FEDERAL REVIEW

"LEGISLATIVE HISTORY OF THE RIGHT OF ENTRY IN AIR TRANSPORTATION UNDER THE CIVIL AERONAUTICS ACT OF 1938*"

INTRODUCTION

We are here today because we feel that a misconception has grown up in the Civil Aeronautics Board, and among many of the beneficiaries of that Board, of the intention which Congress had in mind when it sent to the President, for his signature, the Civil Aeronautics Act of 1938.

It is clear from the language of that Act, and from the statements made in both Houses while it was under consideration, that the purpose of the Congress was to write a law which would encourage the development of an air transportation system for all of the people of the United States, for their commerce and industry, and for their national defense. There was nothing in the debates in either House to give the slightest ground for believing that anybody in Congress, or indeed in the industry, whatever his secret designs, if any, may have been, to establish a system which would give to any bureau of the Government the power, on its own discretion, to restrict the development of aviation and to drive out of the business of air transportation any individual or any group willing to risk its capital in the pioneering of this industry, while at the same time obeying all the necessary rules to maintain the maximum degree of safety in the air. Indeed the very purpose of the exemption provision was to insure reasonable freedom of entry of new small enterprises.

In 1938 the Congress thought that it was establishing the basis upon which a new industry of great proportions would be built. It did not believe that this industry would be confined to less than a score of airlines which had graduated into the grandfather class, but that a constant opportunity would be kept open for the free entry into this business of every new generation. Sons of the first pioneers in air transportation were not to be excluded from this industry. It was not surprising, therefore, that when flyers returned from World War II they found a ready welcome from officials of the Government, and particularly from the RFC, when they sought to set themselves up in this new field for which they had been trained, fighting in the defense of their country. No one dreamed that the time would ever come when any regulation of the Board would be interpreted to mean that America was saying to any of its sons — "You may not enter here."

The United States Senate, since 1938, has on three occasions shown grave concern with the Board's restrictive policies with respect to entry into aviation. As early as March 1942 this concern was reflected in a Resolution sponsored by Senator Walter F. George of Georgia, now the Dean of the United States Senate. It was expressed once again in 1949 during the Johnson Hearings before the Senate Interstate and Foreign Commerce Com-

* Memorandum submitted by Joseph C. O'Mahoney, formerly U.S. Senator from Wyoming, before the U.S. Senate Small Business Committee in May 1953, representing North American Airlines, Inc.
mittee. Senatorial concern reached its culmination during Senate Small Business Committee hearings in 1951 on the Role of the Large Irregular Airlines in air transportation.

**BACKGROUND OF THE CIVIL AERONAUTICS ACT**

Rarely has the Congress given such extended consideration for proposals to regulate any industry as it devoted to the airline industry from 1934 to 1938. During this period, various bills were drafted, and hearings and debates were held in the Congress with respect to the desirability of full regulatory control of the industry and with the form such control should take. The explanation for such prolonged deliberation can be explained by reference to the state of the industry during this period. None, or practically none, of the factors which make a comprehensive scheme for the economic regulation of a common carrier a categorical imperative appeared to obtain in the scheduled airline industry. In the case of railroad and motor carriers, the Congress did not legislate complete control until these industries were so fully developed that such control was inevitable.

For example, it was almost one hundred years after the railroad began operations in this country that such control was applied to them. The scheduled airline industry, on the other hand, was in a very formative stage of development. By 1935, the industry was only five or six years old and accounted for but a fraction of one percent of existing inter-city passenger traffic, including traffic of rail and motor carriers. In 1936, industry revenues, including mail pay, amounted to only some $30,000,000. As late as 1936, its operations were not even as extensive as the operations of non-scheduled operators. In a letter dated March 29, 1937 from Mr. Joseph Eastman, Commissioner of the Interstate Commerce Committee, to Rep. Clarence F. Lea, Chairman of the House Interstate Foreign Commerce Committee, the following statistics were submitted with respect to the scheduled airlines and the non-scheduled industry as of 1936:

<table>
<thead>
<tr>
<th>Type of Operators</th>
<th>Passengers Carried</th>
<th>Miles Flown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic scheduled</td>
<td>1,020,297</td>
<td>68,777,221</td>
</tr>
<tr>
<td>Domestic nonscheduled</td>
<td>1,027,280</td>
<td>88,480,000</td>
</tr>
</tbody>
</table>

These figures do not include privately owned airplanes not operated for hire. During the same period air carriers of the United States engaged in foreign commerce carried 125,841 passengers a total of 9,590,938 miles. It was also shown in hearings during 1938, that only 1,347 of a total of 8,000 commercial pilots and only 447 of the total of 1,780 aircraft certificate.

---

for common or contract carriage operations were employed by the scheduled airline industry.\(^5\)

Difference in the nature of the investments involved in railroad operations, on the one hand, and scheduled airline operations, on the other, also appeared at the time to suggest a difference in regulatory approach. In the case of railroads, tremendous investments are necessary to purchase and construct along right of way. This, together with the immobility of equipment, has traditionally been advanced as the basis for protection through complete economic regulation of such investments from excessive competition. No comparable investments existed in scheduled airline industry. The airways are free and navigational and other operational facilities are maintained or subsidized by the Government. Government subsidies for the construction and maintenance of government ownership of airport facilities permit use of such facilities at nominal or reasonable fees. The absence of large fixed investments and the newness of the industry were regarded by Miss Amelia Earhart as crucial distinctions between airlines and railroads insofar as similarity of regulatory treatment was concerned. Miss Earhart stated:

"... I think the situation in connection with air lines is somewhat different from that of the railroads. If you speak of the matter of expense, no comparable ground facilities are necessary. We do not have to buy rights-of-way. We do not have the tremendous expense of laying down rails, of paving highways, of surveying mountainous districts, of tunneling through mountains, or anything like that. Airplanes can be run from airport to airport over almost any kind of terrain on a far smaller initial expenditure and a far smaller upkeep, and at the same time the industry can feel its way toward the ultimate service to be rendered by aviation."\(^6\)

While the various bills were being considered Col. Gorrell was the President of the Air Transport Association, the trade association of the scheduled airlines. There is no single person of airline industry who was so prominent as Col. Gorrell in efforts to obtain legislation for complete economic regulation of the scheduled airlines. The advantages to the existing carriers of such control were obvious then, and, as events have since turned out, are even more obvious now. As Col. Gorrell observed during hearings in 1937, the characteristics of the industry were (and still are) such as not to require any appreciable fixed investments. Col Gorrell stated: "Today a person without any appreciable finances, if he desires to take a chance, can start a line as a common carrier."\(^7\)

During this entire period, the scheduled airline industry's operations were affected by three governmental agencies. Safety matters were subject to the jurisdiction of the Bureau of Air Commerce of the Department of Commerce.\(^8\) Air mail contracts providing subsidies for the scheduled carriers were awarded on a bid basis by the Post Office Department.\(^9\) Mail rates under

\(^5\) Testimony of Col. Edgar S. Gorrell, President, Air Transport Association of America, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), p. 367. The 1,780 commercial plane figure is limited to planes engaged in commercial operations and does not include aircraft certificated for instructional (schools, flying lessons) or business (crop dusting, aerial photography) use.


