered the Court's opinion in the Brattleboro case. In a log drive, logs were impounded by a boom erected across the mouth of the West River, awaiting abatement of high waters imperiling the logs on the Connecticut River into which the West flowed. The Town of Brattleboro asserted that a taxable halt had occurred. The Court rejected this argument:

The boom at the mouth of the West river did not constitute an entrepot or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of its own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classified, measured, counted, or in any way dealt with by the owner for his benefit except to save them from destruction

\[56\] Id. at 173 (emphasis supplied). On the other hand, where the decision for onward movement is made only after reaching Dallas, the court cases support the Board's expressed view that the movement is always intrastate. Bracht v. San Antonio & A. P. Ry., 254 U.S. 489 (1921).

\[57\] 260 U.S. 366 (1922).
in the course of their journey that, but for natural causes over which he could exercise no control, would have been actually continuous.\textsuperscript{58}

E. \textit{If Speed Is The Chief Objective, A Pause For Any Convenient Step In Achieving It Does Not Break The Movement.}

A few brief quotations from decisions issued after \textit{Settle} and \textit{Brattleboro} will demonstrate that the Court has continued to test the continuity of journeys by the same consistent guiding principles:

The change in the method of transportation by floating to carriage on a vessel did not affect the continuity of the interstate passage, if such a passage was intended by the parties and had begun. \ldots\textsuperscript{59}

The quickness of transshipment in both [the \textit{Sabine Tram Co.} and the instant] cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose.\textsuperscript{60}

\[\text{If the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points.}\textsuperscript{61}\]

While most of the foregoing cases dealt with freight, their principles are equally applicable to passenger transportation. They were thus applied in the case of Mrs. Nothnagle when she bought from the New Haven Railroad a ticket from Meriden, Connecticut, to Fall River, Massachusetts, requiring a one hour and ten minute wait between connecting trains in New Haven. On the New Haven platform between trains, Mrs. Nothnagle handed her suitcase to a redcap. There were mixed results. She never saw the suitcase again, but her name was written indelibly into the reports of the Supreme Court.\textsuperscript{62} Mrs. Nothnagle sought to defeat the federal interstate

\textsuperscript{58} \textit{Id.} at 373, 374. \textit{Cf.} Canadian Colonial Airways, 2 C.A.B. 752 (1941), discussed \textit{infra} at section IV.A.

\textsuperscript{59} Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 474 (1926).

\textsuperscript{60} Carson Petroleum Co. v. Vial, 279 U.S. 95, 109 (1929).


tariff baggage liability limitation by asserting that her trip was an intrastate Meriden-New Haven trip, broken by the New Haven transfer stop from the New Haven—Fall River interstate leg. The Court held, correctly as would appear from the cases hereinbefore cited, that this claim was without merit: "In this case respondent undertook a voyage from Connecticut to Massachusetts, with a temporary stopover for transfer along the way . . . ."

It appears, in summary, that a long and unbroken line of Supreme Court cases has relied on the very factors that distinguish through from stopover passengers in finding movements to be continuous and interstate in character. Let us now look at the other side of this coin, the stop made by some passengers for reasons other than facilitation of an onward journey.

III. THE SUPREME COURT CASES HAVE HELD STOPOVER TYPE INTERRUPTIONS TO BREAK THE INTERSTATE JOURNEY.

A. Non-Incidental Interruptions Break Interstate Movement Where Not Fully Communicated To The Carrier (Knowledgeable Stopovers).

A person who plans an interstate movement, preceded or followed by a break for activities not incidental to the furtherance of that movement, and carries out his plan without informing the carrier of such plan in advance, may be compared to the knowledgeable stopover passenger in California-Texas Fares. The Supreme Court, however, has consistently held such users legally entitled to the benefits of state regulation (or subject to the burdens of state personalty taxation).

