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THE INTRASTATE EXCEPTION TO CAB REGULATION: HOW MUCH INTERSTATE ACTIVITY CAN AN INTRASTATE CARRIER ENGAGE IN AND RETAIN ITS FREEDOM FROM CAB REGULATION?


T H E F E D E R A L Aviation Act¹ (the Act) provides for both safety and economic regulation of commercial aviation. In contrast to its broad safety jurisdiction,² the Act establishes a narrower jurisdiction in matters of economic regulation.³ A notable limitation on the jurisdiction of the Civil Aeronautics Board (CAB) in the economic realm has traditionally been the exclusion of intrastate carriers from economic regulation.⁴ Litigation involving Southwest

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² The Federal Aviation Administration is primarily responsible for safety regulation under the Act, and the Civil Aeronautics Board is primarily responsible for economic regulation. The safety regulatory provisions of the Act apply to all civil aircraft flying in “air commerce,” 49 U.S.C. § 1421 (1976), which is defined in 49 U.S.C. § 1301(4) (1976) as including “any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.” The Administrator of the FAA can grant exemptions from safety regulations “in the public interest” under 49 U.S.C. § 1421(e) (1976).


⁴ The following cases have established the intrastate exception to the economic regulatory jurisdiction of the CAB: Allegheny Airlines v. Pa. Public Utility Comm'n, 465 F.2d 237 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973); Peo-
Airlines (Southwest) reaffirmed the intrastate exclusion at the beginning of this decade. Current matters before the CAB, the courts, and the Congress are expanding the intrastate exclusion, allowing intrastate airlines to engage in interstate operations while remaining free from economic regulation by the CAB. This article examines these matters and their expected impact on the legal environment in which the nation's airlines operate.

I. THE INTRASTATE EXCEPTION REAFFIRMED: THE LEGAL ORDEAL OF SOUTHWEST AIRLINES

Southwest Airlines is an intrastate air carrier operating entirely within Texas, certified and economically regulated by the Texas Aeronautics Commission (TAC) rather than the CAB. Southwest began flight operations in 1971 after a three year court battle with CAB certificated carriers who attempted to prevent Southwest's entry into the Texas market without CAB certification.

Southwest's legal ordeal continued when Texas International...
(TI) and Braniff filed complaints against Southwest with the Bureau of Enforcement of the CAB, claiming that Southwest's proposed services would carry a significant number of interstate travelers. Since Southwest had no certificate from the CAB, Braniff and TI argued that Southwest would violate section 401 of the Act. They also claimed that even if Southwest's services were truly intrastate in character, the diversionary impact on TI and Braniff would amount to an undue burden on interstate commerce which the CAB could and should prohibit.

The Director of the CAB's Bureau of Enforcement refused to docket a petition for enforcement of TI's and Braniff's complaints, and the CAB dismissed the complainants' appeal from this refusal, finding the burden on commerce argument "legally untenable":

While the [CAB] has never had occasion to rule formally on the question in a concrete case, the consistent view of the [CAB] and its legal staff has been that the adverse impact of intrastate operations on interstate air carriers neither precludes state certification of such operations nor gives the [CAB] jurisdiction to interfere with them. The generally accepted opinion has always been that purely intrastate operations are beyond the reach of the power conferred on the [CAB] by the Act even where such operations may be thought to burden interstate commerce by reason of their adverse economic impact on interstate air carriers.

TI and Braniff appealed the CAB's decision to the United States Court of Appeals for the District of Columbia Circuit. The court upheld the decision of the CAB and found that the plain language of the Act dictated that its economic regulatory provisions should

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8 Texas International Airlines, Inc. v. CAB, 473 F.2d 1150, 1152 (D.C. Cir. 1972).
9 49 U.S.C. § 1371(a) (1976) provides: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."
10 473 F.2d at 1151.
11 CAB Order No. 71-6-79 (June 15, 1971). The CAB declined to act on the complainants' charge that Southwest's services truly would be interstate in character, stating that Southwest had represented its services would be intrastate in character and there was no reason to doubt Southwest's good faith.
12 Id. at 6-8. Petitions for reconsideration were denied. CAB Order No. 71-9-23 (Sept. 3, 1971).
14 The court reasoned in this manner:
The economic regulatory provisions which require certification by
not be construed to apply to the activities of carriers which, although intrastate, nevertheless affected interstate commerce.\textsuperscript{15}

Southwest had apparently cleared the intrastate air of legal obstacles when the cities of Dallas and Fort Worth and their Regional Airport Board sought to close Dallas' Love Field to Southwest.\textsuperscript{16} The cities and their airport board sought a declaratory judgment that rulings of the CAB required the transfer of all certificated air carrier services to the new Dallas-Fort Worth Regional Airport,\textsuperscript{17} including the intrastate services of Southwest.\textsuperscript{18} The court found this contention to be without merit because: (1) the CAB has no economic regulatory jurisdiction over a purely intrastate airline

the Board apply, insofar as is here pertinent, only to persons who engage in "air transportation" as defined in the Act, Section 401, 49 U.S.C. § 1371(a). Air transportation is defined in relevant part as "interstate air transportation." Section 101(10), 49 U.S.C. § 1301(10). "Interstate air transportation" is in turn defined as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between ... a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia."

Further, "air commerce," defined in the same provision of the Act as "air transportation," expressly includes "any operation or navigation of aircraft within the limits of any Federal Airway" and "any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate ... air commerce." Section 101(4), 49 U.S.C. § 1301(4). This indicates that the omission of similar language in the definition of "air transportation" was deliberate. Thus appellants' position that Southwest should be required to obtain certification because its activities affect interstate carriers is untenable.

473 F.2d at 1152.

\textsuperscript{15}There is little doubt that Congress could have extended the CAB's jurisdiction over intrastate carriers had it chosen to do so. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

\textsuperscript{16}Love Field is approximately 5.5 miles from downtown Dallas. The cities and their airport board desired to force Southwest to move to the new Dallas-Fort Worth Regional Airport, located midway between the two cities, which are 31 miles apart. See Note, A Purely Intrastate Carrier is Not Within the Jurisdiction of the CAB, 40 J. AIR L. & COM. 566 (1974).

\textsuperscript{17}The CAB orders relied upon by the complainants resulted from the Dallas-Fort Worth Texas Regional Airport Investigation, CAB Docket No. 13959 (1962). The interim orders gave the cities 180 days to arrive at a voluntary agreement to designate a single airport to serve their area, or the CAB would choose one for them. See Note, supra note 16.

such as Southwest; and, (2) the CAB only has jurisdiction over air carriers engaged in "interstate air transportation" as defined in the Act," and, therefore, it has no jurisdiction over Southwest.20

The Fifth Circuit Court of Appeals affirmed, stating that although Southwest would be regulated by the Federal Aviation Administration in all matters of flying safety, Southwest would not come within the economic regulatory jurisdiction of the CAB:

By flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Southwest will not require a certificate from the federal agency in charge of economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law.21

These cases would appear to establish conclusively that purely intrastate aviation is not within the economic regulatory jurisdiction of the CAB, even when that intrastate air traffic substantially affects interstate commerce. They also seem to mandate that "interstate air transportation" be defined restrictively under the Act.22 These results lead to the primary inquiry of this article: how many interstate operations or activities can an intrastate carrier engage in without forfeiting its intrastate exemption from CAB regulation?

II. The Lake Tahoe Hearings And The De Minimis Doctrine

As defined in the Act, "interstate air transportation" does not include flights originating and ending within a single state without


20 Two other reasons given by the court, not pertinent here, were: (1) the CAB never attempted to assert jurisdiction over Southwest in the orders relied upon by the cities and their airport board; and, (2) the CAB has no jurisdiction over cities or their airports, as such. 371 F. Supp. at 1022.

21 City of Dallas v. Southwest Airlines Co., 494 F.2d 773, 776 (5th Cir. 1974). This case is discussed in Note, supra note 16. Braniff and Texas International were enjoined from relitigating the issues of this case in Southwest Airlines v. Texas International Airlines, 396 F. Supp. 678 (N.D. Tex. 1975), aff'd, 546 F.2d 84 (1977).

going outside that state's air space. The CAB has nevertheless held that such flights are interstate air transportation subject to CAB regulation if more than a de minimis volume of the traffic is moving as part of a continuous interstate journey.