\(^7\) Hearings on H.R. 5234 and H.R. 4652, House Committee on Foreign and Interstate Commerce, 74th Cong., 1st Sess. (1937), at p. 73.


these contracts were subject to review and adjustment by the Interstate
Commerce Commission. No more than one carrier was awarded a contract
over any particular route. However, none of these agencies had certificate
of convenience and necessity jurisdiction, and no restrictions whatsoever
were placed upon the freedom of any independent unsubsidized carrier to fly
over any route or into any territory. Through 1936, the industry experi-
enced a phenomenal and apparently sound growth under this regulatory
scheme. The passenger and air express business of the industry trebled in
the two years ending 1936. With the growth of passenger and air express
business, the carriers became less dependent upon mail pay to sustain their
operations. The mail pay rates and total mail pay for the industry de-
creased, even though the volume of air mail handled was more than doubled.
Competition was resulting in a substantial reduction in passenger and air
express rates. Although the Board in support of its restrictive policies has
repeatedly relied on allegedly chaotic conditions in the industry at the time
in seeking justification for the policies it has adopted, the record fails to

---

10 Air Mail Act of 1934, as amended.
11 Air Mail Act of 1934, as amended.
12 Air Mail Act of 1934, as amended. See Letter dated March 11, 1937, to
Senator Wheeler, Chairman of the Senate Interstate Commerce Committee, from
James A. Farley, Postmaster General, Hearings on H.R. 5234 and H.R. 4652,
House Committee on Foreign and Interstate Commerce, 75th Cong., 1st Sess.
(1937), at pp. 122, 124. Hearings on S. 2 and S. 1760 before a Subcommittee of
the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. (1937), at
pp. 139, 141.
13 Letter dated March 29, 1937 to Hon. Clarence F. Lea, Chairman, House
Committee on Foreign and Interstate Commerce, from Joseph B. Eastman of the
Interstate Commerce Commission, Hearings on H.R. 5234 and H.R. 4652, House
Committee on Foreign and Interstate Commerce, 76th Cong., Ist Sess. (1937),
pp. 15, 17. The following growth statistics were presented to Sen. Wheeler by
Mr. Farley in his letter of March 11, 1937; Hearings on H.R. 5234 and H.R. 4652,
House Committee on Foreign and Interstate Commerce, 75th Cong., 1st Sess.
(1937), p. 121; Hearings on S. 2 and S. 1760 before a Subcommittee of the Senate
Committee on Interstate Commerce, 75th Cong., 1st Sess. (1937), p. 138:

<table>
<thead>
<tr>
<th>Year</th>
<th>Express Revenue</th>
<th>Passenger Revenue</th>
<th>Mail Pay</th>
<th>Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1933</td>
<td>$202,567</td>
<td>6,407,748</td>
<td>$19,400,264</td>
<td>$26,010,579</td>
</tr>
<tr>
<td>1936</td>
<td>$796,171</td>
<td>17,413,260</td>
<td>$12,034,953</td>
<td>$30,244,384</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

14 Letter dated March 29, 1937 to Hon. Clarence F. Lea, Chairman, House
Committee on Foreign and Interstate Commerce, from Joseph B. Eastman of the
Interstate Commerce Commission, Hearings on H.R. 5234 and H.R. 4652, House
Committee on Foreign and Interstate Commerce, 75th Cong., 1st Sess. (1937),
pp. 15, 17. The Eastman letter reveals that whereas a few years before mail pay
accounted for 70 per cent of the total revenues of the domestic carriers, it only
accounted for one-third of their revenues by the end of 1936. See also statistics
in the Farley letter, cited in note 13, supra.
15 Testimony of Karl A. Crowley, Solicitor, Post Office Department, Hearings
on S. 2 and S. 1760, before a Subcommittee of the Senate Committee on Interstate
Sen. Wheeler, Chairman of Senate Interstate Commerce Committee from James A.
Farley, Postmaster General, Hearings on H.R. 5234 and H.R. 4652, House Committee
on Foreign and Interstate Commerce, 75th Cong., 1st Sess. (1937), p. 121; Hearings
on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on
16 Report submitted in testimony of Commissioner Joseph B. Eastman, Hear-
ings on H.R. 5234 and H.R. 4652, House Committee on Foreign and Interstate
disclose that such conditions existed. Col. Gorrell placed similar reliance on alleged economic chaos during hearings for the purpose of showing the need for economic control of the industry. Even Col. Gorrell was finally obliged to acknowledge under questioning that the development of the industry was taking place without any incidence of cut-throat competition for passenger and freight traffic:

"Mr. Gorrell. Perhaps so, sir. But it is not quite so simple as that. For example, I have been talking to a man who spoke about going into the business solely of flying freight, or freight and passengers, or freight, passengers, and express. Now, not many people are willing to go into that business today and put their money into it, thus making an investment, unless there is some protection against fly-by-night companies whereby such irresponsible companies cannot come along with a lot of second-hand planes and cut prices right out from under legitimate operators. A system that permits such an operation gives no protection for an orderly growth of the business between the points to be served.

"Mr. Sadowski. Has that been done on very many occasions?

"Mr. Gorrell. No; but it has been much closer than I would like to talk about. I have been shaking in my boots very recently on this subject."1

Such chaotic economic conditions as existed arose solely out of ridiculously low bids by the three or four major carriers to secure mail contracts which were required by law to be awarded by the Post Office to the lowest bidder. With pending legislation which would result in later increases and in future permanent rights in the air, only these large carriers could afford this below cost operation until they received ultimate reimbursement from the Government. Such payments as one mill instead of a reasonable thirty cents13 gives some idea of the situation that existed. The situation was referred to by Congressman Boren as the

"... final banquet that they [the large operators] may gorge themselves before we put them on a diet of public convenience and necessity."10

Under this liberal scheme of regulation, this country was able quickly to outrank the combined world in civil aviation.20

This background was revealed to the Congress during hearings and debates for economic regulation of the industry. It was obvious to the Congress that the alternatives were either to permit the industry to develop under the existing regulatory schemes or modifications thereof, or to regulate competition under a liberal policy of freedom of entry into aviation. It is not surprising, therefore, that freedom of entry into aviation was a dominant theme in all debates and hearings, concerning the industry and in the Civil Aeronautics Act itself.