In a leading case, flatboat-loads of Pennsylvania coal were brought from Pittsburgh to New Orleans where they lay on the Mississippi River awaiting sale in boatload lots. Some boatloads would eventually move on, pursuant to sales for export, and be transhipped to ocean vessels. Other boatloads were destined for intrastate movement to Louisiana plantations. The Court held Louisiana’s personal property tax validly assessed:

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43 The term "stopover for transfer" as used by the Court in Nothnagle appears synonymous with through as used by the Board in California-Texas Fares.


45 Brown v. Houston, 114 U.S. 622 (1885).
The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state. . . .

A 1907 decision," qualified—but approved as “consistent”—in the Settle case," concerned carloads of corn waybilled interstate from South Dakota to Texarkana, Texas, and five days later separately consigned, in the same car, to a different railroad for “intrastate” shipment to the corn’s ultimate purchaser in Goldthwaite, Texas. The Court upheld the Texas position that the low intrastate rate applied, rather than the higher interstate proportion demanded by the railroad. The broker in the corn transaction maintained a practice of taking delivery of Texas-destined commodities in Texarkana and reconsigning and rebilling intrastate to get the lower rates. While the finding of a non- incidental interruption of journey in Gulf seems open to question on the facts, the decision has never been overruled and does stand, among a number of other cases, for the proposition that a substantial interruption, although at all times intended, will justify application of intrastate rates.

The storage of oil in tanks in Memphis, following its carriage from Pennsylvania and preceding its onward shipment to Arkansas, Louisiana, and Mississippi, subjected the oil to personal property tax, which the Court upheld." In this opinion, the Court presented the governing principle in a form seemingly helpful in assessing the character of Mr. Nader’s movement within California: “The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. [Citing and discussing cases]. But intermediate between these points questions may arise. . . .”

Noting that the Memphis oil distributing business of plaintiff in-

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"The decision in Gulf . . . relied upon by defendants in error, is entirely consistent with these later decisions of this court, although some expressions in the opinion are not.” Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166 (1973), discussed supra note 40.

"General Oil Co. v. Crain, 209 U.S. 211 (1908).

"Id. at 228, 229.
volved the filling of numerous small orders, impractical while the oil remained in tank cars, the Court observed: "This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil." Similarly, for a purpose outside the mere transport of his person from place to place, Mr. Nader took himself from transportation at both San Francisco and Los Angeles, each time coming to rest in California, under the protection of the state.

Continuing to develop the doctrine of non-incidental purpose, the Court next found a tax properly levied on piles of coal in New Jersey:

The conclusion of the district court was that, by the storage of coal, appellant 'obtained two beneficial results. First, cars arriving when no bottoms were on hand could be released and demurrage charges saved; second, when bottoms arrived and no cars were on hand containing the kinds of coal desired, such vessels could be loaded from the piles, resulting in a saving of time in the departure of such bottoms.' In other words, there was something more than the submission to delay in transportation and the acceptance of its consequences."

So with Mr. Nader's visits to San Francisco and Los Angeles, as with any ticketed passenger paying stopover charges, there is something more than submission by the passenger to the delay of a connection en route, "something more, therefore, than an incidental interruption of the continuity of" an air movement.

If a commodity is waybilled interstate to a place with the general intent that it be there reconsigned and shipped onward to intrastate points there determined, the intent to have the goods move beyond the distributing point does not render the movement legally continuous:

Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The coal was

71 Id. at 231.

72 Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 668 (1913).
under the control of the consignee, and he could sell it in transit or at Davenport, or reconsign it to a point on respondent's railway, or any other railway, at his own discretion.

[T]he fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character.73

The stopover break in California-Texas Fares is in one respect weaker, but in another respect far stronger, than the Iowa coal distribution break. The consignee's uncertainty of the coal's next destination beyond Davenport contrasts with Mr. Nader's knowledge of his entire itinerary at all relevant times. But on the other side, anyone who pays for a stopover ticket must by necessary inference intend to leave the plane, the concourse, and the terminal to go about some unknown, separate activity at the visited cities, indistinguishable from the general populace of the state. Significantly, the Iowa coal was deemed to break its transit by doing nothing more than sitting in the railroad's coal cars on the railroad tracks.

