Case Notes

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ADMINISTRATIVE LAW—PROCEDURE—The Issue of Comparative Carrier Selection Was Deleted by the CAB from the Hearing on Public Convenience and Necessity, Accomplishing Partial Deregulation. Oakland Service Case, CAB Orders No. 78-4-121 (April 19, 1978) and 78-9-96 (September 21, 1978).

The Port of Oakland, California, and the Oakland Chamber of Commerce filed a petition1 on April 6, 1977, requesting the Civil Aeronautics Board (CAB, also referred to as “the Board”) to investigate the need for additional or replacement commercial scheduled air passenger service between Oakland and twenty-two major American cities.2 The case, called a service investigation, was instituted by order of the Board.3 Simultaneous applications by six carriers4 for authority to operate between Oakland and the points named were consolidated with Oakland’s petition.5 In the five-month interim between the instituting order and the second order,6 described below, the Board authorized multiple minor adjustments among the parties to the proceedings for the purpose of facilitating the Board’s adjudication of Oakland’s service. Six markets were deleted as duplications of route proceedings already pending before the Board.7 Miscellaneous representatives of other

2 These cities were: Albuquerque, Atlanta, Boston, Chicago, Dallas/Fort Worth, Denver, Detroit, Houston, Kansas City, Las Vegas, Los Angeles, Miami/ Ft. Lauderdale, Minneapolis/St. Paul, New York, Philadelphia, Phoenix, Portland, Reno, St. Louis, Salt Lake City, Seattle, and Washington/Baltimore.
3 CAB Order No. 78-4-121 (April 19, 1978) [hereinafter cited as First Order].
5 The consolidation was done pursuant to 14 C.F.R. § 302.915(b) (1978), under the style Oakland Service Case.
6 CAB Order No. 78-9-96 (September 21, 1978) [hereinafter cited as Second Order].
7 The markets eliminated were: New York and Washington/Baltimore in the
governmental bodies and agencies, air lines, chambers of commerce, and the general public filed comments, participated in oral argument, or were granted leave to intervene. One carrier was added, the Los Angeles market was rejoined in the proceedings notwithstanding the intrastate character of the route, and Seattle and Portland were combined as co-terminals.

In instituting the Oakland service investigation, the Board adopted a presumption that public convenience and necessity required additional service to each named market, and announced a tentative policy to award certificates of convenience and necessity to all carriers found fit, willing, and able to perform such service. The first order concluded with an outline of a series of hearings, each to generate a separate formal order by the Board, in order to dispose of the issues raised by the investigation of Oakland service. The first hearing was limited to the subject of the policy determination proposed in the instituting order, that is, elimination of comparative carrier selection. Formulated in notice and comment style, the hearing itself was designed to be procedurally less

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Transcontinental Low-Fare Route Proceeding, CAB Docket No. 30356; Las Vegas and Reno in the California-Nevada Low Fare Route Proceeding, CAB Docket No. 31574; Miami-Ft. Lauderdale in the Miami-Los Angeles Low-Fare Case, CAB Docket No. 31976; and St. Louis in the St. Louis-Louisville and San Francisco Bay Area Nonstop Case, CAB Docket No. 31491.

See generally Second Order, supra note 6. A complete list was not memorialized in either order, but among those whose arguments were summarized in the Second Order were: Department of Justice, Department of Transportation, California Public Utility Commission, the City and County of San Francisco, the Texas Aeronautics Commission, the City of Houston, and the Houston Chamber of Commerce.

See Second Order, supra note 6, at 1. That carrier was Ozark Air Lines, Inc., no docket number.

The theory was that although the Los Angeles market already received extensive nonstop low fare service by an intrastate carrier beyond the regulation of the CAB, First Order, supra note 3, at 2, the findings apply to the Los Angeles market nevertheless. Second Order, supra note 6, at 2.

Second Order, supra note 6, at 2.

First Order, supra note 3, at 17-18, concluding an exhaustive review of demand potential at Oakland.

Id. at 19. "Fit, willing, and able" are statutory criteria. See note 28, infra, and accompanying text.

First Order, supra note 3, at 57.

See Administrative Procedure Act § 5, 5 U.S.C. § 553 (1976), which prescribes the procedure for informal rulemaking by administrative agencies.
formal than the evidentiary style" usually required by the Board."

The order resulting from the first hearing contained an analysis of arguments submitted by the many interested parties regarding the proposed permissive award policy, and a statement of the Board's policy innovation sufficient to constitute notice to the public and to the industry of the imminent change. Held: the issue of comparative carrier selection was deleted by the CAB from the hearing on public convenience and necessity, accomplishing partial deregulation.

The Board conceived Oakland Service as a pattern for its own conduct of future proceedings where routes are contested. Without doubt, the case has already fulfilled that function. The broad import of the case, however, will be measured by its impact on other administrative agencies, and on the future existence and nature of Board function, as well as in the growth of the air passenger industry and in service to the consumer. In an age when administrative agencies appear to be single-minded in their assertion of expanded legislative authority, Oakland Service is a welcome respite. Indeed, Oakland Service, in that respect at least, is a model of agency self-control.

Since the Civil Aeronautics Act of 1938, the CAB and its predecessor have exercised absolute administrative control over

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16 See Administrative Procedure Act §§ 7-8, 5 U.S.C. §§ 556-57 (1976), which prescribes the procedure for formal rulemaking by administrative agencies.

17 See 14 C.F.R. § 302.3 (1978) for the Board's requirements. An evidentiary hearing closely resembles a trial with all the usual accoutrements: pleadings, cross-examination, motions, and a record, but without the strict standards of the Federal Rules of Evidence. Whether such formal adjudicatory proceedings are required for any or all of an agency's rulemaking depends upon the provisions of the statute under which the agency operates.