The Report of the Federal Aviation Commission

Probably the first document mentioning freedom of entry was the Report of the Federal Aviation Commission in 1935.21 This Commission had been

18 The one large carrier bid 1 mill per mile for a contract at the same time that it was arguing before the Interstate Commerce Commission that a rate of 24 cents per mile was not fair and reasonable. Letter of Rep. Boren, dated February 26, 1938, Debates on H.R. 9738, 75th Cong., 3d Sess. (1938), p. 6406.
20 Statement of Chairman J. M. Johnson, Hearings before Interdepartmental Committee on Civil Aviation (1937), p. 214. Apparently copies of the record of these hearings were never printed. A photostatic copy of these hearings is available at the Legal Library of the Civil Aeronautics Board.
appointed under the Air Mail Act of 1934 for the purpose of recommending policies to the Congress with respect to civil aviation. The Commission recommended that an independent agency be established with the authority to control competition through the issuance of certificates of convenience and necessity and that the industry be subject to comprehensive economic regulation. Even though the Commission did not have all the facts before it which were subsequently developed in voluminous Congressional hearings and debates, the Commission, of course, was conscious of the infancy of the industry, and that air transport was not a “natural monopoly” requiring an “exclusive right of way” such as street railways, or, it might be added, railroads or electric power utilities. These circumstances relating to air transport, the Commission concluded, required no more than “a certain restriction on competition” between the subsidized carriers in order that the Government subsidy given to each of such carriers might not be unduly increased.

In its report, the Commission made it clear that air transportation must not be frozen in the hands of existing carriers and that there was to be no arbitrary denial of the right of entry to newcomers in scheduled airline operations:

“There must be no arbitrary denial of the right of entry of newcomers into the field where they can make an adequate showing of their readiness to render a better public service than could be otherwise obtained. There must be no policy of a permanent freezing of the present air transport map, with respect either to the location of its routes or the identity of their operators. The present operators of air lines have no inherent right to a monopoly of the routes that they serve.”

Initial Opposition to Comprehensive Regulation of Civil Aviation

Initially, various individuals and Government agencies directly connected with civil aviation raised objections to regulating competition in the airline industry. Opposition was particularly directed against the certificate of convenience and necessity provisions of the various bills upon which the Civil Aeronautics Act is based. Miss Amelia Earhart believed that such control was premature and that the necessity of obtaining certificate authorization might hinder or prevent new interests from entering the airline business. She gave the following example of what the effect of such regulatory powers would be:

“Miss Earhart. That is true. But I see in it a certain amount of stalemating in the matter of progress. I do not know whether I make myself clear. For instance, one air line is run here, and another line is run over here. A far-sighted gentleman wishes to connect these two points and he cuts across the hypotenuse of the triangle. Of course with the two named air lines having certificates of convenience and necessity, the pioneer is going to be held up in attempting to cut across, whereas he might be serving two centers of population exceedingly well if permitted to go ahead.

“Senator McCarran. You do not understand, do you, that under this bill he would be held up?

22 Air Mail Act of 1934, as amended, Secs. 20 and 21.
"Miss Earhart. I think so.
"Senator McCarran. He could apply for a certificate of convenience and necessity and establish a basis to cover the issuance of it.
"Miss Earhart. Perhaps so, but you know that the mills of any legislative body grind exceedingly slow."27

The Post Office Department and the Commerce Department, which were two of the three governmental agencies directly connected with civil aviation, strongly objected to the certificate of convenience and necessity requirements and to the "grandfather rights" accorded to existing carriers. These objections were raised at a time when the Congress was considering the Interstate Commerce Commission as the agency which would regulate all economic phases of civil aeronautics.

The position of the Post Office Department with respect to the effect of certificate jurisdiction was expressed by Mr. James A. Farley, then the Postmaster General, as follows:

"Section 305(d) authorizes the Interstate Commerce Commission to issue generally certificates of convenience and necessity authorizing an applicant to engage in interstate, overseas, or foreign air traffic, except mail, and authorizes an applicant to transport mail between the terminal and intermediate points between which such applicant or its predecessor was engaged in the transportation of mail at any time during the period of December 31, 1936, to the date of the passage of the bill.

"Thus, it will be seen that both foreign and domestic air-mail contracts may be perpetuated and retained in the hands of the present contractors." 28

"Under the provisions of this bill no person, whether carrying the mails under contract with the Government or desiring to operate an independent air line, could operate without securing a certificate of convenience and necessity. The bill would absolutely stifle competition both from the standpoint of carrying the mails as well as in the operation of an interstate air-transport line.

"It is my opinion that under present conditions, non-subsidized air-transport companies should be free to open up and develop any territory and that such pioneering work should not be hampered by the necessity of first securing a certificate of public convenience and necessity from the Interstate Commerce Commission. While Congress has found it wise to prohibit competition between subsidized air-mail contractors, it has not yet seen fit to prohibit or impose any restriction upon the operations and development of independent air transport companies not subsidized by the Government.

"Since the Government began to aid aviation, both domestic and foreign, it has expended hundreds of millions of dollars in the building of airports, the development of airways, installation of beacon lights, etc. and direct subsidies paid to the contractors. Now that the financial position of these lines is being constantly improved it would appear wise to go very slow in granting them perpetual contracts with exclusive franchises and making possible monopolies which may prove a menace to the public interest."29

The position taken by the Post Office Department was elaborated upon by Mr. Karl A. Crowley, the agency's solicitor. He emphasized that the industry was too young to be subjected to full regulatory control.29 Certificate


of convenience and necessity provisions, he stated, would be so administered as to create a monopoly for the benefit of existing carriers and to prevent small, unsubsidized operators from getting into the airline business.

"Mr. Crowley. You are getting right at the very real reason why the contractors want the passage of this bill. This bill provides a perfect plan for creating monopoly of air transport in this country. It creates a monopoly. People are getting more interested in aviation right along.

"Mr. Hallack. You mean by reason of the issuance of a certificate of convenience and necessity?

"Mr. Crowley. I mean by reason of the certificate of convenience and necessity."

"Mr. Crowley. . . . This is an infant industry. It is something that has grown with competition. As somebody remarked a little while ago, the airplane has actually brought the streamlined train to the railroads.