The CAB's de minimis doctrine has recently been unsuccessfully challenged in an extended and complicated series of administrative and judicial hearings involving service to and from Tahoe Valley Airport and other points in California. This airport is situated in California but also provides air service for nearby Nevada resorts, although any passenger travel between the airport and Nevada destinations is by means independent from flights into Tahoe Valley Airport. In 1975, Pacific Southwest Airlines and Air California...
nia, both intrastate airlines, applied for exemptions from CAB reg-
ulation to provide service to Tahoe Valley Airport while holding
themselves out as thereby providing service to nearby Lake Tahoe,
Nevada. In other words, the intrastate airlines desired the authori-
zation to advertise their air services as effectively interstate without
losing their intrastate exception to CAB regulation. The CAB
granted conditional exemptions, but in so doing stated:

[In our view, air service at Lake Tahoe is interstate in nature
by definition. . . . The [CAB] has previously found, both explicitly
and implicitly, that more than a de minimis number of passengers
moving by air between Lake Tahoe and other California points
originate or terminate their journeys in Nevada; consequently, the
transportation is interstate, not intrastate, notwithstanding that the
aircraft may be navigated entirely within California. See CAB v.
Friedkin Aeronautics, 246 F.2d 173 (9th Cir. 1957).]

A petition for reconsideration of this order was filed by the Cali-
ifornia Public Utilities Commission (PUC). PUC took issue with
the CAB’s finding that the air transportation provided by the intra-
state airlines to and from Tahoe Valley Airport was interstate in
nature, arguing that the CAB had failed to define the de minimis
standard upon which the finding was based. PUC argued addition-
ally that the transportation could not be interstate because there
were no air carrier contracts contemplating interstate service, and
that the CAB failed to offer facts to support its conclusion that the
service was interstate.

The CAB was not persuaded by these challenges and upheld its
original position, but cited only previous CAB decisions in support
of its de minimis doctrine. The CAB also stated that the airlines
serving Lake Tahoe would never have filed for exemptions from the

\[\text{\textsuperscript{27}}\text{Id. at 17,681.}\]
\[\text{\textsuperscript{28}}\text{CAB Order No. 75-6-135 (June 27, 1975).}\]
\[\text{\textsuperscript{29}}\text{Id. at 5.}\]
\[\text{\textsuperscript{30}}\text{CAB Order No. 75-9-78 (Sept. 22, 1975). The PUC is the state aviation
regulatory agency in California. PUC was joined in this petition by Air Califor-
nia and the National Association of Regulatory Utility Commissioners (NARUC).}\]
\[\text{\textsuperscript{31}}\text{CAB Order No. 75-9-78 (Sept. 22, 1975) at 2-6.}\]
\[\text{\textsuperscript{32}}\text{It is debatable whether the de minimis doctrine has ever been upheld in
court. CAB v. Friedkin Aeronautics, discussed \textit{infra} at notes 45-47, was cited by
the CAB in support of the de minimis doctrine in CAB Order No. 75-6-135
(June 27, 1975), but not in the order on reconsideration, CAB Order No. 75-9-78
(Sept. 22, 1975).}\]
CAB in the first place if they had not been "fully aware that a sizeable portion of their Lake Tahoe passengers are interstate passengers."33

PUC and the National Association of Regulatory Utility Commissioners (NARUC) appealed, claiming that the CAB's determination that Lake Tahoe traffic was interstate encroached upon the jurisdiction of the PUC and went beyond the jurisdiction of the CAB under the Act.34 The court conceded that the CAB made its determination without the benefit of a full hearing or investigation, but held that no case or controversy requiring judicial review was presented for the court.35

Prior to the decision by the court of appeals on the appeal of PUC and NARUC, the CAB had ordered an ancillary investigatory hearing to develop a factual record as to the actual intrastate/interstate mix of passengers at the Tahoe Valley Airport.36 In January, 1978, CAB Administrative Law Judge Greer Murphy recommended that the CAB grant Pacific Southwest and Air California their requested exemption authority to operate between South Lake Tahoe, California, and other California points for a period of five years.37 Judge Murphy's recommendation basically adopted the position of the CAB staff, which suggested that the CAB exercise its exemption powers under the Act38 and allow virtually complete intermingling of interstate and intrastate traffic while taking jurisdiction only over the interstate portion of the flights.39

The CAB adopted Judge Murphy's findings and conclusions as its own in May 1978,40 and granted exemptions for five years to Pacific Southwest Airlines and Air California. The CAB again applied the de minimis doctrine, this time offering statistical evidence

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33 CAB Order No. 75-9-78 (Sept. 22, 1975), at 6.
35 The dissenting opinion ably takes the majority to task on this point, arguing that a case or controversy did exist because a current and continuing harm was being inflicted upon Air California and Pacific Southwest Airlines. 14 Av. Cas. at 17,682-17,685.
36 CAB Order No. 76-3-114 (Mar. 16, 1976).
40 CAB Order No. 78-5-77 (May 12, 1978).
in support of its contention that many of the passengers flying these routes are interstate,\(^4\) despite the fact that the planes fly wholly within California airspace.\(^4\)

Although the CAB announced its de minimis doctrine more than sixteen years ago,\(^4\) it has never been firmly upheld in the courts, and the doctrine should perhaps be reconsidered. The doctrine seemingly conflicts with cases prior and subsequent to its announcement.\(^4\) The primary case cited by the CAB in support of its de minimis doctrine is *CAB v. Friedkin Aeronautics, Inc.*,\(^4\) a case which offers weak, if any, authority in this regard. In *Friedkin*, the CAB tried to enjoin a non-CAB certificated air carrier, operating wholly within California airspace, from carrying passengers engaged in interstate travel. The *Friedkin* court never reached a decision on the merits, but remanded for more complete findings of fact and conclusions of law, leaving undecided the question whether the intrastate carriers were involved in interstate air transportation\(^4\) and thereby within the CAB's jurisdiction. The case was dropped and the issue left unanswered when the carrier changed its operations to avoid further charges of interstate transportation.\(^4\)

The strict construction of "air transportation" applied in the Southwest Airlines cases clearly militates against application of the de minimis doctrine in the Lake Tahoe hearings. In both proceedings the intrastate carriers were independent from any transportation used to cross state lines. Neither were there any interline or

\(^4\) See note 35 supra, and accompanying text.

\(^4\) CAB Order No. 78-5-77 (May 12, 1978) at 2 n.4.

\(^4\) See note 24, supra.


\(^4\) 246 F.2d 173 (9th Cir. 1957). See also note 29 supra, and accompanying text.

\(^4\) 246 F.2d at 176. In fact, the court even suggested that "[i]f appellees [intrastate carriers] were correct in [their] estimate of the evidence, then probably it would not be possible to hold that appellees were engaged in air transportation." *Id.*

\(^4\) Comment, *State-Federal Economic Regulation of Commercial Aviation*, 47 *Tex. L. Rev.* 275 (1968). That author reads *Friedkin* as supporting CAB jurisdiction over intrastate air traffic, along with *CAB v. Canadian Colonial Airways*, 41 F. Supp. 1006 (S.D.N.Y. 1940), another case which failed to reach a decision on the merits. This author respectfully suggests that neither case supports the CAB's de minimis doctrine, especially in the Lake Tahoe situation where there is no crossing of state lines by the carrier.
joint fare agreements with any airline actually flying interstate. The position taken by the CAB in the Lake Tahoe hearings also seems contrary to the holding of United States v. Yellow Cab Co.\textsuperscript{48} In Yellow Cab, the question before the court was whether two types of taxicab services were involved in interstate commerce for purposes of the Sherman Act. One type of cab service was provided by railroads to their interstate passengers and purchased by the passengers simultaneously with their rail tickets, while the second type of cab service was provided by local cabs which merely conveyed interstate passengers between their homes and the railroad stations. The first type of service was found to be transportation in interstate commerce; the second type was not. The position of the second type of cab is analogous to the independent and local intrastate air carriers who carry interstate passengers to the Tahoe Valley Airport.