18 See First Order, supra note 3, at 64. The second and third hearing, on the economic and fitness issues, were to be conducted in the usual evidentiary format, but due to the pervasive nature of the policy finalized by the first hearing, they became somewhat pro forma, and are not the subject of this analysis.

19 Chicago-Midway Expanded Service Proceeding, CAB Order No. 78-7-41 (July 12, 1978), at 2.

20 See, e.g., Houston Service Investigation, CAB Order No. 78-8-172 (August 30, 1978), Improved Authority to Wichita Case, CAB Order No. 78-12-106 (December 14, 1978), and Transcontinental Low-Fare Route Proceeding, CAB Order No. 79-1-75 (January 11, 1979).


22 The Civil Aeronautics Authority became the CAB in 1940. Presidential Reorganization Plan No. IV, April 11, 1940.
route entry authority. Recognized as the cornerstone of economic regulation of routes, the "certificate of public convenience and necessity" has been a mandatory statutory prerequisite to carrier service on every city-pair market. To this extent, control over route entry is not subject to the discretion of the Board.

Congress provided little guidance for the exercise of such broad authority, but did prescribe issuance of the certificate to the applicant carrier whom the Board finds "fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority thereunder." The 1938 Congress enhanced this minimal guidance only by prefacing the Act with a Declaration of Policy which requires the Authority to consider as being in the

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22 Subject to judicial review under § 1006(a) of the Civil Aeronautics Act of 1938, supra note 21, and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 702-706 (1976).

23 A. Lowenfeld, Aviation Law I-12 (1974). It is axiomatic that competition in other areas, such as rates and service, is only illusory where the threat of route entry by additional carriers is precluded by government regulation. Civil Aeronautics Board, Report of the CAB Special Staff on Regulatory Reform 126 (1975) [hereinafter cited as Special Staff Report].

24 Civil Aeronautics Act of 1938, supra note 21, Title IV; see A. Lowenfeld, Aviation Law I-12 (1974).

25 49 U.S.C. § 401(a). "The major significance of the CAB's use of the certification powers is now, as it has always been, to determine the amount of competition that will be allowed in the airline industry." E. Redford, The Regulator Process 147 (1969).

26 It has been said that the only goal was to protect and nurture the infant air transportation industry. Comment, An Examination of Traditional Arguments on Regulation of Domestic Air Transport, 42 J. Air L. & Com. 187, 205 (1976) [hereinafter cited as Examination of Arguments].


28 Id. at § 2, which reads as follows:

SEC. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service
public interest "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system."

The Congress of 1958 neglected the opportunity to clarify the intent of the earlier version of the Declaration of Policy regarding competition on routes. In drafting the Federal Aviation Act of 1958, they reenacted pertinent portions of the 1938 statute virtually intact, while disclaiming any approval of CAB interpretations. As for the Declaration of Policy, Congress again included it as their "Declaration of Policy: The Board" adding but one word of substance.

Prior to the Oakland Service Case, the award of a certificate of convenience and necessity climaxed a discretionary procedure known as "comparative carrier selection." In the initial phase, the Board inquired into the public need for service on the subject city-pair route, considering an analysis of past traffic, operating performance of current carriers, and growth potential. Finding public need, the Board turned to the task of selecting the carrier by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Although such competition is only one of six stated policy objectives, the statement offers no priority system to govern those situations where individual objectives may be antithetical.

The word "promotion" appears along with "encouragement and development" for the first time in § 102(f), 49 U.S.C. § 1302(f) (1976). Compare with § 2(f) of the Civil Aeronautics Act of 1938 quoted at note 29 supra.

First Order, supra note 3, at 53-55. The author has found no reference to this term in the scholarly commentaries. This illustrates the inherent difficulty in researching CAB policy, which has been systematically interred in orders consequent to miscellaneous service investigations. See generally N. TANEJA, THE COMMERCIAL AIRLINE INDUSTRY 153 (1976). While comparative carrier selection has existed for more than two decades, the term itself may have been coined by the current Board.

N. TANEJA, supra note 34, at 154.

Id.
or carriers to serve the route. These proceedings were invariably marked by the tedium and minutia of the lengthy testimony and numerous exhibits necessary to each carrier competing for the route, who was charged with proving not only his own competence, but his superiority to each other competitor as well.\(^7\)

In the past the Board considered such evidence as an applicant's size, financial resources, equipment inventory, and proposed operating strategy as well as less tangible factors such as potential diversion from existing carriers or an applicant's historical interest in the route.\(^8\) The route was analyzed for consistency with the applicant's existing route system as well as its integration into the route system of the nation. International routes were considered separately from domestic routes, which were further distinguished as trunk-line (routes between major cities) or feeder (local) service.\(^9\) Such a catalogue of policy standards in route entry cases is engaging, but not a reliable indicator of future Board action due to the fact that the Board, using the same policy criteria, has sometimes arrived at very different decisions in cases involving similar routes and similar situations. . . . Because there is no mathematical formula, the Board is forced to decide the weight to be attached to each consideration for each particular case.\(^{10}\)

In sum, the procedure now known as "comparative carrier selection" was the mechanism by which the Board pre-empted the marketplace in designating which carrier or carriers could serve each market more consistently with the objectives of the Act.\(^{11}\)

Whether the statutory language contemplated comparative carrier selection has been the subject of debate since the law was passed. The legislative history of the Act relative to competition on routes supports a variety of hypotheses. One contemporary of the 1938 legislators attributed to them a "natural-monopoly" analysis that "[e]veryone agreed that economic and safety regulation was imperative and that it should follow the traditional lines of

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\(^7\) First Order, supra note 3, at 55.

\(^8\) N. TANEJA, supra note 34, at 154.

\(^9\) Id. at 155.

\(^{10}\) Id. at 153.