In the spring of 1914, Campbell's United Shows were touring the Southwest. The plan was to tour from El Paso, Texas, through Arizona and New Mexico and into California, using eighteen railroad cars. Campbell's arranged with one railroad for transport from El Paso to Tucson. It separately obtained carriage from Phoenix to California on the Santa Fe. From the Southern Pacific, it demanded carriage to close the gap between Tucson and Phoenix. When the Southern Pacific refused, except under high interstate rates, Campbell's enlisted the aid of the state regulatory agency. The agency ordered the railroad to provide the service sought under intrastate rates. The Supreme Court upheld the agency order against the railroad's challenge that "the proposed movement of the shows was 'interstate in character.'"74

At the time of the state commission order, Campbell's was "exhibiting for six days at Tucson," breaking the interstate trip from Texas into Arizona. The formal arrangements for transporta-

tion from Phoenix to points outside the state, on the Santa Fe, had not at that time been completed. The Supreme Court said: "The mere intention of the shipper to ultimately continue his tour beyond the state of Arizona did not convert the contemplated intrastate movement into one that was interstate." Thus, it again appears that the mere intention of a "Houston businessman" ultimately to pursue his business beyond Dallas would, in the Court's view, "not convert the contemplated intrastate movement into one that was interstate." Nor could Mr. Nader's intent to return to Washington at the conclusion of his activities in Los Angeles have such an effect.

A decision under the Federal Employers' Liability Act and another under the Fair Labor Standards Act accord with the foregoing decisions. Further, they illustrate the migration of the constitutional principles therein set forth into statutory interpretation. A similar migration of these principles into the Federal Aviation Act has been acknowledged by the CAB.

The cases discussed in this section involved stops followed by onward movement planned to some extent in advance, but not always fully communicated to the carriers involved. In the next category of decisions, the plan to move beyond the stopping place was more often known to the carrier. The following cases are thus closest to the situation of the uninformed stopover passenger, such as Mr. Nader, who innocently discloses his complete plans to the airline. The outcome, however, seems generally unaffected by disclosure of itinerary.

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75 Id. at 477. This is not a true case of a knowledgeable user deliberately withholding the itinerary from the carrier. Although Campbell's bought three separate "contracts"— cf. passenger tickets—it does not appear to have been any part of Campbell's purpose to conceal the fact that the Shows had come from Texas into Arizona and were on their way to California. The case is in this respect a hybrid with multiple ticketing, on the one hand, and apparent candor as to itinerary, on the other. See also Minnesota v. Blasius, 290 U.S. 1 (1933).


* See section IV, infra.
B. Non-Incidental Interruptions Of Movement Planned And Communicated To the Carrier ("Uninformed" Stopovers) Break Interstate Movement.

Logs cut at Wentworth’s location in New Hampshire (New Hampshire logs) during the winter of 1879 were drawn by teams down to Clear Stream and laid on the banks and the ice to await the spring thaw. Other logs were harvested in Maine (Maine logs) just across the Umbagog Lake, which straddles the Maine-New Hampshire border and is the source of the Androscoggin River. In 1879, the Maine logs had been rafted across the lake into New Hampshire and the Androscoggin, but low water and ice had there arrested their progress in the Town of Errol. The destination of all the logs was the mills near Lewiston, Maine, far down the Androscoggin. The upper Androscoggin, when it flows, flows through the Town of Errol. On April 1, 1880, while the ice of New Hampshire still held the logs in its frosty grasp, the Selectmen of Errol assessed them for taxes.