"This bill would freeze the present air service. It would create a monopoly with the present contractors. No little fellow with a new idea, with plenty of capital, could go out and establish a line from, say, Wyoming to California. He would have to get a certificate of convenience and necessity before he could do it. The law right now does not prohibit an independent citizen from establishing an air line—an air-transport line—at all. If you prohibit that sort of thing, then air-transport lines would not be established except by air-mail carriers. Of course, the cost to the Government would be prohibitive."

The views of the Department of Commerce with respect to certificates of convenience and necessity were expressed by J. Monroe Johnson, Assistant Secretary of Commerce, as follows:

"Passage of such a bill would be premature. While in the near future wisdom may dictate that the quasi-judicial functions now exercised by the Interstate Commerce Commission with respect to air transportation should be extended, the present state of that transportation does not warrant the sudden and comprehensive regulation of it proposed by the bill. The American air-transport industry, the history of which is measured by a span of less than 10 years, is emerging from its experimental-demonstration stage, which is evidenced by the high rate of obsolescence of its equipment; its constantly changing operating practices; and by the relatively slight volume of passengers and merchandise that it carries."

"The Department of Commerce is unalterably opposed to the issuance of such certificates at this time when the air-transport industry is still in a metamorphic state; when the airways map is still devoid of feeder or secondary routes; and when there is not yet enough competition to promote the potential traffic. It is greatly to be feared that the immediate institution of such requirements will produce an undue advantage to the three or four powerful air lines which are already well entrenched and a detriment to the weaker ones. This country is not yet sufficiently provided with air-line routes as it is with rail or motor routes. The domestic routing of air lines at the current writing is about 30,000 miles. The total express and freight carried by our air lines in 1936 (estimated for all services, foreign and domestic) will be about 3,800 tons; the total mails carried will be about 8,500 tons; and the number of passengers carried barely over 1,000,000. Deliberation upon this factor alone, the

---

volume of traffic carried, is deemed to be sufficient argument against the necessity for such certificates."38 (Emphasis supplied.)

Representative Sadowski, of the House Committee on Interstate and Foreign Commerce, had this observation to make:

"It just seems to me that a certificate of convenience and necessity provides for a monopoly unless the industry, carrier industry, is developed to such an extent that it is absolutely necessary for regulation."34

Rebuttals to Opposition to Comprehensive Regulation of Civil Aviation

Throughout the entire period that the Subcommittee of the Senate Committee on Interstate Commerce held hearings during 1937 and 1938 with respect to the regulation of civil aeronautics, the then Senator Harry S. Truman was its chairman. With the possible exception of Senator McCarran, there was no single Senator more responsible for the drafting and passage of the Civil Aeronautics Act than Mr. Truman. As chairman of the subcommittee Mr. Truman had no intention whatsoever of permitting the passage of any bill which did not clearly reflect a policy of liberal entry into aviation and against making air transportation the exclusive province of existing carriers. It was believed by him that the pending bill adequately reflected this intention and that if it did not, the bill should be changed.

"The Chairman. There is no competition being throttled in this industry. How are we throttling competition?

"Mr. Crowley. If you will read this bill, you will see that nobody in the world can ever carry the mail except the present air-mail contractors.

"The Chairman. Not at all. According to your own statement, they have to come and get a certificate of convenience and necessity. The truck people are constantly adding new trucks and having new truck lines.

"Mr. Crowley. If I am not mistaken, the Air Mail Service is confined exclusively to the present air-mail operators.

"Senator McCarran. No.

"The Chairman. Show me that provision. If that is true, it ought to be changed."35

The opposition of the Post Office Department, Mr. Truman concluded, was based upon a failure carefully to read the pending bill36 and upon the "ridiculous assumption"37 that the regulatory commission would abuse the powers delegated to it by the Congress by showing bias or prejudice:


"The Chairman. You are just assuming now that the Commission is going to be biased or prejudiced.
"Mr. Crowley. There is nothing to prohibit it, Senator.
"The Chairman. Of course, you have got to assume that you can trust somebody. Every bill that we draft up here, perhaps, unfortunately, makes it necessary to have to trust somebody. Perhaps we should not, but we do trust somebody. We have to trust the Interstate Commerce Commission and we have to trust the Post Office Department with carrying out some of the policies and some of the details. If we cannot trust the Interstate Commerce Commission, perhaps we should turn it over to the Post Office Department or some other department." 88

Senator McCarran explained that the fears of the Post Office Department with respect to independent non-subsidized operations were groundless and that such operators would presumably have the same freedom to start out in business that they had under existing law.

"The witness likewise states that no lines would be established except by air-mail carriers, which would make the cost to the Government prohibitive. This is no more likely to occur under the proposed bill than under existing law. If an independent air line can institute service under existing law without mail, it would still be able to institute service without mail under the proposed bill." 89

Under existing law, there were, of course, no certificate requirements and the independent operators had complete freedom to inaugurate air line operations.

Representatives of the existing carriers were also of the opinion that liberal entry into aviation would be permitted and in fact encouraged under the proposed legislation. Colonel Gorrell, then President of the Air Transport Association, testified in various hearings as follows:

"Mr. Martin. If your association comprises 18 air lines, scheduled lines, and there are only about six others, that would apparently give to the members of your association a virtual monopoly. Why is it concerned for a change which would bring into the field a larger number of carrier companies which would set up competition with those now in this association?

"Mr. Gorrell. We feel that the enactment of H.R. 5234 will bring in a number of new companies and there will be additional air-line service." 40

"Mr. Sadowski. I was going to say that we can expect that within the next few years practically every city of any importance in the Middle West and in the East will want to run its own lines or have its own company operating between those cities and, say, the west coast, Los Angeles, or San Francisco, or some place along the coast, because it is natural to suppose that every city of any importance will want to have that direct contact, as to private service for freight and also as to mail and passenger service. Now, if this bill should go into effect, will it not have the effect of stifling this development in that direction?

"Mr. Gorrell. No; I personally think that if this bill becomes law, air-line service will spring up everywhere, and the volume of air passenger traffic, and of shipment of cargo by air, will be greatly increased. I think the existing act does more to foster monopoly than this particular bill would do. I think this bill will let air lines spring up wherever the public necessity and convenience warrants them coming into operation. There is nothing in H.R. 5234 to stop lines from being put into operation..."

between point A and B, except the question of public convenience and necessity.

"Mr. Sadowski. I know. But what is for the public convenience and necessity may be a very different thing in the view of the citizens of Flint, Mich., from what it would be by the Interstate Commerce Commission in Washington. They may have an idea that it would be of considerable necessity for them, but the Interstate Commerce Commission down here in Washington may say 'no.'