\(^{11}\) First Order, supra note 3, at 34; see also 40 Fed. Reg. 28,723, 28,748 (1975).
other public utility regulation,” while another observed that Congress enacted the legislation while assuring itself that “freedom of entry and healthy competition would be maintained under the new system.” A third analysis suggests that Congress was so preoccupied with details of organization, financing the industry, and questions of executive versus legislative control of the new agency that any consideration of economic regulation was superficial if not tacit. Further, one must question whether any reference to competition in 1938 is relevant to the contemporary form of competition; the “destructive competition” known to and feared by the 1938 Congress was in reality competitive bidding, termed “destructive” when outrageously low.

Internal CAB interpretations of the Act’s reference to competition have vacillated. An early interpretation allowing competition to the extent necessary to carry out the policy goals of the Act evolved into a presumption in favor of competition, expressed by the Board in optimistic terms:

The greatest gain from competition, whether actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the customer and to the Nation and affording the Government a comparative yardstick by which the performance of the carriers may be measured. Competition invites comparison as to equipment, costs, personnel, methods of operation, solicitation of traffic, all

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43 Examination of Arguments, supra note 27, at 199 (citing Memorandum Submitted by Senator Joseph C. O’Mahoney with Respect to the Right of Entry in Air Transportation Under the Civil Aeronautics Act, in Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess., at 926 (1956)).

44 See Westwood & Bennett, A Footnote To The Legislative History of The Civil Aeronautics Act of 1938 and Afterward, 42 NOTRE DAME LAW. 309 (1967).

45 See R. CAVES, supra note 42, at 124; compare with First Order, supra note 3, at 24, n.33: “The bidders’ behavior was in fact quite rational, although speculative.” See generally A. LOWENFELD, supra note 24, at I-12.

of which tend to assure the development of an air transportation system as contemplated by the Act.\textsuperscript{47}

By 1951 the Board had reformulated its presumption into one against competition by adopting standards of proof of market need so rigorous\textsuperscript{48} that the dissenting member was prompted to complain that "[t]he majority decision in this case continues and extends a monopoly over one of the heaviest route segments in the country."\textsuperscript{49}

Even when the Board attempted to relax restrictions in favor of competition, the more liberal regulations were foreclosed by judicial mandate. For example, when a Circuit Court disallowed exemption of supplemental carriers from certification requirements,\textsuperscript{50} an alternate scheme of issuing "supplemental certificates" was likewise blocked by court action. The action was initiated by trunk-line carriers threatened by the liberalization of Board policies regarding competition.\textsuperscript{51}

Recent judicial authority, however, again favors competition, holding that "when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102."\textsuperscript{52} This decision hobbled the theoretical

\textsuperscript{47} Hawaiian Case, 7 C.A.B. 83, 103-04 (1946); see also Transcontinental & Western Air, Inc., 4 C.A.B. 373 (1943).

\textsuperscript{48} Southern Service to the West Case, 12 C.A.B. 518, 534 (1951). The majority described the burden of showing a need for competition as "present[ing] to the applicant a major, if not insurmountable, task . . . ." Id. at 535.

\textsuperscript{49} Id. at 582 (Lee, Member, dissenting opinion) (Emphasis in original).


\textsuperscript{52} Continental Airlines, Inc. v. C.A.B., 519 F.2d 944, 954 (D.C. Cir. 1975), cert. denied, 424 U.S. 958 (1976). This case culminated a struggle of nearly eight years over certification on the San Diego-Denver route, arising out of an application by United Air Lines on January 12, 1967, for permission to provide non-stop service on several San Diego markets. The appeal was heard by Circuit Judges Leventhal and Wright, and District Judge Weigel, who found support for their analysis of the role of competition in "the particular respect due a 'contemporary construction of a statute by men charged with the responsibility of setting its machinery in motion'" id. at 954-55, and from the consistency in the Board's own position on route competition in the past. Id. at 955. In finding such consistency, this three-judge panel ignored Southern Service to the West Case, 12 C.A.B. 518
foundation of the Board’s policy of comparative carrier selection; its influence on subsequent Board policy may not be ignored.

By the time Oakland petitioned for improved service, the Board policy of comparative carrier selection was so well entrenched and entry into trunk-line service was effectively denied to new carriers and the entire nation was served by a route system based on an elaborate network of cross-subsidized city-pair markets. Not surprisingly, metropolitan Oakland had been all but neglected and was substantially dependent upon San Francisco International Airport for air service. To effect a remedy the Board had at its

(1951), and discounted the Board’s recent freeze on routes since it was not articulated as a “fundamental change in policy.” 519 F.2d at 955.

Comparative carrier selection was subject to exception as early as 1955. The board canvassed prior actions in route awards as well as ancillary air services, such as freight forwarders and tour operators, for evidence that abandonment of comparative carrier selection may not be considered an abrupt 180 degree policy maneuver. First Order, supra note 3, at 46.

Not one new trunk-line carrier has been certified since 1938 while the 16 carriers "grandfathered" under § 401(e)(1) of the Civil Aeronautics Act of 1938, 49 U.S.C. 1301 et seq., have been reduced to 10 as a result of merger. A. Lowenfeld, supra note 25, at I-17 n.b. Ninety-four such applications for trunk-line authority have been denied. SPECIAL STAFF REPORT, supra note 24, at 49 n.1 (1975). See note 55 infra, for the economic significance of trunk-line authority, which is generally more profitable than feeder service.

Cross-subsidy was explained in testimony before a Senate Subcommittee as follows:

Each carrier has a complex route system made up of markets which vary widely in their profit potential. At one end of the spectrum are markets which have the potential to be extremely lucrative if the carrier’s operations are protected from competition. At the other extreme lies a group of markets in which the carrier’s operations are unprofitable. Under the present regulatory scheme, each carrier is pictured as willingly shouldering the burden of serving these unprofitable markets because the Board allows it, as a quid pro quo, to earn extra profits in its rich markets. This is accomplished by setting fares in the rich markets at a level in excess of costs (including a normal return on capital) and by keeping out competition.