The New Hampshire Supreme Court, affirmed by the United States Supreme Court, quashed the tax as to the Maine logs and upheld it as to the New Hampshire logs.79 The Maine logs had been arrested by natural conditions while floating along the very watercourse that would eventually transport them to their destination near Lewiston, and thus, “started . . . in a continuous route.” The New Hampshire logs had never been floated, but only “drawn down from Wentworth’s location,” a separate, “preparatory” intra-state movement. As the Supreme Court framed its holding:

[Products of a state intended for exportation to another state . . . do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey.80

In another log drive decision seventeen years after Coe, again upholding a tax, the Court observed: “[W]e may say that the cases establish that there may be an interior movement of property

80 Id. at 527.
which does not constitute interstate commerce, though the prop-
erty come from or be destined to another state. . . .}

A clear, strong decision on non-incidental interruption resulted
from a purchase by Mr. Bacon of grain in transit from the south-
west to New York and Philadelphia, under contracts with the
railroads permitting the consignee to withdraw the grain en route
for "the mere temporary purposes of inspecting, weighing, clean-
ing, clipping, drying, sacking, grading, or mixing, or changing the
ownership, consignee, or destination" thereof at Chicago. Bacon
availed himself of this privilege and was caught with his grain in
Chicago elevators on tax day. Upholding the tax, the Court said:

But neither the fact that the grain had come from outside the state,
nor the intention of the owner to send it to another state, and there
to dispose of it, can be deemed controlling when the taxing power
of the state of Illinois is concerned. The property was held by the
plaintiff in error in Chicago for his own purposes and with full
power of disposition. It was not being actually transported, and it
was not held by carriers for transportation.

In the same way, Mr. Nader had come from outside the State
of California to San Francisco and intended, as indicated on his
ticket, to proceed to Washington, D. C., beyond Los Angeles.
But these facts could not be considered controlling where the
power of California to regulate the fare for an intrastate trip from
San Francisco to Los Angeles is concerned:

The plaintiff in error had withdrawn [the grain] from the carriers.
The purpose of the withdrawal did not alter the fact that it had
ceased to be transported and had been placed in his hands. He had
the privilege of continuing the transportation under the shipping
contracts, but of this he might avail himself or not as he chose.

Similarly, Mr. Nader had withdrawn his person at San Francisco
and Los Angeles from the custody of United to go about his private
business. He had the privilege of continuing the transportation
under his ticket.

81 Diamond Match Co. v. Ontonagon, 188 U.S. 82, 96 (1903). The correct-
ness of this decision on its facts is open to doubt.
83 Id. at 515, 516.
84 Id.
85 Mr. Nader's ticket was priced at a combination of three local rates, and
he could have cashed in his unused coupons for a full refund after traveling
Mr. Bacon's case involved personal property tax. Subsequently, in an intrastate-interstate regulation conflict, the Court upheld state regulation by finding a break in journey (a manufacturing process) where the intrastate movement was tied to the post-manufacturing interstate movement by an incentive rate structure. In a more recent decision, under a "transit" privilege contracted with carriers, similar to that involved in Bacon, the Court dealt with coal mined in New Jersey and freighted intrastate to Coalburg, New Jersey. In Coalburg the coal was put in piles to await further shipment at a through rate contractually prearranged with the railroad. The Court upheld the local tax, citing Bacon, and observed: "That the storage of the coal is a part of a transit privilege does not in itself sustain appellants' claim that the interstate movement had not stopped sufficiently for the state's taxing power to attach when the coal reached and was stored in Coalburg."

The foregoing cases appear to stand at odds with the theory underlying the California-Texas Fares decision that passengers intending non-incidental stops in transit, and so informing the carriers (uninformed stopover passengers) are interstate in character.

IV. The Board's Own Prior Decisions Do Not Point Toward A Conclusion That Domestic Stopover Passengers Are in Continuous Interstate Air Transportation.

A. Board Orders Have Accepted The Applicability Of The Court Cases Herein Discussed To The Identification Of "Air Transportation" Under The Act.

1. The Canadian Colonial Case

The Act provides for economic regulation by the Board of "foreign air transportation," which is air common carriage between

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either to San Francisco or to Los Angeles. Airline Tariff Publ. Co., Local and Joint Passenger Rules Tariff No. PR-6 (CAB No. 142). Mr. Bacon's grain was apparently on a through rate below the combined local rates east and west of Chicago. In this respect, Mr. Nader's itinerary is more strongly broken than was the movement of Mr. Bacon's grain.