"Mr. Gorrell. There is nothing in H.R. 5234 that would control lines within a State; that is, intrastate lines. As regards the lines flying in interstate commerce or in overseas or foreign commerce, I should think that perhaps the Interstate Commerce Commission is the one body best qualified, by experience, to pass upon the public necessity and convenience. I do not know of any body that is as well trained, by experience, to pass on the question of public necessity and convenience as is the Interstate Commerce Commission. I personally think if H. R. 5234 is enacted you will see air lines springing up in places where they would otherwise never be brought into existence. I look for a far greater broadening of air travel and air shipments if such a bill as this is considered by Congress to be wise."41

"Within the industry itself the situation is as I have already described it, namely, that there is no great economic barrier to the inauguration of new service, such as prevails in the case of the railroads or water carriers, and that competition is in fact very keen. As Commissioner Eastman pointed out before this committee and also in his testimony before the Senate committee, there are today several entirely new interests which are apparently on the verge of entering the field of air transportation, and there seems to be no present limit to the possibility of new capital embarking upon air carrier service."42

"At the same time it must be pointed out, as Commissioner Eastman emphasized, that the requirement of a certificate of convenience and necessity prior to the inauguration of a service is in no sense a provision for monopoly. Commissioner Eastman stated that the Commission's policy has always been to be most liberal where new interests sought to enter and develop the field of transportation."43

"So far as criticism has been made of the Commission's [Interstate Commerce Commission's] administration of this provision, [certificate of convenience and necessity provision] it is not that the Commission has too often denied, but that it has too often granted certificates of convenience and necessity."44

It appears indisputable that the Congress and the industry itself believed that whatever commission was entrusted with authority to regulate air commerce would apply, and in fact was obliged to apply, a policy permitting and, indeed, encouraging new companies to enter aviation.

THE CIVIL AERONAUTICS ACT OF 1938

A. The Interdepartmental Committee

While the various bills before the Congress were being readied, the President of the United States suddenly became much more "interested" in

44 Hearings of the Interdepartmental Committee on Civil Aviation Legislation, (1937), p. 629. A photostatic copy of the transcript of these hearings is available at the Law Library of the Civil Aeronautics Board.
legislation for the regulation of air transportation.\textsuperscript{45} Sometime in August, 1937,\textsuperscript{46} the President appointed an Interdepartmental Committee to review and make recommendations with respect to civil aeronautics legislation. The fact that two departments of Government, namely, the Post Office Department and the Department of Justice, thought that the pending bills could be administered in such a way as to permit air transportation to become the exclusive domain of existing carriers or to permit the exercise of bias and prejudice against newcomers to aviation was presumably a factor accounting for the President's sudden "interest." Another factor influencing the President may have been the disclosure during hearings of the circumstances attending the drafting of these bills. The bills, it was discovered, were drafted during conferences and sessions held in hotel rooms of representatives of the scheduled airline industry.\textsuperscript{47} An official of the Interstate Com-

\textsuperscript{45} Testimony of Clinton M. Hester, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), p. 65.

\textsuperscript{46} Testimony of Clinton M. Hester, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), note 45, p. 70.

\textsuperscript{47} "Senator McKellar. The bill I am talking about is the bill that Mr. Lea introduced.

"Mr. Haley [the official of the I.C.C. mentioned in this memorandum], do you sometimes go to the Carlton Hotel?

"Mr. Haley. Yes, sir; and may I say, Senator, that I was at the Carlton Hotel on several occasions in February, at least, if not in the latter part of January, in connection with this very matter. The reason why I went to the Carlton Hotel was that we were doing this work overtime — nights and Sundays — and the offices of the Commission were closed, and the guards would not let people come in who were not employees of the Commission.

"Senator McKellar. Those meetings were held in Room 212, were they not?

"Mr. Haley. I think the rooms we worked in were 212 and 214. They were adjoining rooms.

"Senator McKellar. Colonel Gorrell was one of those present?

"Mr. Haley. Yes.

"Senator McKellar. He is president of the Air Transport Association?

"Mr. Haley. Yes.

"Senator McKellar. His assistant, Mr. Paxton, was there?

"Mr. Haley. That is correct.

"Senator McKellar. Mr. Godehn, of the United, was there?

"Mr. Haley. Yes, sir.

"Senator McKellar. Mr. Brophy, of the TWA, was there?

"Mr. Haley. That is right.

"Senator McKellar. Mr. Hale and Mr. C. R. Smith, of the American, were there?

"Mr. Haley. That is right.

"Senator McKellar. Mr. Carleton Putman, of the Chicago & Southern, was there?

"Mr. Haley. That is correct.

"Senator McKellar. Mr. Denning, who represents some of the companies, was there?

"Mr. Haley. I did not happen to see Mr. Denning there; but Mr. Denning did join the conference in Mr. Eastman's office later.

"Senator McKellar. Was the bill that you gentlemen finally agreed upon endorsed and approved by all present, or did anybody object to it? If so, who?

"Mr. Haley. We were not there for the purpose of voting on the bill; we were there for the purpose of assisting the committee in working out the changes in the bill.

"Senator McKellar. Was that not the bill, after you had worked it out, that was sent to the House?

"Mr. Haley. It was introduced, [sic] Senator, and referred to the Commission. It then went to the legislative committee of the Commission, which made a report on it. I presume that the Commission would have no objection to having a copy of that report to go into the record here.
merce Commission who was entrusted with the responsibility of holding conferences with respect to the bills, was apparently unable to advance satisfactory explanations as to why these conferences took place in private hotel rooms instead of Government offices. Although the Post Office Department and the Department of Commerce were directly concerned with civil aeronautics, representatives of these departments were neither informed of nor invited to these conferences.

The Interdepartmental Committee consisted of representatives of all departments of the Government affected by civil aviation, including representatives of the two departments which had raised objections to previous bills, namely, the Post Office and the Department of Commerce. The Chairman of the Committee was J. Monroe Johnson, the Assistant Secretary of Commerce, who had expressed strong dissatisfaction with previous bills because he thought that they would give undue advantages to existing carriers and would not provide opportunities for new interests which were commensurate with the newness of scheduled air transportation.

After hearings, the Interdepartmental Committee made reports and recommendations which were translated into a House bill, while a parallel bill was prepared in the Senate under the direction of the then Senator Truman. After debates and conferences during which minor adjustments were made, a final bill reflecting the recommendations of the Interdepartmental Committee was passed as the Civil Aeronautics Act of 1938.

"Senator McKellar. Did you make a report on it?"
"Mr. Haley. No, sir; not a written report."
"Senator McKellar. Was Mr. Westwood also at that meeting?"
"Mr. Haley. Mr. Westwood, also."
"Senator McKellar. He was there, too?"
"Mr. Haley. Yes; and he is here today."
"The Chairman. Who is Mr. Westwood?"
"Mr. Haley. Mr. Westwood is attorney for the Air Transport Association."