Available economic data support both Oakland’s request for improved service and our finding that the current pattern of service in the San Francisco area is causing inconvenience to millions of air travelers. The East Bay contains 40.6 percent of the total Bay area population and, considered as a separate economic unit, the East Bay area would rank 16th, 15th, 16th, and 18th nationally in terms of population, effective buying income, buying power index, and retail sales, respectively. Moreover, the results of the Bay Area
disposal authority based on an elderly Act designed to protect an infant industry, which had supported a wide variety of Board policies over a period of forty years. With little manipulation, the Federal Aviation Act of 1958, as originated in the Act of 1938, became the statutory authority for the latest and most liberal of the Board policies of economic regulation: the multiple permissive route award.

While the contemporary approach adopted in Oakland Service may be dismissed as merely an "idea whose time has come" or a necessary adjunct to the maturing of an industry, the majority left no element of their innovation to chance. The Board's own discussion of its reasons for adopting the "novel and experimental procedure" amounts to arguments which may be summarized as a) from the law, b) from policy, and c) from necessity.

Necessity was discussed first in the form of a generalized explanation for the announcement of new policy at the commencement of proceedings rather than at the conclusion. Without abdicating responsibility for carrier selection, a service investigation of the magnitude proposed for Oakland would have been admittedly unthinkable "because a conventional route proceeding covering all 15 Oakland markets would take an inordinate length of time to complete, and would overtax our hearing and analytical resources." Yet to reduce the number of markets for the purpose of manageability and speed would compromise the opportunity of the Oakland carriers to generate a mutually supportive pool of connecting traffic.

Metropolitan Transportation Commission's 1975 survey of departing passengers at the three Bay area airports show that the East Bay area generates 25 percent of the total Bay area traffic using scheduled services, and that 17 percent of the traffic at SFO originates or terminates in the East Bay area. This last figure translates into 2.7 million East Bay passengers who are using an airport less convenient than OAK.

First Order, supra note 3, at 4-5.

57 See notes 46-52, supra and the accompanying text.
58 See notes 80-81, infra and the accompanying text.
59 First Order, infra note 3, at 21.
60 Id. at 3.
61 Id. at 19-20.
62 Id. at 20.
63 Id.
Having justified their timing as an issue of sheer necessity, the Board expanded its argument in a tactic, either by design or accident, which effectively anticipated and disarmed each major objection of the opponents of deregulation. Additionally, the majority reformulated the hearing on the issue of the new procedure in notice and comment style, discarding the more rigorous evidentiary format with its adversary proceedings and opportunities for cross-examination, and left the pro-regulators a chance merely to comment on their dismantled arguments.

Secondly, the Board defined its radical departure from precedent by arguing policy considerations, attributing to the 1938 Congress the intent that the Board adapt to changing economic conditions:

We would be faithless to our trust if, through timidity or an unthinking adherence to precedents based on facts which no longer exist, we set a vital and burgeoning industry on the same path to obsolescence and decline which has been trodden by some other industries whose regulators did not dare to innovate as conditions changed.

Finally the Board argued from the statute, confronting the issue of destructive competition, which was admittedly feared by the 1938 Congress, and unambiguously addressed in the Declaration of Policy. In describing the contemporary mode of destructive competition, the Board exposed a fundamental policy change, that "we cannot agree to define healthy competition as that state where the fortunes of the competitors fluctuate but no competitor ever goes to the wall." To this, the Board footnoted a self-laudatory claim that past regulation has not protected carriers from forced

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64 See generally A. Lowenfeld, supra note 24, at I-101 to I-150. In U.S. v. Florida East Coast Ry. Co., 410 U.S. 224 (1973), the Supreme Court found no intrinsic requirement for adjudicatory proceedings unless the act under which the agency operated provided that hearings must be "on the record." The Civil Aeronautics Act contains no such "magic ingredients," which is not surprising in that the Civil Aeronautics Act of 1938 preceded the Administrative Procedure Act, passed in 1946. Without formal adjudicatory proceedings the factual bases for agencies' conclusions are not available for cross-examination, nor exposed to review on appeal.

65 See Second Order, supra note 6, at Appendix A.

66 First Order, supra note 3, at 21.


68 Quoted at note 29, supra.

69 First Order, supra note 3, at 25.
acquisitions but has spared them bankruptcy. The Board continued by describing four possible types of destructive competition. Three of these were discounted as unusual circumstances, and the fourth—predatory behavior by a powerful competitor—was considered controllable under current statutory authority. The destructive competition argument was concluded with citation to unregulated intrastate markets and lightly regulated segments of the industry, such as freight forwarders, as models of competitive response to relaxed regulation.

The Board's argument then shifted from the defensive to the offensive with a discussion of the new-found role of the marketplace. Mistrust of the effects of market forces has not been a traditional argument against deregulation, but appears to be a pivotal issue in the dissent on the Board:

I can't get over the feeling that we are imparting near human attributes of insight, rationality, and purposefulness to the market, and I can't accept the proposition that such an impersonal agent will do the job with the same dedication to the public interest, with the same accountability, and with the same respect for due process that we as appointed officials have been called upon to demonstrate for nearly forty years.

The majority argued that the forces of the marketplace pull in directions similar to the objective criteria of comparative carrier selection, but are capable of doing so continuously, finely tuning their sensitive mechanisms to current circumstances rather than the episodic manipulations of the Board which respond only to "past facts embalmed in the evidentiary record." The Board then re-

70 Id. at 25 n.35; compare Gritta, Profitability and Risk in Air Transports A Case for Deregulation, 7 TRANS. L. J. 197, 203-04 (1975).

71 The unusual circumstances were described as 1) irretrievable commission of long-lived, immobile capital to a depressed market, 2) management characterized by lack of sophistication or motives other than profit maximization, and 3) irrational market behavior typified by imprudent entry as well as by failure to withdraw from an unprofitable market. First Order, supra note 3, at 25-27.