68 But see Galveston, H. & S.A. Ry. v. Woodbury, 254 U.S. 357 (1920), in which the issue of a "break" in trip by reason of an "apparent" stopover was not raised.
"a place in the United States and any place outside thereof." The Board is not entrusted with regulation of air common carriage between two places both outside the United States. This is so even if the plane flies through the United States. Before the United States entered World War II, Canadian Colonial Airways, Ltd., an airline of Canada, operated inclusive tour-type charter flights on a DC-3 between Montreal, Quebec and Nassau, Bahamas, through the United States. The southbound flights would land at Jacksonville, Florida for refueling in the evening and would remain overnight. The passengers were restricted to expenditure of no more than ten dollars in United States currency in Jacksonville. The CAB expressly found that it would have been unsafe for the flights to proceed to Nassau after dark.

The CAB held that, under these circumstances, Canadian Colonial was not engaged in "foreign air transportation" to and from Jacksonville. Discussing a number of the court cases supporting this result, the Board said:

With respect to the question of whether an interruption of a journey will affect the interstate nature thereof so as to render the portion of the trip following or preceding the break of an intrastate journey, it has been held in numerous cases that the essential nature of the movement is determined by the ultimate destination of the journey. If the stopover or interruption is merely an incidental part of the whole trip to the ultimate destination, it is held that the interruption does not change the nature of the traffic from interstate to intrastate commerce. . . . [citing cases]

While the Board appropriately cited a number of the cases herein discussed for the foregoing proposition, it might well also have invoked, as dispositive support for its holding, the language of

86 Under § 1108(b) of the Act, 49 U.S.C. § 1508(b) (1970 & Supp. V 1975), the CAB is, however, given power to issue permits for the navigation of foreign aircraft in the United States on a reciprocal basis.
87 Canadian Colonial Airways, Montreal-Nassau Service, 2 C.A.B. 752, 754 (1941).
Chief Justice Taft on a safety interruption in Brattleboro, that "it was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way." The Canadian Colonial plane and passengers seem to fit most closely within the category of through traffic rather than stopover traffic as those terms are used in the California-Texas Fares decision.

2. The Resort Case

After the War, the CAB experimented with a temporary certificate limited to overseas (United States Territorial) and foreign air transportation and further confined to package tours, including air and ground elements, between east coast cities (including New York and Miami) and Caribbean vacation stops. Resort, the holder of this certificate, interpreted it to allow sale to New Yorkers of vacation packages which included sojourns at Miami. The scheduled airlines serving the New York-Miami market considered such activities inpermissibly similar to the "interstate" New York-Miami business offered by their certificates.

In addressing this contention, the CAB held that Resort's status was to be determined in accordance with the principles declared in the judicial decisions. It further noted that Resort's business was sui generis. Hence, the application of those principles could not be a mechanical process:

Moreover, the intent of the shipper of property is to secure the movement of goods via one-way transportation to some particular destination, a significant factual element here absent. The passenger cases also involve different legal and policy considerations, and none of them deals with the effect of a planned recreational stopover on an escorted circular recreational tour where the passenger's activities during both the stopover and the tour as a whole are largely controlled by the carrier. . . .

The Board concluded that Miami stopovers would not convert Resort's transportation to prohibit interstate air transportation so long as such stopovers were strictly limited in duration.

The Board's reasoning in Resort, as described above, contributes

Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 379 (1922), discussed supra, notes 44, 45.

Resort Airlines Miami Stopover Investigation, 19 C.A.B. 1, 6 (1954).

Limited to 1/3 the duration of the total tour or, as modified in an unpublished order, 7 days, whichever was longer. CAB Order E-8680, Sept. 30, 1954.
to the present analysis in two principal respects. First, the *Resort* opinion emphasized that there was no single "intended ultimate destination" for the tours. The same conclusion seems appropriate in *California-Texas Fares* with respect to the stopover passengers. The latter passengers must be regarded as attaching significance to and as intending non-incidental activities at each point at which their ticket permits an extended stay. No other inference seems tenable in view of the substantial charges assessed for the stopover privilege.