48 The Interstate Commerce Commission was the agency to be vested with jurisdiction over Civil Aeronautics under the proposed bill.

49 Note 47, supra. All or virtually all Government agencies permit the issuance of visitors' passes for the conduct of official Government business after working hours. Accordingly, the explanation of the I.C.C. official would appear to be without merit.


52 See notes 32 and 33, supra.


55 83 Congressional Record, 75th Cong., 3d Sess., 9616 (1938). The bill actually passed after changes were made during debates and after conferences was an amendment in the nature of a substitute for S. 3845, which amendment in the nature of a substitute was introduced by Senator Harry S. Truman. See remarks of Senator Harry S. Truman, Debate on S. 3845, 83 Cong. Record, Part 6, p. 6724, 75th Cong., 3d Sess. (1938), pp. 6724 et seq. Proceedings on the parallel House Bill, H.R. 9738, were vacated after debates and S. 3845, with the amendment presented by Senator Harry S. Truman was substituted. 83 Cong. Record, 75th Cong., 3d Sess. (1938), p. 7104.
reviewing the legislative history of the bills which were to become the Civil Aeronautics Act, the Post Office Department and the Department of Commerce reversed the positions they had previously taken and presumably came to the conclusion that the legislation unmistakably reflected a policy of reasonable freedom of entry and against freezing aviation in the hands of existing carriers. Accordingly, the pending bills, as well as the Civil Aeronautics Act, had the approval of all the executive departments of the Government.  

B. The Philosophy to Guide the New Agency in Controlling Air Transportation

Following the recommendations of the Interdepartmental Committee, the Congress did everything that could possibly be done in order to make it unmistakably clear that opportunities were to be accorded to newcomers to an extent never before paralleled in Federal regulation of transportation. Instead of entrusting the Interstate Commerce Commission with jurisdiction over the infant industry, a new agency, free from conservative preconceptions that might have been developed from regulating mature forms of transportation, was established to control what Senator McCarran called "...one of the greatest avenues and opportunities for commerce we will have ten years from now."  

In a break with traditions of draftsmanship, the Act set forth a broad declaration of policy, which was also to serve as a definition of the term "public interest" and "public convenience and necessity," in order to encourage the Board to exercise the daring and imagination necessary to guide the development of the new air age.

"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 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."  


58 Civil Aeronautics Act of 1938, as amended, Sec. 2.
During debates, both Senator Truman and Senator Copeland stressed the numerous provisions in the declaration of policy and elsewhere in the Act as evidencing a policy against freezing aviation in favor of existing carriers. At the insistence of Senator Borah, equivocal language in one provision of the Act was eliminated in order to make the policy against monopoly in the air even the more crystal clear.

Senator King of Utah undoubtedly reflected the sentiment of the Congress when he said:

"Mr. KING. Mr. President, the members of the committee who drafted the pending bill undoubtedly are familiar with its terms, but some Senators have not had opportunity to study its provisions.

"From the discussion of its terms this morning, I have been confused as to their meaning and effect. If the purpose of the bill is to 'freeze' certain contracts, or certain activities of a number of companies or organizations, and to give them rights in perpetuity to the exclusion of others; if the bill erects bars to protect those who now have contracts..."

---


60 "Mr. COPELAND. The subject under discussion received attention not only in the Committee on Interstate Commerce but also in the Committee on Commerce. I call attention to five places in the pending bill where the question of monopoly is dealt with in one way or another with the view to its control and prevention. First, I ask Senators to turn to page 12, lines 16, 17, and 18, where in the declaration of policy, among other things, it is declared to be the policy of Congress—now we come to the language on line 16:

"(3) To preserve and encourage competition in such transportation to the extent necessary to assure the sound and safe development thereof.

"When the bill came to the Committee on Commerce that committee added this language on page 13, line 2, in the declaration of policy:

"(5) To promote 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.

"Now, Mr. President, I ask Senators to turn to page 30, where is found another addition made by the Committee on Commerce to the bill. In line 20 on that page, in the section devoted to the expenditure of Federal funds, there is found this provision:

"There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

"I turn now to page 37, line 11, and read, under the heading 'Certain rights not conferred by certificate', the following language:

"No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing airway, or air navigation facility."

Debate on S. 3845, 83rd Congressional Record, Part 6, 75th Cong., 3d Sess. (1938), p. 6730. Senator Copeland then proceeded to discuss the provision limiting mergers and consolidations, which then read as follows:

"Provided, That no consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be approved if such approval would result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control."

61 Senator Copeland was reading from the bill before minor amendments were made, during the course of which Senator Borah objected to the words "unduly" and "unreasonably" in the merger and consolidation provision cited in note 60, supra. It was his opinion that these terms would give the Authority too much leeway to approve monopolistic mergers and consolidations just as similar language had been used by the courts to interpret the anti-trust laws less strictly than, in Senator Borah's opinion, they should have been interpreted. The language objected to was deleted from the merger and consolidation provisions of the Act. See Civil Aeronautics Act, Sec. 408(b).
or now have established air lines and to prevent other persons or other
corporations from obtaining franchises and rights to operate airplanes,
I would hesitate to vote for the bill.

"I recognize the fact that the art of aviation has made progress; that
regulation is needed just as railroads are regulated by the
I.C.C. I recognize the fact that there are some fields already adequately
served by existing lines, but the growth of the country will call for
other air lines and facilities. Undoubtedly there must be some discretion
vested in a board or agency to grant permits and rights-of-way through
the air; but I should be reluctant to vote for a bill that was a guaranty
to certain agencies and certain organizations that they shall be per-
petuated, and that other applicants for right-of-way and for permits
should be denied consideration.

"It seems to me that the 'grandfather' clause, using the phrase em-
ployed by my friend from Nevada, may be utilized to prevent the develop-
ment of this art and the establishment of new air routes; and I am
concerned to know just how far authority is granted to the authority
which is being set up to restrict and restrain the development of the art
and how far the bill 'freezes' existing routes and corporations that have
established airplane routes throughout the United States. If it authorizes
their activities to the exclusion of others who may desire to enter this
great field, then I think there should be some amendments that would
fully protect the public and protect those who are interested in the
development of this great art."62

Senator Truman assured Senator King that no such eventualities could con-
ceivably come to pass under the Act, as it was drafted.62a

C. The Exemption Provision and the Encouragement of Small Business in
Scheduled Air Transportation

Congress not only intended that a policy of encouraging newcomers in
aviation should prevail. It specifically indicated that the entry of small
business interests into scheduled air transportation should be encouraged,
and, in fact, enacted special provisions for this purpose.