72 Id. at 25.

73 Id. at 31.

74 See generally Examination of Arguments, supra note 27.

75 Second Order, supra note 6 (O'Melia, Member, Interim Statement).

76 See note 38, supra and accompanying text.

77 First Order, supra note 3, at 34.
iterated its interpretation of the Act under which it found authority for its innovative posture.

By the time the notice and comment hearing on the proposed procedure was accomplished, the arguments offered by the parties were neatly categorized as 1) legal objections to certificating more carriers than a market can support, 2) legal objections to permissive certification at Oakland, 3) economic (policy) objections to multiple permissive certification in any situation, 4) economic (policy) objections to multiple certification in any situation other than Oakland, 5) economic (policy) objections to failure to apply multiple permissive certification in all situations, 6) objections to environmental procedures, and 7) complete accord with the order.8 The Board's rebuttal to the comments submitted included citation to the arguments and evidence in the instituting order with an occasional original reference. Only the environmental topics were new. Without further proceedings, the Board made its revolutionary policy final.

The Oakland Service Case is not remarkable for the fact that deregulation of route entry9 was accomplished. Indeed, deregulation was inevitable. Every administration since that of John Kennedy has espoused such a relaxation of governmental control in some form.90 The prevailing temper of the judiciary, as evidenced by Continental Airlines, Inc. v. C.A.B.,91 has naturally reinforced this inevitability. Less than two months after the second Board order on Oakland Service the Congress passed the Airline Deregulation Act of 1978,92 making now academic any question of Board propriety.

8 Second Order, supra note 6, at 2.
9 Deregulation is used here in the popular sense of removing economic protection, such as proscribing competition or controlling rates in the public utility style; no current advocate of deregulation seriously proposes exception from antitrust, labor, or safety regulations nor from regulation to ensure adherence to tariffs, financial responsibility or maintenance of schedules. Special Staff Report, supra note 24, at ii.
90 Special Staff Report, supra note 24, at 7-12.
92 Pub. L. No. 95-504, 92 Stat. 1705, to be codified in scattered sections of 49 U.S.C. §§ 1301 et seq. The Act amends the Civil Aeronautics Act of 1958, establishing specific programs for increased competition under a revised policy statement, including liberalized carrier entry into new markets and reduced control over fares.
What is worthy of memorial, in view of the public attention which legitimately accompanies federal legislation, is that the impetus for the abandonment of comparative carrier selection by the Board was internal. One can only imagine the herculean effort required to orchestrate the overruling of such a precedent where the ultimate effect may well be "sunset" for the Board itself. To accomplish this, the Board was forced to rely on its authority under an Act which was, if not obsolete, at least unequal to the task of regulating an industry so vigorous, an Act further handicapped by ambiguous intent and conflicting policy objectives.

Eclipsed by the Airline Deregulation Act of 1978, the Oakland Service Case has received precious little attention, but it has raised two vital issues which must now be considered with the implementation of the latest Act: 1) what shall be the criteria and parameters of fitness, willingness, and ability, the only threshold for route entry which remains intact, and 2) whether there now exists any function for the Civil Aeronautics Board.

Paula Brown Sinclair

CONSTITUTIONAL LAW—AIRPORT SEARCH AND SEIZURE—Congress Appropriated Private Air Carriers to Aid in the Government's Air Transportation Security Program, Thereby Supplanting any Common Law Power of Search Air Carriers May Have Had, and Subjecting Such Searches to the Fourth Amendment's Standard of Reasonableness. United States v. Fannon, 556

\[83\] In an interesting parallel allusion Member O'Melia charged that "[t]he staff on its own prepared the order to adopt the multiple permissive award policy, and the Board gave its blessing to it at its 'Sunshine' meeting of September 7. This makes it all too evident that the policy decision to use multiple permissive awards was made elsewhere and at an earlier time." Second Order, supra note 6, Interim Statement at 2.

\[84\] See note 82, supra.

\[85\] See note 28, supra and accompanying text. This has led Member O'Melia to complain that "the operating authority is entitled a Certificate of Public Convenience and Necessity, and not a fit, willing and able certificate, or anything else." Seattle/Portland-Japan Service Investigation, CAB Order No. 78-10-42 (July 6, 1978) (O'Melia, Member, dissenting opinion) at 2.
Acting in concert in March of 1976, the defendants deposited at an airline freight office two packages for shipment. Due to the defendants' hesitation and nervousness, employees of the carrier suspected the packages contained drugs and, when defendants left the freight office, opened the packages and found heroin. They then turned the drugs over to federal law enforcement officers. The defendants were indicted and tried jointly. The district court denied the defendants' motion to suppress the use of the drugs as evidence, finding that since no government authorities had participated, the search by the freight agents was in fact a private search and therefore not governed by the fourth amendment. Upon conviction of multiple counts of violating federal narcotics and conspiracy laws, the defendants appealed to the United States Court of Appeals for the Ninth Circuit, assigning as the principal error the district court's denial of their motion to suppress the drugs as evidence. Held, Reversed and Remanded: Congress appropriated private air carriers to aid in the government's air transportation security program, thereby supplanting any common law

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1 556 F.2d at 963. The opinion of the district court is not reported.
   (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
      (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .
   Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy.
   (a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport—
      (1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or
      (2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.
   Subject to reasonable rules and regulations prescribed by the Ad-
power of search air carriers may have had, and subjecting such searches to the fourth amendment's standard of reasonableness. *United States v. Fannon*, 556 F.2d 961 (9th Cir. 1977), rehearing en banc granted, 569 F.2d 1106 (1978).

The fourth amendment's protections against unreasonable searches and seizures apply only to action by the federal government. The origin and history of the fourth amendment show it was intended as a restraint upon the activities of sovereign authority, and not as a limitation upon nongovernmental agencies. A purely private search is therefore not governed by the fourth amendment's standard of reasonableness. In *Burdeau v. McDowell,* for instance, the Supreme Court found the amendment is not violated by a private corporation's seizure of papers from the possession of a director and an employee.