In view of the CAB's order granting exemptions to the California intrastate airlines, however, it is unlikely that the CAB's de minimis doctrine will be reviewed judicially in the near future. As will be discussed later, however, Congressional action may have preempted the doctrine.\textsuperscript{49}

III. CALIFORNIA—TEXAS FARES

The CAB's decision in California-Texas Fares,\textsuperscript{50} recently affirmed by the United States Court of Appeals for the District of Columbia Circuit,\textsuperscript{51} directly reduces the intrastate exception to economic regulation under the Act by expanding CAB jurisdiction to

\textsuperscript{48} 332 U.S. 218 (1947).

\textsuperscript{49} See the discussion of reform legislation, notes 163-179 infra, and accompanying text.

\textsuperscript{50} CAB Order No. 76-7-23 (July 7, 1976). This order was reconsidered and affirmed by the CAB in CAB Order No. 76-10-138 (Oct. 29, 1976). The CAB's decisions and their implications are discussed in depth in Smuck, The CAB California-Texas Fares Case: An Intrastate Stopover Takeover?, 42 J. AIR L. & COM. 675 (1976).

\textsuperscript{51} California v. CAB, Nos. 76-2117, 76-2123, 76-2155 (D.C. Cir., June 20, 1978). Appeals from CAB decisions are allowed to any person disclosing a substantial interest in the CAB's order, upon petition within 60 days of the order. 49 U.S.C. § 1486 (1976). The following were petitioners in the appeals of the California-Texas Fares orders: Texas Aeronautics Commission, the California PUC, and the National Association of Regulatory Utility Commissioners. The following parties were granted leave to intervene: Texas International, Western, United, TWA, Hughes Airwest, Ralph Nader, and the Aviation Consumer Action Project.
include the economic regulation of the intrastate fares of CAB certificated interstate carriers, an area previously regulated by the states. The issue before the CAB in *California-Texas Fares* was whether fare differentials charged passengers for the same CAB certificated flight on the basis of whether the passenger was interstate or intrastate were unjustly discriminatory, unduly preferential or prejudicial, or otherwise unlawful under the Act. The initial complaint was filed after Ralph Nader, as an interstate passenger on United, was required to pay $35.00 for the San Francisco-to-Los Angeles leg of his interstate journey, while intrastate passengers on his flight had to pay only $16.50 for the same service. The CAB found that such fare differentials in California and certain Texas markets were unjustly discriminatory, and could only be corrected by elimination of the fare differentials. The CAB therefore ordered the establishment of a single level of fares for both interstate and intrastate passengers moving in the intrastate markets.

The fare differentials in this case were the product of a dual system of regulation involving the CAB and state regulatory agencies. The CAB regulates the interstate fares of CAB certificated carriers in interstate air transportation. Prior to this case, the Cali-

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52 CAB Order No. 76-7-23 (July 7, 1976). The CAB also addressed the issue whether "any unlawfulness resulted from the differences between, on the one hand, interstate coach or standard-class fares in the above identified markets and, on the other hand, the interstate commuter or economy-class fares in those same markets."

53 49 U.S.C. § 1374(b) (1976) provides:

No air carrier or foreign air 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.


55 Unfortunately for consumers, the new fares are to be computed on the costlier basis of federal formulas, with the exception that they can be lowered to the extent necessary to meet competition from non-CAB certificated intrastate carriers. CAB Order No. 76-7-23 (July 7, 1976).

56 In California, the Public Utilities Commission (PUC) is the state aviation economic regulatory body. In Texas, this function is served by the Texas Aeronautics Commission (TAC). See Chasnoff & Means, *State Regulation of Air Transportation: The Texas Aeronautics Commission*, 53 Tex. L. Rev. 653 (1975).
fornia PUC regulated the fares of non-CAB certificated carriers operating exclusively within California,\textsuperscript{57} as well as the intrastate fares of CAB certificated carriers operating within the borders of California.\textsuperscript{58} In Texas, the Texas Aeronautics Commission (TAC) merely licensed intrastate carriers without regulating their fares, and therefore intrastate and interstate carriers in Texas were free to raise or lower their intrastate fares at will. The effect of the CAB's decision in \textit{California-Texas Fares} is to expand the economic regulatory jurisdiction of the CAB to include the regulation of the fares charged for intrastate trips by CAB certificated carriers—an area previously regulated by the states.\textsuperscript{59}

The CAB's decision seems directly contrary to the Southwest Airlines cases as well as the decision in \textit{People v. Western Airlines, Inc.},\textsuperscript{60} which held that the California PUC had exclusive authority to regulate the intrastate rates of both CAB certificated carriers and intrastate carriers. In that case, the California Supreme Court held that under the Act it seems clear that Congress has not sought to extend the economic regulation of the CAB to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates. . . . There is no language indicating that Congress intended to preempt the field of economic regulatory control of air transportation of passengers solely between points within a state and not involving the use of the air space outside of the state.\textsuperscript{61}

The CAB claimed, however, that its decision was authorized by the

\textsuperscript{57} Two examples of such Airlines are PSA and Air California.

\textsuperscript{58} Two examples of such airlines are United and Western.

\textsuperscript{59} Although this paper does not propose to deal in depth with the propriety of this decision, one of the stronger arguments adopted by the appealing parties was that the CAB does not have economic regulatory jurisdiction over intrastate lines per the Southwest cases and the following sections of the Act: 49 U.S.C. §§ 1301(10), 1301(21), 1324(b), 1373(a), & 1482(b) (1976). Brief for Petitioner National Assoc. of Regulatory Utility Commissioners at 10 ff.

\textsuperscript{60} 268 P.2d 723 (Cal.), cert. denied, 348 U.S. 859 (1954). Although this is a state court case, it was relied on by the federal district court in City of Dallas v. Southwest Airlines Co. \textit{See note 19 supra}. The CAB also seems to disregard its own statement with reference to Southwest that a finding that an intrastate airline burdened interstate commerce "would not confer jurisdiction on the CAB." CAB Order No. 71-9-23 (Sept. 3, 1971) at n.2.

\textsuperscript{61} 268 P.2d at 736-737.
Shreveport doctrine, under which the Interstate Commerce Commission (ICC) is authorized to eliminate differences between inter-state railroad rates approved by the ICC and lower intrastate rates charged by railroads subject to ICC jurisdiction, when such rates result in an undue preference for one locality over another.

The CAB's decision takes de facto jurisdiction over the intrastate rates of CAB certificated carriers, despite the following disclaimer by the CAB:

The CAB's decision here is no assertion of an authority under the Act to control the intrastate rates of federally certificated carriers, or intrastate carriers as such. We are cognizant of the many cases cited to us to the contrary. But our determination here does not seek to control such intrastate fares but simply carries out the mandate of the Act to eliminate unjust discrimination in air transportation. This we are empowered to do.

Just as this decision increased CAB jurisdiction, it equally decreased the jurisdiction of parallel state regulatory agencies. The CAB order provided, however, that the fares "could be lowered to the extent necessary to meet the competition from intrastate carriers."

The CAB's decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. The court recognized that the CAB's order has "the effect of regulating intrastate fares, a right reserved to the state and one which the Federal Aviation Act does not grant to the CAB." Nevertheless, the court adopted the CAB's position and held that the CAB has preemptive authority, under the Shreveport doctrine, to regulate the intrastate flights of interstate airlines.

The provisions of the statutory schemes of the Interstate Commerce Act and Federal Aviation Act limit the federal agencies to

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63 CAB Order No. 76-7-23 (July 7, 1976) at 11.

64 Id. at 14.


66 Id. at 8-9.

67 Id. at 9-11.
the regulation of interstate commerce, but when unjust discrimination results from an intrastate rate structure, the federal power preempt that of the state. . . . The court upholds the [CAB]'s authority to eliminate unjust discrimination by setting a single fare level to apply to both interstate and intrastate passengers on inter-state carriers.68

Although the Shreveport doctrine was originally created in a case involving the Interstate Commerce Act, the court felt clearly justified in making it applicable to the Federal Aviation Act as well. The court pointed out that the Shreveport doctrine has been followed consistently since its inception,69 and that the applicable section of the Federal Aviation Act70 was modeled after the Interstate Commerce Act, "the latter being an appropriate guide for construing the former."71 The court additionally stated that "the legislative history of the Civil Aeronautics Act of 1938 indicates that Congress, although asked to do so, decided not to limit the application of the Shreveport doctrine in air transportation as it had done in highway transportation."72 The intrastate exception to CAB economic regulatory jurisdiction consequently is diminished by this opinion.