The second helpful aspect of the *Resort* analysis is its careful reliance on the passengers' common, overriding purpose of participation in a carrier-organized, supervised, recreational tour, "which embodies and at the same time transcends air transportation." The Board's description eloquently evokes the thread of continuity that defines the tour passengers' purpose even when they are on the ground, making it possible to view the *Resort* tour as a single, continuous, unbroken activity. This demonstration presents a stark contrast with the individually ticketed, scheduled, point-to-point stopover passenger. The latter, unlike the *Resort* tour participant, departs totally from the carrier's custody, supervision, knowledge, and control and journeys to places unknown for private purposes at each stopover point. The carrier plays no necessary part in planning the passenger's activities once he leaves the concourse. There are no controls on the maximum duration of the stay. There is no demonstrable common purpose between any two or more passengers. Indeed, there is nothing beyond the prearrangement for onward carriage after the stop—a prearrangement indistinguishable from those held insufficient to impart continuity in the *Bacon, Arkadelphia*, and *Scheele* cases.

By its recognition of the futility of seeking to define a single

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96 See section I.D.2. of this article, supra.

97 *Resort Airlines Miami Stopover Investigation*, 19 C.A.B. 1, 11.

98 See notes 69, 73, and 74 supra. Additionally, *Sprout v. South Bend*, 277 U.S. 163 (1928), cited in the decision, at 5 n.11, is yet another instance of traffic prepaying an interstate rate but being held intrastate because of an actual break in movement within the state. The relevance of *Sprout* to the present analysis is limited because it did not involve movement after, as well as before, an interruption. It does add force to the point seemingly established in other cases that the sandwiching of Mr. Nader's San Francisco-Los Angeles coupon between two interstate coupons can be given virtually no weight in determining the character of Mr. Nader's movement between the two California points.
destination for a passenger who has significant nonincidental activities at several points on a complex itinerary, and by its necessary reliance on the sui generis recreational tour purpose of Resort's passengers, the Resort case seems deeply to undermine the California-Texas Fares classification of point-to-point stopover passengers as "interstate."

Board orders touching upon the question of legal break in air movements subsequent to Resort have cited both Canadian Colonial and Resort with general approval. The issues have not been discussed in depth again. In a few instances, the later decisions have included language apparently heedless of the Resort admonition against misuse of judicial maxims hinging on the term "destination."

B. The Treatment Of Stopover Passengers In Foreign Air Transportation Does Not Support A View That Domestic Stopover Passengers Are In Continuous Movement.

Foreign airlines serving the United States do so pursuant to foreign air carriers permits issued by the Civil Aeronautics Board and the President of the United States. These permits authorize only foreign air transportation. A number of foreign airlines hold coterminous or lineal segment authority to serve two or more United

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99 Bader Bros. Van Lines, Inc., CAB Order No. 74-6-110 (June 25, 1974).
101 See, e.g., Eastern Air Lines, Inc., Enforcement Proceeding, 40 C.A.B. 745, 748 (1964), wherein the Board says, "But it is urged that the usual rule that the origin and destination of the trip determines the nature of the transportation should not be followed in this case because for the travel agents the stopover at Miami was the dominant or principal part of the trip." Here, the Board seems to stumble over the semantic snare it avoided in Resort. When the judicial cases speak of "destination," they do not refer to the ticketed or paper destination, but to the "dominant or principal part [purpose] of the trip." Thus, the urging of Chief Administrative Law Judge Newmann and the Bureau was, in substance, that the "usual rule" be followed and that Miami be found to be the principal destination of the travel agents whose itinerary durations were tracked; See also Tucson Airport Authority, TWA Certificate Amendment, 23 C.A.B. 772, 799 (1956).
103 For a definition of "foreign air transportation" see text supra note 76. It is the policy of the United States to forbid cabotage to foreign airlines, pursuant to the right secured to each signatory nation by Article 7 of the Chicago Convention, opened for signature Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.
States points on the same flight. For many years, these foreign airlines have been permitted to carry on-line connecting and foreign stopover passengers between such common United States points.