The general policy of the Congress with respect to small airlines was
elocutously expressed by Senator McCarran as follows:

"None of the small operators has more of my sympathy than the
operators of the Braniff Lines. The small operators must of necessity be
considered. It is our object and purpose that an independent agency
shall be set up by the bill which eventually will not only give to the great
operators, such as the United, the T. W. A., and the American and other
lines, but will give to the small operators an opportunity to have life,
if I may so express it tersely, and to have the right to operate, and to
have the right to enjoy their investment and the fruit of their courage,
because it requires investment and courage to initiate air lines. The
whole object, so far as I am concerned, in initiating this legislation has
been to establish an independent agency so that air lines such as the
Braniff Lines, and other lines of similar nature and character, may have
a secure place in the picture for their service. That is the reason the bill
provides that when a certificate of convenience and necessity is given,
there follows and flows therefrom the right to carry the mail."63

In order to foster the entry and development of airlines whose operations
would at first be modest in scope, the Board was given virtually unfettered
power to exempt such airlines from any and all requirements of the Act,
including the certificate of convenience and necessity requirement:

(1938).
62a Remarks of Senator Harry S. Truman, Debate on S. 3845, 83 Cong. Record,
63 Debates on S. 3845, 83 Cong. Record, Part 6, pp. 6848-6849, 76th Cong.,
3d Sess. (1938).
"The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

Both the Senate and the House had specifically rejected proposals that these exemption powers be limited to non-scheduled operators. As Senator Truman explained in a statement submitted during debates on the Act:

"[The exemption provision] empowers the Authority to make exemptions from any provision of the act where it would cause undue hardship. It is designed especially to enable the Authority to adjust some of the requirements of the law where necessary to encourage small operators, such as the small operators in Alaska, in cases of hardship. Section 305 (c) of S. 3659 [i.e., a bill which the Congress rejected] contains a similar provision, but is applicable only to a nonscheduled operation. There might be undue hardship on a scheduled operator as well, as is shown by those in Alaska."

The intent of the Congress with respect to the exemption provision was more fully revealed during debates on the Crosser Amendment to the exemption provision. This amendment, which, after modifications, was eventually made part of the Act, provided that the Board could not exempt scheduled operators from the provisions of the Act concerning minimum wage and maximum hours of pilots. The amendment was contested by Representatives Lea, Chairman of the House Interstate and Foreign Commerce Committee, and also Chairman on all hearings held with respect to the Act, and by other members of the House. Representative Lea pointed out that the exemption provision generally was designed to encourage the entry of small airlines into aviation, and that this objective could only be achieved if the new operators were permitted to get into business on a scheduled basis:

"Every air line in interstate or foreign commerce that amounts to anything has to go on a schedule. They cannot secure business unless they do."

Requiring the new scheduled operator to pay the minimum pilot wage imposed under the Act would discourage the entry of these operators, and was, in Mr. Lea's opinion, inconsistent with the general purpose of the exemption provision.

During the course of the debates, other members of the House made it clear that the purpose of the exemption provisions was to foster the entry of new companies into the airline business, to enable them to develop into large airlines, and otherwise prove their worth in civil aviation. With respect to the Crosser Amendment, Representative Nichols stated:

---

64 Civil Aeronautics Act, Sec. 416(b) (1).
67 Civil Aeronautics Act of 1938, Sec. 4(b) (2).
"The gentleman, when he offered his amendment, stated this will apply only to those lines that fly schedules. There are only 200 towns in the United States today now being serviced by air mail. I would not venture to say how many towns there are in the United States that have an air line running out of them, connecting with a transcontinental line, that does not carry mail at all but, despite that, flies on schedule. We want those feeder lines to grow. We want a small line to start some place so it can become a large line. If the small line is compelled to do the same thing the large line does, the small lines can never get out of its swaddling clothes and get on its feet and get in shape to grow to be a large line. Therefore, I believe the amendment of the gentleman from Ohio [Mr. Crosser] should be defeated in all fairness to even the pilots themselves. If this industry is not going to grow, you will freeze the pilots where they now are as far as their number is concerned, and they will not be able to increase in number. If you want to give a monopoly to the already existing transcontinental air lines and freeze in their hands the monopoly of transportation of air mail, passenger, and express, in my opinion, the best way you can do it is to adopt the Crosser amendment and give the already existing air lines a monopoly on the air-transportation business. I do not believe this House wants to do that."

Representative Wadsworth cited his own experience in the airline business in urging that the restrictions of the Crosser Amendment should not be written into the exemption provision.

"Now, something about feeder lines. I am probably imposing upon the members of the Committee if I recite a personal experience. Perhaps, I cannot do it in the 3 minutes, but I shall try. Back in 1927 and 1928 I happened to be associated as a director in a company that started pioneering in air navigation. It was known as the Canadian-Colonial. We operated from New York to Montreal. We had the first foreign air-mail contract under the old provisions. We operated for 2 years. The stock was sold privately. It was subscribed to in comparatively small amounts by men who thought they could take a chance and, perhaps, would lose, but if they won they would have done something for aviation... Had the Crosser amendment been in effect then, forcing us to pay $600 a month, we simply never would have started.

"We lost money every one of the 24 months as it was. We lost money and finally sold out to a larger company, but we had done the pioneering. We lost money every one of the 24 months as it was. We lost money and finally sold out to a larger company, but we had done the pioneering. We had laid out the air course. We had given good employment to an excellent lot of pilots who learned more and more about the game and who, when absorbed by the larger company, are today getting the $600.

"They never would have been there had companies like ours had not gone to work and pioneered as feeder lines. Adopt this Crosser amendment and I say to you that you will stop pioneering by the small men in this country, who cannot pay $600 a month and who are not doing it now."

Representative Wadsworth, like Representative Lea, was a member of the House Committee on Interstate and Foreign Commerce and was a participant in all hearings held in connection with the regulation of the airline industry.

The proponents of the amendment maintained that unless this restriction was adopted, the Board would be in a position to exempt larger operators from the wage and hour obligations; that hardship to the smaller carriers was not conclusively demonstrated, and that if the Crosser restrictions did in fact hinder the growth of new airlines, the exemption provision would be amended accordingly.
Except for wage and hour restrictions, no other restrictions were introduced or ever imposed upon the exemption powers which the Congress apparently wished the Board to exercise freely and boldly in order to usher in the new air age.