IV. THE CHICAGO-MIDWAY LOW-FARE ROUTE PROCEEDING

The most significant recent action regarding the intrastate exception to the CAB's economic regulatory jurisdiction is the CAB's decision in the Chicago-Midway Low-Fare Route Proceeding73 with regard to the application of Midway (Southwest) Airlines. The

69 Id. at 10.
70 Id., referring to 49 U.S.C. § 1374(b) (1976).
71 Id.
72 Id. at 10-11.
73 Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978). The July 14 decision was tentative, ordering an additional expedited proceeding to investigate the need for additional authority between Chicago's Midway Airport and the following cities: Atlanta, Boston, Buffalo, Cincinnati, Columbus, Dallas/Fort Worth, Dayton, Denver, Des Moines, Hartford, Indianapolis, Louisville, Memphis, New York/Newark, Omaha, Philadelphia, and Washington/Baltimore. Twenty-one airlines are seeking authority in these expanded hearings. See 237 AV. DAILY 196 (1978).
CAB's decision allows Southwest Airlines to operate a wholly owned subsidiary airline, Midway (Southwest), out of Chicago's Midway Airport. Although Southwest is a wholly intrastate airline, Midway (Southwest) will operate interstate routes. The CAB's decision not only approves the affiliate relationship between Southwest and Midway (Southwest) but, most importantly, it holds that the operation of an interstate affiliate by Southwest does not bring the parent company's intra-Texas operations within the economic regulatory jurisdiction of the CAB. This decision broadens the intrastate exception to economic regulation by the CAB. The details of the decision, the propriety of the decision, and the probable impact of the decision on other intrastate airlines will be addressed respectively.

A. Details of the Decision

Midway (Southwest) initially applied for authority in December, 1971, to operate high-frequency, low-fare service to a number of short- to medium-haul, high density markets from Chicago's Midway Airport. Midway (Southwest)’s proposed services and fares are modeled after the highly successful operations of its parent airline in Texas, with the important distinction that Midway (Southwest)’s flights will be interstate, requiring CAB certification. In its statement of issues, the prehearing conference report in the Chicago-Midway Low-Fare Route Proceeding included the following issue: "Can a carrier [Southwest] not regulated by the CAB by virtue of its wholly intrastate operations retain its intrastate character

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74 Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978). Midway (Southwest) has been granted authority to fly between Chicago's Midway Airport and the cities of Cleveland, Detroit, Kansas City, Minneapolis/St. Paul, Pittsburgh, and St. Louis.

75 Id. at 59. The proposed Southwest-Midway (Southwest) relationship will be as follows: Midway has 2,000,000 shares of common stock authorized, at a par value of $1.00. 250,000 shares have been issued, all owned by Southwest. Midway will lease nine advanced model Boeing 737-200 aircraft from Southwest. There will, however, be no interlining of passengers or baggage between the two carriers. The relationship is discussed in further detail, id. at 54-57.

76 Id. at 57.

77 Id. at 1.

78 49 U.S.C. § 1371 (1976). Southwest is a wholly intrastate, non-CAB certificated carrier, specializing in short-haul medium- to high-density markets. Southwest flies twelve Boeing 737-200 aircraft at lower fares than many CAB certificated carriers.
while at the same time its affiliate [Midway (Southwest)] holds a certificate of public convenience and necessity from the CAB to engage in interstate air transportation?" In other words, would the interstate operations of Midway (Southwest) force Southwest to forfeit its intrastate carrier status and come within the economic regulatory jurisdiction of the CAB?

The CAB answered this question in the negative by determining that Southwest is not an air carrier under section 101(3) of the Act, and that Southwest remains an intrastate air carrier under section 101(22) of the Act despite the interstate operations of Midway (Southwest). The CAB stressed that the operations of the two airlines will be "totally distinct," having separate management, separate equipment, separate operations personnel, and operating in separate parts of the country. The CAB stated that the ownership of an interstate airline by a corporation that engages in intrastate air transportation "does not in and of itself make the parent an interstate air carrier under the Act."

In making these determinations the CAB applied a "holding out"

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79 Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (Sept. 26, 1977) at Appendix A, question 7.
80 Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978).
81 49 U.S.C. § 1301(3) (1976), provides:
"Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.
83 Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 57. The CAB stated further that the operations of Midway (Southwest) will, of course, be subject to the "full panoply" of CAB economic regulation, as would those of any other interstate air carrier.
84 Id. at 57 n.147. The CAB pointed out, however, that several of the officers of Southwest may also be officers of Midway (Southwest).
85 Id. at 58. This was in response to the brief of North Central Airlines which argued, at 39-40, that such ownership did make the parent an interstate air carrier under the Act. The Texas Aeronautics Commission argued against North Central on this issue in oral argument before the CAB on March 15, 1978. The CAB's Bureau of Pricing and Domestic Aviation also opposed North Central on this issue in its brief to the CAB of March 20, 1978, at 35.
test for air carrier status," explaining that the critical element is whether the applicant holds itself out to the public as a supplier of interstate air transportation, either directly on aircraft it owns or leases, or indirectly as an independent agent between the buyer and the direct carrier." The concept of "holding out to the public" refers generally to (1) offering transportation services to the public, (2) receiving compensation for those services, and (3) assuming responsibility for those services.*

The CAB held that Southwest does not satisfy the "holding out" test because (1) Southwest does not itself offer transportation services on any interstate routes, (2) Southwest does not receive compensation for Midway (Southwest)'s services other than through stockholder dividends, and (3) Southwest does not assume responsibility to travelers or shippers for the services offered by the subsidiary.*

The CAB also approved, as required by sections 408 and 409 of the Act, the control of Midway (Southwest) by Southwest Airlines* as well as the interlocking relationships of directors and officers between the two airlines.* Stating that the purpose of sections 408 and 409 is to prevent intercorporate conflicts of interest that might have an anticompetitive effect on the industry,* the CAB found no potential problem with the Southwest-Midway (South-

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* Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277 (July 14, 1978) at 58.
* The corporate relationship between the parent and subsidiary is explained in note 75, supra.
* Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 58.
* CAB approval of interlocking relationships is required by section 409 of the Act, 49 U.S.C. § 1379 (1976). The chief executive officer and the secretary of Southwest will hold the same offices for Midway (Southwest), and both will be directors of both companies. Thus, there will be no more than two officers and two directors common to both companies. Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 59 n.150.
* Id. at 59. The CAB cited Hughes Tool Co. v. TWA, 409 U.S. 363 (1973), and Lehman Brothers Interlocking Relationship Case, 15 C.A.B. 656 (1952), for this proposition.
west) affiliation.\textsuperscript{94} No horizontal takeover would occur from Southwest competing with Midway (Southwest) for traffic\textsuperscript{95} because the airlines would be flying in wholly separate areas of the nation.\textsuperscript{96} The CAB similarly found no danger of vertical integration between the two airlines, creating a substantial and unfair cost advantage for the subsidiary airline, because there are "virtually no goods or services that Midway (Southwest) would be purchasing from Southwest that could give Midway (Southwest) a competitive advantage."\textsuperscript{97}

It is important to note that the CAB could have asserted jurisdiction over Southwest Airlines and merely granted Southwest an exemption from the economic regulation of the CAB.\textsuperscript{98} This would have allowed Southwest to proceed with its proposed interstate affiliate airline while continuing its intrastate Texas operations without actual economic regulation by the CAB, although technically Southwest would be within the CAB's economic regulatory jurisdiction. It is unlikely that Southwest would have pursued its proposed affiliation with Midway (Southwest) at the price of giving up its intrastate exclusion from economic regulation by the CAB.\textsuperscript{99} The CAB chose, however, to determine that Southwest lies wholly outside the economic regulatory jurisdiction of the CAB, despite its affiliation with an interstate carrier.