The principal feature that distinguishes this foreign stopover authority from domestic is that, while the domestic stopover passenger may use several different airlines, foreign stopover passengers may be brought into or taken out of the United States only by the same airline that provides the stopover carriage between United States points.\(^{104}\)

The *Qantas* case that stands as authority for this last proposition rests on a detailed consideration of the legislative and international treaty framework of foreign air carriage. It makes clear that the entitlement of foreign airlines to carry single-carrier stopover passengers in the United States is *not* based on any theory that such passengers are moving in a continuous flow of foreign air transportation to which their stops are incidental. *Qantas* precludes the foreign airlines from carrying transfer traffic brought into or taken from the United States by another carrier, even though such traffic is clearly *through* traffic within the meaning of the term in *California-Texas Fares*.

The Board noted in *Qantas* that the foreign carriers’ entitlement to United States point-to-point carriage of traffic brought into or taken from the country on their own line depended, not on concepts of flow and continuity, but on the expressed intent of Congress on this particular subject. In explaining the development of the governing practices, the Board said:

In issuing certificates and permits restricted [to foreign air transportation], the Board has made the scope of permissible operations dependent solely upon the haul performed by the holder between points named in the route described in the certificate or permit, without regard to whether the traffic itself is moving as part of the continuous journey to or from a point not named in the certificate or permit. . . . This ‘carrier haul’ approach has been used in route descriptions notwithstanding the fact that the Board’s jurisdiction under the Act itself has generally been construed as embodying ‘the flow of commerce concept.’\(^{105}\)

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\(^{105}\) *Id.* at 44, 45.
The rationale of *Qantas* is that the single-carrier connecting and stopover privileges accorded airlines in foreign air transportation are based on a special "carrier haul" approach. In contrast, stopovers in domestic contexts are evaluated by the "flow of commerce" concept discussed in *Canadian Colonial, Resort*, and later orders down to and including the *California-Texas Fares* decision.106

Similar to the Supreme Court cases, the CAB's own past decisions bearing on the jurisdictional character of California and Texas stopover passengers seem to map the territory by different boundaries than those announced in *California-Texas Fares*.

IV. CONCLUSION

The inquiry detailed in the preceding pages fails to support a conclusion that the *California-Texas Fares* order lies within the Board's—as opposed to the states’—subject matter jurisdiction. The Board has made a highly commendable effort to end a rank injustice between knowledgeable and uninformed passengers in California and Texas. It sought this result, however, under an anti-discrimination statute addressing invidious distinctions only between "descriptions of traffic in air transportation." (emphasis supplied).107 If the analysis in this article be taken as a guide, neither knowledgeable nor uninformed stopover passengers are in air transportation within the statutory meaning of those words. Rather, all are true intrastate passengers subject to state regulation.

This is not to say that the Board is without power to deal effectively with the matters raised in Mr. Nader's complaint in Docket 23859, or that the resources devoted to investigating it in *California-Texas Fares* were wasted. A different section of the Act108 gives the Board power to issue cease and desist orders prohibiting "unfair or deceptive practices . . . in air transportation or the sale

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106 The distinction between foreign and domestic regulatory theory expounded in *Qantas* was recently reaffirmed in Sitmar Cruises, Inc., CAB Order No. 75-8-88 (March 13, 1975).


108 Act, § 411, 49 U.S.C. § 1381 (1970 & Supp. V 1975). As a consumer, Mr. Nader did not fall within the limited categories of persons entitled by the terms of this section to invoke it. Once possessed of Mr. Nader's complaint seeking to invoke § 404, however, the Board could act under § 411 "on its own initiative" to remedy, and prevent recurrences of, the injustice.
thereof." (emphasis supplied). Arguably, it was the sale of Washington-San Francisco and Los Angeles-Washington air transportation that enabled United to charge Mr. Nader $18.50 more for intrastate San Francisco-Los Angeles passage than the $16.50 specified in United's applicable intrastate tariff duly published and filed with the California Public Utilities Commission. The Board has in section 411 of the Act a sufficient warrant to insure that the sale of services authorized under federal authority is not used as the basis for unfair or misleading treatment of consumers with respect to other services performed by federally-licensed carriers under state supervision.