Conduct that is formally "private" may, however, become so
entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. Such involvement has been found to exist where a bus line is operated under the regulatory supervision of a federal governmental agency which is taking an active role in the line's day to day operations. Similarly, the Supreme Court has held that private individuals or groups endowed by the state with governmental powers or functions are state agencies or instrumentalities and subject to constitutional limitations. While sufficient governmental involvement in private activity may trigger fourth amendment protections, the Supreme Court has stressed it is no part of the policy of the fourth amendment to discourage


10 In Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), the agency regulating transit operations in the District of Columbia received complaints about radio broadcasts of music and commercials aboard buses. The agency investigated the broadcasts and after hearings concluded public safety, comfort, and convenience were not impaired. The Supreme Court held that governmental involvement was sufficient to invoke constitutional protections, but that any invasion of privacy was not unreasonable.

11 Evans v. Newton, 382 U.S. 296 (1966). Under a private will, a city was named the trustee of a park that was to remain racially segregated. Unable to legally enforce racial segregation, the city resigned as trustee and had three individuals named instead, in order to effectuate the testator's intent. The Court held the individuals were performing a public function and were subject to the fourth amendment.

12 "[T]he fourth amendment was directed against specific historical evils, 'searches' and 'seizures' in the sense of forcible official entries into homes and offices to ransack the owners' drawers and closets under general warrants and writs of assistance..." Amsterdam, Perspectives on The Fourth Amendment, 58 Minn. L. Rev. 349, 362 (1974).

citizens from aiding in the apprehension of criminals to the utmost of their ability.  

Cases relating to searches and seizures by airline officials at airports indicate that there are two categories of constitutional searches, resulting in different court imposed controls, procedures, and consequences. The first category is the search of passengers and their carry-on baggage prior to boarding. The second category involves the opening and inspection by airline officials of packages which have been delivered to the airline for air freight.  

The first category of searches, that of passengers and their luggage before boarding conducted pursuant to the anti-hijacking program, constitutes governmental action within the reach of the fourth amendment. In United States v. Davis, the Ninth Circuit considered an anti-hijacking statute together with related rules issued under the regulatory authority of the Federal Aviation Administrator. These rules require air carriers to implement a screening system acceptable to the Federal Aviation Administration (FAA) in order to prevent or deter a passenger's boarding an
aircraft with sabotage devices either in carry-on baggage or on or near his person. Furthermore, these rules forbid the transportation of any person refusing to consent to a search of his person or property. The court concluded that such preliminary searches of airline passengers constituted a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers, and thus within the reach of the fourth amendment. Since Davis, the Ninth Circuit and the Sixth Circuit have applied fourth amendment standards to searches of boarding passengers and their luggage.

The second category, inspections by common carriers of packages delivered for shipment, traditionally has constituted a private search not subject to fourth amendment protection, unless the

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19 14 C.F.R. § 121.538 (1978):
   (k) Each certificate holder shall refuse to transport—
      (1) Any person who does not consent to a search of his person
          in accordance with the screening system prescribed by paragraph
          (b) of this section; and
      (2) Any property of any person who does not consent to a search
          or inspection of that property in accordance with the screening
          system prescribed by paragraph (b) of this section.

20 United States v. Davis, 482 F.2d 803, 904 (9th Cir. 1973).

21 See United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867 (1976), in which a search by an airline security guard of a passenger's suitcase was held to constitute state action for fourth amendment purposes and was held to be permissible under the fourth amendment because the passenger voluntarily consented to the search; United States v. Miner, 484 F.2d 1075 (9th Cir. 1973), in which defendant's implied consent to a search of his suitcase was a reasonable search within the safeguards of the fourth amendment.

22 See United States v. Freeland, 562 F.2d 383 (6th Cir.), cert. denied, 434 U.S. 957 (1977), in which defendant's implied consent based upon constructive knowledge of the airline's right to search his baggage precluded any violation of his fourth amendment rights. The court assumed arguendo that the requisite state action was present. Prior to Davis, see United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972), which held that within the context of a potential hijacking a necessarily limited search with a magnetometer is not per se unreasonable under the fourth amendment. Cf. Terry v. Ohio, 392 U.S. 1 (1968) (where the Court held that a pat-down weapons frisk of a suspect after an investigative stop does not violate the fourth amendment when the officer reasonably believes the person frisked to be armed and dangerous to the officer and others.)

actual participation or involvement of a government agent is shown. Under the common law, carriers have the right to decline shipment of packages when circumstances indicate the contents are of a suspicious or possibly dangerous nature, and they may make a search to confirm such suspicion. In United States v. Pryba, an air freight clerk opened a package when the shipper

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\[4^4\] See, e.g., United States v. Newton, 510 F.2d 1149 (7th Cir. 1975), in which the court held that there had been a government search where airline employees searched a suitcase for the sole purpose of aiding the investigative work of a government drug agent who witnessed the search; Corngold v. United States, 367 F.2d 1 (9th Cir. 1966), in which a search conducted by TWA employees at the request of federal agents constituted a government search within the meaning of the fourth amendment.


Fourth amendment procedures are significantly more comprehensive in their protection against unreasonable searches than the common law rule which allows a carrier to make an immediate determination of fact based upon his own suspicions. An 1845 English statute regulating railroad transportation provided:

\[5^8\] An Act for consolidation in One Act certain Provisions usually inserted in Acts authorizing the making of Railways, 1845, 8 & 9 Vict., c. 20(a), § 105.