B. Is the Midway Decision Justified Regarding Southwest and Midway (Southwest)?

Any discussion of the propriety of the CAB's decision in the Chicago-Midway Low-Fare Route Proceedings must begin with an

\textsuperscript{94} Id. at 59.
\textsuperscript{95} Id.
\textsuperscript{96} The nearest the two airlines will operate to each other will be Dallas, Texas and St. Louis, Missouri.
\textsuperscript{97} Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 59.
\textsuperscript{98} The CAB has this power under 49 U.S.C. § 1386 (1976), when regulation would result in undue hardship on the carrier or would be against the public interest.
\textsuperscript{99} Interview with Mike Muse, former V.P. of Southwest Airlines (Nov. 11, 1977). See also Dallas Times Herald, July 13, 1978, § A (Business) at 24; 235 AV. DAILY 213 (1978), reporting on testimony before the CAB of then Southwest Airlines President M. Lamar Muse.
examination of the record of Southwest Airlines. Operating without CAB certification, Southwest has compiled a sterling record in Texas. Beginning its short haul intrastate service on June 18, Southwest carried a total of only 114,085 passengers in 1971. That total rose annually, climbing to 1,539,113 passengers in 1976, with passenger boardings in 1977 rising fifty-two percent over 1976. Southwest's growth still continues, with traffic increasing eighty-five percent in January, 1978, compared to January, 1977.

Only the propriety of the CAB's decision as it regards Southwest and Midway (Southwest) is addressed in this article. The Chicago-Midway Low-Fare Route Proceeding has an interesting history and an intricate nature, involving no less than twenty-four parties. Two other noteworthy issues which should be mentioned, even though not addressed in this article, have been brought to the author's attention, for which the author is grateful. First, the CAB's tentative decision to grant all applications without giving totally new entrants (namely Midway Airlines and Midway (Southwest) Airways) a protected opportunity to inaugurate service in the Midway markets is "a radical departure from past practices" which one of the parties to the proceeding suggests "may not prove to have the pro-competitive impact which the CAB desires." Letter from Robert G. Cross, General Counsel, Texas Aeronautics Commission, to the author (June 7, 1978). Mr. Cross' views are echoed by the Departments of Justice and Transportation, which favor route protection for a short initial period for Midway and Midway (Southwest). 236 AV. DAILY 132 (1978). Republican CAB Member Richard O'Melia also takes this position, 236 AV. DAILY 50 (1978), and has filed a formal dissent to the CAB's decision in the Midway proceeding. Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (Aug. 11, 1978). See also 238 AV. DAILY 226 (1978). Midway (Southwest), on the other hand, maintained that it was willing to compete with anyone in all of the six markets for which it sought authority. 236 AV. DAILY 132 (1978). AVIATION DAILY reported that the CAB's refusal to give the new airlines a protective "corridor" could seriously hurt Midway Airlines, which unlike Midway (Southwest) has no parent airline, and make Midway Airlines "a big loser." The DAILY also reported that although then CAB Chairman Alfred E. Kahn and Members Richard O'Melia, G. Joseph Minetti, and Lee R. West were sympathetic with the concerns of Midway Airlines, they were apparently convinced that the "overwhelming" legal risks involved in prohibiting incumbent airlines at O'Hare Airport from exercising dormant Midway authority outweighed the benefits of imposing the protective corridor. 236 AV. DAILY 292 (1978). The second noteworthy issue not addressed in the body of this article regards the power of the CAB to preclude incumbent carriers with existing Chicago certificate authority from operating out of Midway Airport. Although not exercised by the CAB in these proceedings, the issue of whether the CAB could legally exercise such a power was thoroughly briefed by the parties, and one party has suggested that an analysis of the merits of the contentions of these parties would be interesting and useful for further consideration of this issue by the CAB and the courts. Letter from J.E. Murdock, III, General Attorney, United Airlines, to the author (May 31, 1978).

Comments of Applicant Midway (Southwest) Airway Co., Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 at Exhibit No. 45.

Id.; 235 AV. DAILY 36 (1978).

crease of ninety-two percent in February, 1977, and an increase of one hundred one percent in April, 1978, compared to April, 1977. In 1975, Southwest's passengers enjoyed an average fare reduction of 41.1 percent below the CAB regulated fares of CAB certificated carriers flying the same routes. Passengers flying Southwest in 1976 saved $23,847,121 in fares compared to the coach fares of CAB certificated carriers. Despite the inflation of recent years and the practices of other airlines in raising their fares, Southwest raised its fares in 1978 for the first time since 1973. Southwest has nevertheless been one of the most profitable airlines in America, earning a net profit margin of 15.9 percent between 1972 and 1976. Southwest's efficiency is illustrated by the fact that even though Southwest's total expenses have risen 180 percent since 1973, its unit costs have actually declined. Most importantly, statistics show that many of Southwest's passengers are new passengers who would never have been attracted to fly at the fares CAB certificated and regulated carriers are required to charge. Until Southwest's CAB certificated competitors moved from Love Field to D/FW Regional Airport in January 1974, their traffic growth continued at substantially the same rate despite Southwest's entry into the market. Southwest's services have therefore benefitted both the consumer and the aviation industry, without harming its incumbent competitor airlines.

Southwest's passenger growth record stands in stark contrast to the national passenger growth record. The annual average passen-

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1. \text{AV. DAILY 150 (1978).}
2. \text{AV. DAILY 79 (1978).}
3. Comments of Applicant Midway (Southwest) Airway Co., Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 at Exhibit No. 36.
4. Id. at Exhibit No. 35.
5. \text{AV. DAILY 325 (1978). Southwest expects to retain its current fares into the 1980's. Id.}
6. Comments of Applicant Midway (Southwest) Airway Co., Chicago-Midway Low Fare Route Proceeding, CAB Docket No. 30277 at Exhibit No. 53. The net profit margins for other airlines during this period included the following: Delta, 5.1%; Braniff, 3.2%; Tiger, 4.8%; Western, 2.0%; National, 0.6%; Northwest, 5.3%; Allegheny, 0.6%; Continental, 1.3%; American, 2.7%; TWA, 0.3%; Eastern, 0.2%; United and Pan Am suffered deficits during this period.
7. Id. at 3.
8. Id. at Exhibit Nos. 25-26.
9. Id. at 7.
ger growth rate between 1970 and 1975 for markets over 500 miles was 5.0 percent, and for markets under 500 miles (such as Southwest serves) a mere 1.6 percent.\textsuperscript{113} The fourteen interstate markets which Midway (Southwest) eventually proposes to serve\textsuperscript{114} from Chicago had an annual growth rate of only 0.4 percent per year.\textsuperscript{115} Southwest's average daily passenger load, however, increased 743.5 percent over the years 1971-1976.\textsuperscript{116} The Quality of Service Index dropped in eleven of the fourteen proposed markets, yet fares in these markets have almost doubled in the last ten years, increasing at an annual rate of 11.1 percent for the years 1973-1976.\textsuperscript{117} Most importantly, the markets which Southwest entered in Texas seven years ago were similar in many ways to the markets Midway (Southwest) now proposes to enter.\textsuperscript{118} The CAB recognized Southwest's fine record in its decision, and even stated that "if we believed a single award [of authority] were the only way to assure service [at Midway Airport], the weight would probably have tipped our decision to Midway (Southwest)."\textsuperscript{119}

The CAB's decision is to be applauded in that it not only allows Southwest to maintain its operations undisturbed in Texas, but also allows Midway (Southwest) to institute them at Midway Airport, most probably bringing efficient service and lower fares to consumers and new passengers to the aviation industry. Meritorious objections were raised against the proposals of Southwest and Midway (Southwest), however, primarily by North Central Airlines.