There are some practical differences between the results that would flow from the Board's decision, on the one hand, and from the conclusions of this article, on the other. Under the decision, a single fare must be offered to all passengers making non-incidental visits at both ends of an intrastate segment. But it must be the higher interstate fare, except in markets having intrastate carrier competition. In the latter markets, the federally certificated carrier is given an option to offer the intrastate fare level to all passengers.

The view reached in this article would similarly require use of a single fare for all passengers making non-incidental stops on an intrastate segment. But that fare would in all instances be the fare published in the carrier's tariffs applicable to intrastate passengers, in accordance with the laws of the state involved. The Board's requirement to charge consumers a higher fare than that allowed by state law in markets where there is no intrastate airline competition would vanish, as would the option to charge a higher fare even where such competition is present.

The California-Texas Fares approach fixes the blame for unjust discrimination on knowledgeable consumers. It takes the view that these culpable users have so infiltrated the innocent, true intrastate passengers that the latter must suffer the loss of the benefits of low fares under state regulation. The CAB would impose this result in order to frustrate the culprits seeking to classify themselves as

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109 In Texas, this might in fact at times be the C.A.B. tariff. Theoretically, a carrier could publish an intrastate fare higher than its interstate fare for the same mileage. This, however, seems not to have occurred either in the railroad cases discussed herein or in the Texas and California air passenger markets addressed in California-Texas Fares.
intrastate "contrary to fact." The analysis of this article reaches a simpler and less cynical result. It maintains that the knowledgeable stopover passengers are right. They, their uninformed brethren, and the true intrastate passenger all should receive, automatically, identical treatment under a view that they all constitute intrastate traffic.

California-Texas Fares would oust the states from effective regulatory protection of even concededly true intrastate passengers using the federally certificated airlines and threaten continued effective state regulation of the intrastate airlines. The jurisdictional analysis of this article avoids depriving the states of any regulatory control they exercise today. It confirms state jurisdiction over wholly intrastate trips, a jurisdiction eroded by the practice of the federally certificated carriers of issuing, at interstate rates, stopover tickets including intrastate trips.

This article is an effort to locate, through conventional legal analysis, the boundary between federal and state jurisdiction over carriage by air where that boundary intercepts the CAB's landmark decision in California-Texas Fares. Perhaps in the last analysis it also offers a practical alternative remedy for the public injustice typified by Mr. Nader's California fare adventure five years ago. If so, it seems that such public benefits are only the byproduct of an unusually detailed inquiry into the correctness of a questionable legal interpretation shared for some time by the CAB and its regulated industry.

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110 Decision, supra note 1, at 10 n.26.

111 The federally certificated carriers as a class are not, of course, guilty of anything more reprehensible than resolving all doubts in favor of collecting the larger fare. One airline-party to California-Texas Fares, Delta, sought forthrightly to raise the question of the character of different descriptions of traffic. The administrative law judge, however, responded as follows:

Delta suggests that there are no definitive guidelines with respect to the criteria to be used to identify intrastate and interstate passengers; and that there is a need for a clear definition of what constitutes an intrastate passenger vis-a-vis an interstate passenger. There is, of course, a clear and legally-sanctioned test for determining whether a passenger is interstate or intrastate. Moreover, it is highly doubtful whether the precision which Delta seeks could be attained by attempting to translate the legal definition into a set of rules and regulations.

Interstate and Intrastate Fares in California and Texas Markets, Initial Decision, CAB Docket No. 24779, served Apr. 23, 1974. Tariff Rule 100, supra note 32, seems precise enough.
To those who believe that reforms in our country's system of air transport regulation are an urgent priority in the public interest, the existence of public benefits as a byproduct of analytical legal inquiry should unlock the gates to a little-explored field for regulatory reform. For it suggests that a detailed review of possibly questionable interpretations of existing law can, in some instances, disclose public benefits which could be realized without an act of Congress, but which might rival those claimed for some portions of the legislative reform proposals currently being urged.