At the time the House was debating the Crosser Amendment, the House exemption provision was so drafted as to apply to small scheduled or non-scheduled operators whose operations were of a "limited character." The parallel provision in the Senate bill was much more liberal than the House provision, and in effect gave the Board plenary power to issue exemptions for any class of carriers. The House version and the Senate version of the exemption provisions were combined in Committee conferences, and the result was the present version of the exemption provision. Realizing that the exemption provision was not limited to the feeder operations as the House had originally contemplated, the Board has since issued exemptions from the certificate requirements of the Act for post-war cargo carriers whose scheduled operations were transcontinental in scope, for the large certificated carriers and for so-called non-scheduled air lines carrying passengers and cargo for the Defense Department.

**The George Resolution of 1942**

By 1942, the Congress was already expressing concern as to what steps the Board was taking under the plenary powers given it under the Act to encourage the expansion of air commerce in general, and the entry of new interests in scheduled air transportation, in particular. This concern was reflected in the adoption by the Senate, on March 31, 1942, of the George

---

73 The exemption section [section 402(o)] of H.R. 9738, the House bill, reads as follows:

"(o) The Authority, from time to time and to the extent necessary, may exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that, due to the limited character of the operations of such air carrier or class of air carriers, the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation, is or would be such an undue burden on such air carrier or class of air carriers as adversely to affect the public interest by obstructing the development of such air carrier or class of air carriers: Provided, That nothing in this subsection shall be deemed to authorize the Authority to exempt any air carrier or class of air carriers from any requirement of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, which provides for maximum flying hours for pilots or copilots."

74 Section 417(a) of S. 3845, the Senate version of the Act, permitted exemptions if enforcement of any requirement of the Act would create an "undue burden" upon a carrier "by reason of the unusual circumstances" affecting the carrier's operations. Debate on S. 3845, 83 Congressional Record, Part 6, p. 6756.

75 Civil Aeronautics Act, Sec. 416(b) (1).

76 Civil Aeronautics Board Economic Regulations, Section 292.5, adopted May 5, 1947, Order Ser. No. 389. This regulation permitted non-scheduled cargo operations to fly without restrictions on frequency and regulatory while their applications for certificates of convenience and necessity were pending.

77 The following are some of the carriers to which exemptions from certificate of convenience and necessity and other requirements which have been issued by the Board under the exemption provisions of the Act. American Airlines (Order Ser. No. E-371; Order Ser. No. E-411); Pan American Airways (Order Ser. No. E-447; Order Ser. No. E-546; Order Ser. No. E-742; Order Ser. No. E-778); Southwest Airways Company (Order Ser. No. E-520); Northwest Airlines, Inc. (Order Ser. No. E-743); Resort Airlines, Inc. (Order Ser. No. E-752); Transcontinental & Western Airlines, Inc. (Order Ser. No. 4926).
Resolution, in which the Board was requested to report to the Senate "at the earliest possible date" on the positive steps it was taking to bring about the development of air transportation at the "maximum possible rate," and what the Board was doing with respect to authorization of operations by new carriers which were not in existence when the Civil Aeronautics Act was passed.

In the report which the Board submitted in response to the George Resolution, it acknowledged that the Civil Aeronautics Act "liberalizes the meaning" of the standard of public convenience and necessity under which regulatory commissions authorize new services. The Board stated that it had a policy of applying an extremely liberal interpretation of that standard:

"... Nevertheless, the Board, in the issuance of certificates has placed an extremely liberal interpretation upon the standard. There have been instances where the Board has issued certificates for routes where the passenger loads have been extremely light. It has repeatedly authorized the issuance of certificates in circumstances where there was no indication that the average passenger load would be greater than approximately one-fifth of the passenger carrying capacity of the plane or that the route would be independent of Government support for a long time in the future."\(^{81}\)

With respect to new interests, the Board declared that they "have received and will continue to receive the same careful consideration as is being given applications of existing carriers."\(^{82}\)

In attempting to quiet the Congressional concern over its apparent failure up to that time to actively encourage the entry of newcomers into aviation, the Board stated:

"In this rapidly expanding industry there should be and will be continuing opportunities for the services of new operators where proper showing is made in conformity with the standards set forth in the Act."\(^{83}\)

The Board made it clear that "new carriers with fresh enterprise and capital" would undoubtedly seek to play a role in the tremendous expansion of air transportation which was expected to take place in the post war era,

\(^{78}\) "Resolved, that the Civil Aeronautics Board be requested, if not inconsistent with the public interest, to report to the Senate of the United States at the earliest possible date what, if any, steps it has taken since 1938 to see that a great many more transport aircraft were built and in service, whether the air transport industry has been, since that date, and is financially able to undertake expansion far beyond its present extent, and what steps the Board contemplates taking to see to it that the air-transport industry is able to and will develop in the future at the maximum possible rate (including the steps the Board contemplates taking with respect to the issuance, under Section 401 of the Civil Aeronautics Act of 1938, of certificates of air carriers who were not engaged in air transportation on the date of enactment of such Act)." Senate Resolution No. 228, 77th Cong., 2nd Ses. (1942).


and that such of these carriers which satisfied the extremely liberal standards of public convenience and necessity, already referred to, would be authorized to start in the airline business.

"In this development and expansion which is certain to take place, new carriers with fresh enterprise and capital will undoubtedly seek to play a prominent part. One of the mandates of the Board is to promote competition to the extent necessary to assure the sound development of an air-transportation system. Such of these new carriers as meet the statutory requirements of being 'fit, willing and able,' and who can best serve the public need, will by authority and encouragement of the Board find their place in the air-transportation system, if the services they seek to perform are required by the public convenience and necessity.84

The Board, in short, reaffirmed its responsibilities under the Act to exercise daring and imagination in encouraging the development of air commerce and in fostering the entry of new carriers into a vastly expanding air transportation system, just as the Congress had intended it should in hearings and debates with respect to the Act, and in the provisions of the Act itself.

The Board was subsequently to adopt policies which are conspicuously inconsistent with the assurances it had given to the United States Senate.85

---


85 One example is the Transcontinental Coach Case (Docket 3397 et al., Order Ser. No. 5840, November 7, 1951) in which the non-sked applicants proved public need to the extent of some 400,000 actual passengers previously carried by non-skeds and a likely immediate future approximately double that amount of traffic. In order to deny these applicants, the Board created an entirely new doctrine. The traffic was so great that the applicants could not be denied on any doctrine previously used by the Board. The Board concluded that the existing carriers could handle the traffic if they would sufficiently expand their services and stated:

"We shall expect, and require, certificated carriers to expand and develop air coach service, subject to appropriate Board regulations and, where necessary to accomplish that end, we will exercise our statutory power to compel reductions [in fares]."