First, North Central argued that the CAB should take economic regulatory jurisdiction over Southwest's intrastate Texas operations

\textsuperscript{113} Id. at 4.
\textsuperscript{114} The CAB's tentative decision on July 14, 1978, dealt with only six of the fourteen proposed routes, and ordered an expedited proceeding regarding the remaining eight. Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978).
\textsuperscript{115} Comments of Applicant Midway (Southwest) Airway Co., Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30277 at Exhibit Nos. 25-26.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 6. The CAB pointed out that the residents of the cities to be served from Midway Airport "are in general much wealthier than residents of Texas, and have more disposable income with which to buy an off-peak ticket for a pleasure trip." Midway-Chicago Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 23.
\textsuperscript{119} Id. at 41.
if Midway (Southwest) became operational.\textsuperscript{120} North Central maintained that unless the CAB took jurisdiction over Southwest, the CAB would be unable to enforce actions which might become necessary to prevent abuses of the proposed control relationships between Southwest and Midway (Southwest).\textsuperscript{121} The CAB answered this argument by pointing out it saw no possible anti-competitive effects flowing from the proposed relationships.\textsuperscript{122} Nevertheless, should any abuse occur, the CAB would be able to take whatever action would prove necessary to protect the public interest by entering a cease and desist order against Midway (Southwest), which would be under the CAB's economic regulatory jurisdiction.\textsuperscript{123}

Still other arguments in favor of North Central's position exist. First, the affirmance of the CAB's decisions in \textit{Lake Tahoe} and \textit{California-Texas Fares}, discussed earlier, would indicate that Southwest could be brought within the CAB's jurisdiction. A second argument exists under the provisions of the Act. In \textit{Texas International Airlines v. CAB}\textsuperscript{124} it was held that the CAB cannot assume jurisdiction over an intrastate carrier on the basis that it affects interstate commerce. \textit{Texas International} indicates, therefore, that the Act must expressly provide for CAB regulation of intrastate affiliates of interstate airlines for Southwest to be subject to CAB jurisdiction due to the operations of Midway (Southwest). An argument that the Act itself expressly provides for CAB jurisdiction over Southwest can be made by recognizing: (1) the Act defines "air carrier" as anyone who "directly or indirectly or by a lease or any other arrangement" engages in air transportation,\textsuperscript{125} and (2) the Act also provides that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the [CAB]."\textsuperscript{126} Arguably, Southwest's proposed leasing of air-

\textsuperscript{120} Id. at 58.
\textsuperscript{121} Brief of North Central Airlines at 39-40. Midway-Chicago Low-Fare Route Proceeding, CAB Docket No. 30277.
\textsuperscript{122} Midway-Chicago Low-Fare Route Proceeding, CAB Docket No. 30277 (July 14, 1978) at 58.
\textsuperscript{123} Id.
\textsuperscript{124} 473 F.2d 1150 (D.C. Cir. 1972). See note 14 supra, and accompanying text.
\textsuperscript{125} 49 U.S.C. § 1301(3) (1976) (emphasis added). The entire section is set out at note 81, supra.
craft to Midway (Southwest) and their affiliate relationship subject Southwest to the CAB's jurisdiction. This statutory argument is perhaps vitiated, however, by further recognizing that under this language a party must be involved in "air transportation" before it can be considered an "air carrier" subject to CAB regulation. Southwest's Texas flight operations were specifically held not to be "air transportation" in *Texas International Airlines, Inc. v. CAB*, and these flight operations will not be expanded despite the operations of Midway (Southwest). It would therefore seem that the Act, as previously construed by the courts, would not give the CAB jurisdiction over Southwest because of its affiliation with Midway (Southwest).

The CAB's Bureau of Pricing and Domestic Aviation also recognized the possibility of the statutory argument explained above, but recommended that the CAB either exempt Southwest from its jurisdiction or altogether disclaim jurisdiction over Southwest. The Bureau reasoned that since no direct federal subsidy to Midway (Southwest) is involved, and further since it does not appear that any anticompetitive activity is likely, the only potential foreseeable harm resulting from the affiliation would be cross-subsidization. The Bureau stated, however, that "the spectre of such [cross-subsidization] is not sufficient to require the [CAB] to exercise jurisdiction" when such activity could be controlled through exercise of the CAB's jurisdiction over Midway (Southwest). The CAB's decision adopts both the result and rationale of the Bureau's proposals.

North Central also argued against CAB approval of the control

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127 49 U.S.C. § 1301(10) (1976), which states: "'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

128 473 F.2d 1150 (D.C. Cir. 1972). The reasoning of the court is quoted in note 14 supra.

129 There will be no joint operations carried out by Southwest and Midway (Southwest). The proposed relationship of the two carriers is based solely on an intercorporate relationship with no integrated flight operations.

130 Brief for Bureau of Pricing and Domestic Aviation at 35-36. Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277.

131 *Id.*

132 *Id.*

133 See notes 122-123 supra, and accompanying text.
relationships between Southwest and Midway (Southwest), suggesting the existence of a potential conflict of interest regarding equipment allocations and working capital. North Central urged that the Southwest board of directors might direct equipment to its most profitable use, to the possible detriment of Midway (Southwest) passengers. The CAB answered North Central's argument by stating that such a possibility is of little consequence in a competitive environment. If Southwest diverts equipment to Texas rather than Chicago the result will be to give a competitive edge to other carriers at Midway. The basic logic of permissive authority is that carriers are expected to allocate resources in whatever way they see fit.

The CAB's decision regarding the application of Midway (Southwest) would appear to be well reasoned from a legal viewpoint. From a policy viewpoint, its utility is unimpeachable. Chicago's O'Hare Airport is the most active air terminal in the United States, as well as the most congested. One recent study estimated that the total annual cost of congestion at O'Hare includes $44.3 million to aircraft operators (including sixty-seven million added gallons of fuel) and 4.6 million hours of passenger time. The Federal Aviation Administration predicts that in 1985, air traffic to and from Chicago could reach sixty-five million passenger movements annually, compared to O'Hare's sixteen million enplanings in 1975.

Despite these crowded conditions at O'Hare, Chicago is today the only metropolitan area in the top five traffic originating cities.

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134 The CAB's approval of the control relationship is discussed at notes 79-85 supra, and accompanying text.
135 Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277 (July 14, 1978) at 59.
136 Id. The CAB is so confident in approving the control relationship that it does not even require these affiliates to file copies of intercompany transactions for CAB review. Id. at 60.
137 Id. at 12. In 1975 Chicago had 38% more departures than Atlanta, the nation's second busiest airport.
138 Id. In 1976, 9,194 flights experienced air delays of thirty minutes or longer at O'Hare, more than 26% of all such delays reported nationally. Id. at 12-13.
139 Id. at 13 n.19.
140 Id. at 13 n.20.
141 Id. at 12.
that is served exclusively through one airport.\textsuperscript{142} Chicago's Midway Airport, once the world's busiest, is almost unused today.\textsuperscript{143} A Federal Aviation Administration study shows, however, that by 1985 Midway Airport could serve approximately ten million of an expected thirty-two million local Chicago passengers if the airport is reactivated.\textsuperscript{144} The same study concludes that the failure to reactivate Midway Airport at an accelerated rate could cost local airline passengers three million hours in time and 100 million miles of driving annually, merely in the extra travelling required to reach O'Hare.\textsuperscript{145}

New carriers, however, are needed to revitalize Midway Airport, because "without a substantial increase in traffic the O'Hare carriers could never operate two stations as economically as one; so any scheme requiring incumbents to duplicate O'Hare services at Midway would be doomed to failure . . . ."\textsuperscript{146} The CAB has also stated that because O'Hare is more convenient than Midway for sixty percent of local Chicago passengers,\textsuperscript{147} the success of the Midway revitalization will depend on the airlines' abilities to stimulate more frequent air travel and "draw travelers away from surface transportation and to attract people who until now could not afford to travel at all."\textsuperscript{148}

Southwest Airlines' success in Texas was achieved largely through its generation of new passengers who had never flown before,\textsuperscript{149} and Southwest therefore has exactly the expertise and experience required to revitalize Midway Airport. Midway (Southwest) made it very clear that it would not serve Midway Airport if the CAB thereby decided to exercise jurisdiction over Southwest's Texas operations.\textsuperscript{150} Although the CAB should not make otherwise unreasonable concessions to airlines merely because their

\textsuperscript{142} Id. at 12 n.16.
\textsuperscript{143} Id. at 14.
\textsuperscript{144} Id. at 13.
\textsuperscript{145} Id. at 13 n.21.
\textsuperscript{146} Id. at 16.
\textsuperscript{147} Id. at 17.
\textsuperscript{148} Id.
\textsuperscript{149} See notes 111-112 supra, and accompanying text.
\textsuperscript{150} Brief of the Bureau of Pricing and Domestic Aviation at 35. Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277. See also note 99 supra.
service is attractive, Southwest attributes much of its Texas successes to its freedom from CAB regulation and such a condition upon the service of Midway (Southwest) would not seem an unreasonable one.