Under the fourth amendment, the Supreme Court emphasizes that reasonableness turns on the more specific commands of the amendment's warrant clause. United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 315 (1972). The Court has condemned searches without a warrant subject only to exceptions for consent searches, a very limited class of routine searches, and searches where exigent circumstances make obtaining a warrant impracticable. See Amsterdam, Perspectives on The Fourth Amendment, 58 Minn. L. Rev. 349, 358 (1974). Such warrants must specifically describe the place to be searched and items to be seized, and may only be issued by a detached magistrate upon a showing of probable cause. Id. But when flexibility of inspection as to time, place, and frequency is a necessity, the Court has found that a regulatory inspection search without a warrant is not unreasonable if authorized by statute. United States v. Biswell, 406 U.S. 311 (1972). Cf. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); (which held that in some situations regulatory inspections authorized by statute may not proceed without a warrant if entry is refused, but that warrants may be issued based on the existence of an area inspection program and "reasonable legislative or administrative standards.")

could not identify the contents with any specificity. The search was within the common law rule, and not subject to the fourth amendment. The court in *Pryba* found the justification to be the carrier's aims to safeguard life and property and to frustrate criminality. Either objective warrants inquiry by the carrier as to the contents of parcels tendered for shipment, and/or a reasonable inspection to fulfill those objectives.

In addition to the common law right, airlines may inspect packages delivered for shipment pursuant to tariffs filed with the Civil Aeronautics Board (CAB). Such rules, of which the public is deemed to have constructive notice, have been found broad enough to authorize the search of any package which an airline official believes does not conform to tariff weight and value regulations. While tariffs make all shipments by air subject to inspection by the carrier, the regulations specifically provide that

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27 *Id.* at 398.
28 *Id.* at 399.
29 *Id.*
30 Rule 24 to Airline Tariff Publisher, Inc., Agent, Official Airfreight Rules Tariff, No. 1-B, C.A.B. No. 96. The regulation provides: "Inspection of Shipments — All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection."

(Tariffs are published schedules of the rules of carriage and monetary rates charged.)


the carrier is not obligated to perform such inspection. Because of this permissive rather than mandatory nature, the CAB's involvement in these inspections—and therefore the government's—is limited to merely accepting the tariffs as filed and providing a forum for challenges to tariffs by either the CAB or interested parties. Accordingly, these tariffs do not appropriate the services of common carriers for governmental purposes, and searches conducted under them are "private." Pryba recognized that tariffs justify carrier searches, but held that this was ancillary to the pre-existing common law powers of search and inspection. The court noted that air freight carriers share a qualified right of package inspection with other common carriers of goods, and the tariffs merely recognize that right. The court found that the bare recognition of this right cannot be equated with a grant of government authority to search, nor can it transform an inspection initiated and conducted by the carrier for its own protection into a search under the aegis of the federal government: such searches are private.

In 1974 Congress enacted the Air Transportation Security Act. Section 1511 (hereinafter referred to as the statute) requires the Administrator of the FAA to authorize airlines to conduct searches or inspections for the purpose of determining whether a "dangerous weapon, explosive or other destructive substance" is present. The statute was enacted as part of a congressional effort

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35 United States v. DeBerry, 487 F.2d 448, 449-50, n.1 (2d Cir. 1973). The air carrier files by tariff its transportation charges and regulations. The CAB may only reject them if they do not conform to regulations on published form and information. 49 U.S.C. § 1373(a) (1976). The carrier may change a tariff after sixty days notice. In the public interest, the CAB may allow such change upon less notice. 49 U.S.C. § 1373(c) (1976), as amended by Act of Nov. 9, 1977, Pub. L. No. 95-163, §§ 8(a), 10(a), 91 Stat. 1281.


38 Id. at 401.

39 Id.

40 Id.


43 Id.
to provide security against hijacking attempts through the Air Transportation Security Act of 1974. While there is no specific legislative history addressing section 1511, Congress' intent behind the entire Act was "to statutorily provide security against acts of criminal violence directed against air transportation through the imposition at airports in the United States of such measures as the screening of passengers and requiring the presence of adequately trained law enforcement personnel." In addition, the security requirements of the Act unquestionably support its stated purpose by providing a law enforcement presence and capability at United States airports adequate to insure safety from criminal violence and air piracy in air transportation. Congress decided that these provisions were needed to ratify statutorily the security policies and procedures that have been put in effect at United States' airports through regulations and directives of the FAA. "Pryba is thus distinguishable from the present case having pre-dated the enactment of the statute.

Faced with this legal background the Ninth Circuit Court of Appeals in Fannon recognized the private nature of air freight searches, in the absence of government authorization or involvement, but found in the statute the requisite government authorization to invoke fourth amendment protections for all airline searches. The court noted that the statute is more than a declaration of the private non-governmental common law and tariff rights to search, because it was passed as part of a congressional effort

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46 Title II was added by the committee to deal with security at airports in the United States. It requires that all passengers and all property be screened by weapon-detecting procedures or facilities employed or operated by employees of the air carrier; that the carrier refuse to transport anyone who does not consent to a search; and that a law enforcement presence and capability be maintained at airports by airport operators.
47 Id. at 4008.
48 Id.
49 United States v. Fannon, 556 F.2d at 963.
50 Id. at 965.
51 Id. at 964.
to provide security against criminal violence in air transportation. The statute involves air carriers in the detection and seizure of weapons and explosives, threats to public safety which the police traditionally have been relied upon to combat. The court took judicial notice of the danger presented by air shipments of explosives, and was confronted with explicit statutory language authorizing air carriers to refuse carriage when consent to a personal or property search is not given. Deciding without further explanation it was "not unreasonable to conclude" that Congress intended to include air freight shipments in the government's air transportation security scheme, the court held that Congress conferred on air carriers a governmental function subject to constitutional limitations. The statute supplants any private powers of search and subjects such searches to the fourth amendment's standard of reasonableness. The present search was unreasonable because defendants could not have consented having no notice that search was a condition of carriage.