C. The Probable Impact of the Chicago-Midway Low-Fare Route Proceedings

Because of the intricate factual nature of the Midway proceedings, the temptation arises to limit the CAB’s decision to its facts and discount its probable impact. This temptation is especially strong when viewing only the Midway proceedings themselves. But when viewed against the larger backdrop of recent CAB actions, the Midway decision seems to fit into a developing trend of CAB permissiveness.

Beginning in the early months of 1978, the CAB has acted liberally towards permissive awards, backup authority, and multiple entry, causing AVIATION DAILY to say that the “CAB is leaving little doubt that carriers will more easily be able to enter and leave new markets, regardless of what action Congress takes on regulatory reform.” The CAB has stated that it is “moving rapidly in adopting regulatory policies of permitting and encouraging a greater degree of price competition and freer entry into markets.” Then CAB Chairman Alfred Kahn also had consistently stated that “[CAB] decisions on route applications are too time consuming and rob the public of improved service at lower rates.” In view of this liberalizing trend, the CAB’s Midway decision is a probable indicator of things to come, and the CAB’s statement in the Midway decision that “[t]he ultimate resolution of the issues in [Chicago-Midway Low-Fare Route Proceedings] has been influenced by our belief in the efficiency of the marketplace for this industry, as a general proposition” should be taken seriously.

153 Interview with Mike Muse, former Vice President of Southwest Airlines (Nov. 11, 1977).
152 Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277 (July 14, 1978) at 2.
154 Chicago-Midway Low-Fare Route Proceedings, CAB Docket No. 30277 (July 14, 1978) at 2.
In any event, future months will give the CAB more than sufficient opportunity to adopt liberal regulatory policies. The CAB has recently approved Administrative Law Judge Greer Murphy's recommendation that Air California and PSA, both intrastate carriers, be granted exemptions in the Lake Tahoe hearings.\textsuperscript{156} PSA has now asked the CAB for authority to fly Los Angeles-Phoenix and San Diego-Phoenix routes.\textsuperscript{157} Air Florida, another intrastate carrier, is seeking exemption authority in several Florida-Bahamas routes.\textsuperscript{158} Southwest Airlines has also requested nonstop authority between Dallas/Fort Worth Regional Airport and New Orleans,\textsuperscript{159} as well as between New Orleans and several west Texas cities.\textsuperscript{160} Lastly, Air Florida has now requested interstate authority to serve Dallas' Love Field from Miami/Fort Lauderdale and Tampa, with plans to interline with Southwest Airlines.\textsuperscript{161} CAB approval of the Air Florida request and the proposed interlining with Southwest would indeed be interesting, in that such a flight would now subject all of both airlines' operations, interstate and intrastate, to CAB regulation under the Airline Deregulation Act of 1978.\textsuperscript{162} An examination of this reform legislation will now complete this survey of recent developments regarding the intrastate exception to the CAB's economic regulatory jurisdiction.

V. REFORM LEGISLATION

On October 24, 1978, President Carter signed the Airline Deregulation Act of 1978.\textsuperscript{163} This statute is the end result of a bill originally introduced in the Senate by Edward Kennedy,\textsuperscript{164} which the Senate approved by a vote of eighty-three to nine on April 19, 1978.\textsuperscript{165} Senator Kennedy recounted the success of Southwest Air-

\begin{itemize}
  \item \textsuperscript{156} See notes 37-42 supra, and accompanying text.
  \item \textsuperscript{157} 235 Av. Daily 251 (1978).
  \item \textsuperscript{158} 238 Av. Daily 148 (1978).
  \item \textsuperscript{159} 237 Av. Daily 157 (1978).
  \item \textsuperscript{160} 237 Av. Daily 300 (1978).
  \item \textsuperscript{161} 238 Av. Daily 53 (1978).
  \item \textsuperscript{162} Pub. L. No. 95-504, § 105, 92 Stat. 1705 (1978).
  \item \textsuperscript{163} Pub. L. No. 95-504, 92 Stat. 1705 (1978).
  \item \textsuperscript{165} 236 Av. Daily 297 (1978).
\end{itemize}
lines and made the following observations when introducing the bill on the Senate floor:

Midway Airlines—a newly formed company—and Texas' Southwest Airlines recently proposed low-fare scheduled service from Chicago's Midway Airport to 14 other cities including Kansas City, St. Louis, Buffalo, Las Vegas, and Detroit. Today, a morning flight between Chicago and St. Louis costs $40. That same flight would cost $25, and an evening or weekend flight would cost only $15—provided, of course, that Midway and Southwest get the green light from the regulators sitting in Washington, D.C.

This low-fare service is safe. . . .

Low-fare service is also convenient . . . . And the lower fares cannot be explained away by arguing that CAB airlines have higher costs. . . .

Then why the lower rates? The answer is that the relative competitive freedom given to intrastate airlines led those companies to try different types of air service at different prices. These airlines lower their fares, compete with the automobile, the bus and the train for passengers who would not have traveled but for the lower fare, put more people in their planes than the CAB carriers, and spread the operating costs over a much greater number of passengers. The companies stay profitable, and that pleases stockholders. The fares stay low, and that pleases travelers. The Government can thus stay out of the airline business, and that should please the taxpayers.

The federally regulated airlines operate much differently. Airline fares are determined by a rigid formula. When Continental Airlines—one of the mavericks in the industry—asked to reduce its basic economy fares from its current 10 percent to a proposed 15 percent below the prices dictated by the CAB formula, the CAB not only turned the company down but ordered it to cancel the 10 percent reduction as well. So much for price competition.\(^{106}\)

Although Senator Kennedy's remarks were probably more appropriate regarding the CAB in 1977 than they are today, they do illustrate the timbre of the thinking which produced the Senate's reform measure.\(^{107}\) One of the provisions of the Senate bill dealt specifically with the issue of how much interstate activity an intra-
state airline could engage in without losing its intrastate exception from CAB regulation. Although not ultimately included in the final form of the legislation signed by President Carter, this provision

168 The last section under the same title prior to the Airline Deregulation Act of 1978 was section 417, 49 U.S.C. § 1387 (1976). The unsuccessful Senate proposal provided as follows:

Sec. 423. (a)(1) No State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations for, any air carrier certified or exempted by the Board under the provisions of this title, except that any state which, on or before January 1, 1979, had authorized an air carrier to provide intrastate air transportation in that State, may continue to regulate such intrastate operations of such air carrier notwithstanding the fact that such air carrier, after January 1, 1979, is issued, for the first time, a certificate under this title, for so long as not less than 50% of the revenues of such air carrier is derived, during the most recent period for which data is available, from such intrastate operations. For the next year following such a period during which such an air carrier derived more than 50% of its revenues from interstate operations, and for each year thereafter, the entire air transportation operations of such air carrier shall be subject to regulation by the Board under this title. The Board shall provide regulations for allocating revenues of air carriers specified in the first sentence of this paragraph between intrastate and interstate air transportation operations.

(2) When any air carrier which is specified in the first sentence of paragraph (1) becomes totally regulated by the Board, any authority received from the State to provide air transportation shall be considered to be part of its authority to provide air transportation received from the Board under this title, until modified, suspended, revoked, amended, or terminated as provided under this title.

(3) Except with respect to air transportation authorized by the Board under a certificate issued under section 401 or air transportation for which compensation may be paid under section 419, the provisions of paragraph (1) shall not apply to the air transportation of persons, property, or mail conducted wholly within the State of Alaska.

(4) Any air carrier certificated by the Board under this title, and who enters into an agreement with an intrastate air carrier for the through handling of baggage or passengers, shall not, by reason of that agreement, be subject to regulation by any State. Neither shall such intrastate air carrier become subject to regulation by the Board by reason of entering into such an agreement. Nothing in this paragraph shall be construed, however, as affecting in any manner the Board's authority, otherwise conferred, over air transportation transactions covered by an agreement between air carriers, including agreements between interstate and intrastate air carriers for the through handling of baggage or passengers.

(5) Any aircraft being used in flights (except flights between points in the State of Hawaii) in air transportation between points in the same State which, in the course of such flights, crosses a boundary between two States, or between the United States and any
proposed adding a new section 423 to the Act, which would have disallowed any state economic regulation of intrastate aviation, unless state regulation existed as of January 1, 1979. An airline operating within a regulating state would not have been considered an interstate airline subject to CAB regulation unless more than fifty percent of its revenues were derived from interstate operations. If classified as an interstate airline, however, the entire operations of the airline would have become subject to CAB jurisdiction.

An airline would have retained its intrastate or interstate character even if it interlined passengers or baggage with an airline of the opposite type, although any such agreements between air carriers would have remained subject to the approval of the CAB. Lastly, flights originating and ending in the same state would not have been considered interstate merely because they may have crossed state or national lines during the flight. This legislation, if passed, would have easily allowed an intrastate airline such as Southwest to retain its intrastate status after the formation of a Midway-type affiliate. So long as the parent airline received more than fifty percent of its total revenues from intrastate activities, it would have remained free from CAB regulation even if it interlined with Midway or with any other interstate air carrier. This legislation also would have allowed intrastate air carriers to cross state lines and fly interstate routes while retaining their intrastate exception, subject to the fifty percent of revenues rule.

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other country, or between a State and the beginning of the territorial waters of the United States shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

The author can only speculate that this provision was the result of a political compromise during the drafting of the legislation.

This would have partially adopted the decision of the CAB in California-Texas Fares, note 50 supra.


Hawaii would have been expressly excepted from this provision, probably in deference to Island Airlines, Inc. v. CAB, 352 F.2d 735 (9th Cir. 1965), which held that flights between the islands of Hawaii were flights over the high seas and, therefore, subject to CAB regulation.
A regulatory reform bill also was introduced in the House,\(^\text{173}\) where consideration of the measure was long delayed by the House Rules Committee.\(^\text{174}\) It differed from the Senate bill in its treatment of intrastate airlines in that it provided that an intrastate carrier would become subject to CAB regulation of its entire system as soon as it began any interstate operations.\(^\text{175}\) The Senate bill did not provide for CAB regulation of intrastate operations until fifty percent of the intrastate carrier's revenues were derived from interstate routes.\(^\text{175}\)

The differences in the Senate and House proposals regarding intrastate airlines were addressed in conference committee, and a substitute bill compromising the House and the Senate proposals was adopted and incorporated into the final Act signed by the President.\(^\text{177}\) This new amendment adopts the Senate's proposal that a flight between two points in one state which crosses a state boundary in the course of its flight will not be considered an interstate flight for that reason alone.\(^\text{178}\) On the other hand, the House proposal is adopted in that when any air carrier which was operating primarily in intrastate air transportation as of August 1, 1977, receives the authority to provide interstate transportation, all of that


\(^{176}\) \textit{Id.} See also the discussion of the Senate bill in the text accompanying notes 168-72 supra.

\(^{177}\) See note 163 supra.


Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.
airline's operations will henceforth come within the economic regu-
laratory jurisdiction of the CAB.179

VI. CONCLUSIONS

The matters discussed in this article demonstrate that the recog-

nized jurisdiction of the CAB to economically regulate commercial
aviation has recently undergone contradictory changes, with some
cases seemingly expanding the CAB's economic regulatory jurisdic-
tion and other cases contracting it. Despite the contradictory deci-
sions, however, the developing trend would seem to be towards
broadening the intrastate exception to the economic regulatory
jurisdiction of the CAB. A brief review of the proceedings ex-
plained in this article serves to clarify this trend.

The Southwest Airlines cases reaffirmed the intrastate exception
to CAB jurisdiction at the beginning of this decade and further es-

established that indirect effects of intrastate aviation operations on in-
terstate commerce would not be sufficient grounds for the assertion
of CAB regulation of intrastate carriers. The Southwest Airlines
cases also indicate that the jurisdictional provisions of the Act
should be read restrictively. The CAB's recent application of the
de minimis doctrine in the Lake Tahoe hearings, however, seem-
ingly conflicts with the language in the Southwest Airlines cases re-
quiring a restrictive reading of the jurisdictional provisions of the
Act. Although the application of the de minimis doctrine in those
hearings arguably decreases the intrastate exception to CAB juris-
diction, it also should be noted that even as the CAB determined
it technically held jurisdiction over the California airlines, the CAB
simultaneously granted those airlines exemptions from CAB regu-
lation. As a practical matter, therefore, the intrastate exception to
CAB regulation was preserved in the Lake Tahoe hearings. The
decision of the United States Court of Appeals for the District of

Stat. 1705 (1978), provides:
When any intrastate air carrier which on August 1, 1977, was
operating primarily in intrastate air transportation regulated by a
State receives the authority to provide interstate air transportation,
any authority received from such State shall be considered to be
part of its authority to provide air transportation received from the
Board under title IV of this Act, until modified, suspended, amend-
ed, or terminated as provided under such title.
Columbia Circuit in *California-Texas Fares* undoubtedly decreases the intrastate exception to CAB regulation by holding that the CAB has jurisdiction to regulate the fares for intrastate routes flown by otherwise interstate carriers, fares which were previously regulated by the states. It should be remembered, however, that the initial CAB decision in this matter was handed down almost two years before the court of appeals' June 1978 decision. It appears, therefore, that the court decision may not accurately reflect the current trend. The CAB has become much more permissive during the past year, and if *California-Texas Fares* came before the CAB for the first time today, the CAB might possibly follow its own example, set in the *Midway* hearings, and altogether decline to assert jurisdiction over the intrastate routes involved.

The CAB's decision in the *Chicago-Midway Low-Fare Route Proceeding* permits an intrastate airline to create a new interstate subsidiary airline without losing its intrastate exception to the economic regulatory jurisdiction of the CAB. This decision profoundly increases the intrastate exception to the CAB's economic regulatory jurisdiction and is the single most important indication that the current trend is towards expanding the intrastate exception. It also illustrates the perhaps surprising fact that the driving force behind the current trend is the CAB itself.

The ultimate status of the intrastate exception to the economic regulatory jurisdiction of the CAB rests, as always, in the hands of Congress. Had Congress adopted the Senate's proposed fifty percent of revenues rule for determining whether an airline was subject to CAB regulation, the future importance of the matters discussed in this article would perhaps be diminished. Adoption of the House proposal regarding the economic regulatory jurisdiction of the CAB over intrastate airlines, however, leaves intact the precedential value of the matters already discussed. Under the new law, any interstate activity by a primarily intrastate carrier subjects the totality of that airline's operations to CAB regulation. What constitutes an intrastate operation, however, as opposed to an interstate operation, remains largely a matter of judgment and interpretation. The CAB also retains the option under the new law to follow its *Midway* precedent and decline to exercise its economic regulatory jurisdiction over an airline even if the law technically empowers the CAB to exercise its powers over that airline.
Another important section of the Airline Deregulation Act of 1978 is its "sunset provision."\textsuperscript{180} This section provides for the eventual termination of the CAB and the transfer of some of its functions to the Departments of State, Transportation, and Justice.\textsuperscript{181} The CAB will cease to exist on January 1, 1985, unless it persuades Congress that it should continue in existence beyond that date.\textsuperscript{182}

The recent proceedings, cases, and statutes discussed above indicate a clear trend towards broadening the intrastate exception to the economic regulatory jurisdiction of the CAB. The CAB is the first and only major regulatory agency of the federal government to face the prospect of termination. It will be interesting to see how the success or failure of airline deregulation will affect the thinking of Congress regarding laws providing for the regulation of other industries.

\textsuperscript{181} Id., § 1601(b).
\textsuperscript{182} Id., § 1601(a).
Comments
and
Case Notes