The court's holding renders all searches by air carriers to be governmental searches regardless of whether there was in fact participation by government agents. Such a broad construction of the statute contradicts both its express purpose and intended application. While the statute on its face authorizes the inspection of property for transportation, the legislative history suggests that Congress did not intend to include air freight within its parameters, but rather baggage and packages accompanying boarding passengers. The Act deals solely with aircraft piracy which it defines as "any seizure or exercise of control of an aircraft in flight by force or violence or threat of force or violence and with wrongful intent." Seizure of an aircraft requires the presence on board the

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53 Id.
54 Id.
55 Id. at 964-65.
56 Id. at 965.
57 Id.
58 Id.
carrier of the person attempting to gain control of the plane. To that extent, shipment by air freight, even of an explosive, does not present a threat of hijacking or air piracy.

Secondly, conceding that the Act authorizes searches of air freight, the statute does not authorize such searches when the sole purpose is to find secreted narcotics. Section (a) of the statute specifically authorizes searches of persons and property for the purpose of determining the unlawful presence of "a dangerous weapon, explosive, or other destructive substance." In addition, this section authorizes the carrier to refuse transportation of a passenger or property when in the carrier's opinion such transportation would or might be inimical to the safety of the flight. Section (b) of the statute only authorizes the carrier to refuse transportation when consent to search is not given for the purposes enumerated in section (a). Only by an extremely broad and somewhat creative construction of "destructive substance" can the statute be interpreted to authorize air carriers to refuse transportation when the sole object of the search is to locate hidden narcotics. Such a construction is not supported by a legislative history that deals with aircraft hijacking.

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62 Id. at 199. In support of the view that the statute was not intended to cover air freight, the sole regulation promulgated by the Administrator of the FAA under section 1511 authorizes the search of passengers and their carry-on or checked baggage. It does not explicitly provide for inspection of air freight except insofar as shipped materials might be considered "checked baggage." 14 C.F.R. § 121.538 (1978) provides in part:

(b) Each certificate holder shall adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carry-on baggage or on or about the persons of passengers, except as provided in § 121.585, and the carriage of any explosive or incendiary device in checked baggage.

(k) Each certificate holder shall refuse to transport—

(1) Any person who does not consent to a search of his person in accordance with the screening system prescribed by paragraph (b) of this section; and

(2) Any property of any person who does not consent to a search or inspection of that property in accordance with the screening system prescribed by paragraph (b) of this section.

66 Id., § 1511(b).
67 See note 45 supra.
Since the statute was not intended to cover air freight, nor any search for illegal narcotics, it appears the search in Fannon exceeded both the purpose and intended application of the statute. Therefore the statute's governmental authorization is not applicable to the facts of the case or to any invocation of fourth amendment protection. The court's holding to the contrary is incorrect. The carrier's authorization to search in this case must lie elsewhere.

The Ninth Circuit's holding in Fannon apparently places it in conflict with the Sixth Circuit. In United States v. Freeland, decided after Fannon, an airline passenger and his luggage were searched prior to boarding and an illegally concealed handgun was found. The Sixth Circuit held that since the passenger had given consent to search, the presence or absence of state action was not at issue. In dicta, however, the court stated it did "not believe that all searches of passengers' luggage at airports are invariably subject to the proscription of the Fourth Amendment. Rather, the question of governmental involvement in the search is determined by the particular facts at hand." The statute is addressed to this exact situation yet the Sixth Circuit does not find sufficient governmental authorization to invoke the fourth amendment. The Ninth Circuit holds that the statute automatically triggers the fourth amendment in a situation to which the statute was not even applying fourth amendment protections to the case at hand, it is debatable whether the search in question was so unreasonable as to be violative of the amendment. The court held that as a threshold matter the search had to be preceded by reasonable notice to the shipper that search was a condition of carriage. 556 F.2d at 965. This notice could take various forms but would be deemed reasonable if sufficient to apprise the ordinary shipper of the condition. Id.

However, the shipper already has notice by operation of law of the carrier's right to inspect shipments for conformance with tariff regulations. See note 32 supra; see also United States v. Freeland, 562 F.2d 383 (6th Cir.), cert. denied, 434 U.S. 957 (1977). Either searches for contraband or unlawful possession of weapons are within the broad category of "nonconformity with tariff regulations." It is arguable that the defendants had reasonable notice in this case.

68 Even applying fourth amendment protections to the case at hand, it is debatable whether the search in question was so unreasonable as to be violative of the amendment. The court held that as a threshold matter the search had to be preceded by reasonable notice to the shipper that search was a condition of carriage. 556 F.2d at 965. This notice could take various forms but would be deemed reasonable if sufficient to apprise the ordinary shipper of the condition. Id.

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69 See notes 25, 30 supra.


71 Id. at 385-386.

72 Id. at 385. The court went on to state that "[i]t was . . . incumbent upon [the defendant] to demonstrate that sufficient governmental involvement existed to invoke the proscriptions of the Fourth Amendment." Id.

73 Id. at 384. It is peculiar that the court in its dicta never mentions the statute or its implications, yet earlier in the opinion reference is made to the Ninth Circuit's decision in Fannon. See generally 562 F.2d at 385.

74 See U.S. v. Fannon, 556 F.2d 961, 965 (9th Cir. 1977).
intended to apply. Such a conflict between the circuits only confuses the applicable law in an area of paramount importance in airport searches.

Nor does excluding the illegally obtained evidence from trial achieve any significant purpose in this case. The basic justification for excluding illegally obtained evidence is to deter the excesses of law officers who have a professional interest in the outcome of their investigations. It is unlikely that air freight clerks will be significantly affected in their actions by any court imposing or declining to impose the exclusionary rule. Upon rehearing the Ninth Circuit should reverse its decision in Fannon and find that the search was in fact private in nature and outside the protection of the fourth amendment.

Craig Weinlein

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76 See United States v. Fannon, 569 F.2d 1106, 1107 (9th Cir. 1978) (Chambers, J. dissenting).
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