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THE POST OFFICE DEPARTMENT AND
THE CIVIL AERONAUTICS AUTHORITY:
THEIR RELATIONSHIP

HOWARD C. WESTWOOD* and WILLIAM DuB. SHELDON†

It requires more than passing temerity to write at this time of the meaning of any portion of the Civil Aeronautics Act. Before pen leaves paper, words in the statute book may have become suffused with the light of administrative rulings giving them a quite different color.

Perhaps the most important feature of the new Act, and one which received most painstaking study by its authors, is its adjustment of functions between the Civil Aeronautics Authority and the Post Office Department.

The basic adjustment is that relating to the institution of a new mail route.

The Act provides that no one may engage in the transportation of mail by aircraft unless authorized to do so in a certificate of convenience and necessity issued by the Authority. A private person may apply for such a certificate at any time, and the application will be granted if the applicant is fit and if the service sought is required by the public convenience and necessity. The Postmaster General likewise may file with the Authority a statement showing needed mail service, whereupon the Authority is to determine whether such service is required by the public convenience and necessity and, if so, it is to provide therefor in a certificate issued in accordance with the statute.

Whenever a carrier is thus authorized to transport the mail it is obligated to provide adequate facilities and service for such transportation. It is also the carrier's duty, under such circumstances, to transport the mail whenever required by the Postmaster General.

It is the duty of the Postmaster General, “from and after the

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2. Sec. 401 (b) and (d). Early drafts of the bill would have prevented a private person from initiating an application for a new mail route. Sec. 306 (f) of H. R. 5524, 75th Cong., 1st Sess., March 2, 1937; Sec. 305 (f) of S. 2, Amendment in the Nature of a Substitute, 75th Cong., 1st Sess, March 3, 1937.
3. Sec. 401 (m).
4. Sec. 401 (m).
5. Id.; see also Sec. 405 (g).

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issuance" of such a certificate, to tender mail to the carrier, to the extent required by the postal service, for transportation between the authorized points.\(^6\)

The carrier's compensation is to be paid by the Postmaster General at rates fixed by the Authority.\(^7\)

Thus the paraphrase of the statute. Several questions arise which require some further examination.

In the first place it may be asked whether the Postmaster General must await action by Congress appropriating funds to cover the cost of a new route before he can tender mail for transportation over it. If he must do so, he is then faced with two alternatives:

(a) To request the funds from Congress prior to the issuance of the certificate, or

(b) To request the funds from Congress after a certificate is issued, withholding mail until the funds are appropriated.

To the former course there are certain objections. The Postmaster General does not issue a certificate. His acquiescence in its issuance is not necessary. Nor will his desire for its issuance suffice to produce it.\(^8\) Issuance turns entirely upon the public convenience and necessity, the determination of which is exclusively in the province of the Authority. Hence, before a certificate is issued, the Postmaster General is able to say to Congress only that in his opinion the route in question would be desirable. And Congress might hesitate to grant funds, for the expenditure of which the occasion is not yet clear. Moreover, if Congress were to attempt to anticipate the Authority's decisions it would be in the embarrassing position of having to inquire into the public convenience and necessity of the route in question, an inquiry highly technical in nature, demanding expert analysis of complicated issues to which an appropriation committee would have to devote a considerable share of its time—which it could ill afford. The very purpose of the Civil Aeronautics Act was to turn that entire matter over to the free judgment of an independent, expert agency, functioning in a quasi-judicial manner.

Thus, when the budget estimate for the 1940 air mail appropriation included an item for prospective new air mail routes, the House Appropriations Committee refused to include all of this sum in the bill, saying, in its report, that while it was reasonable to assume that the Authority would grant certificates for additional routes it was impossible to make any accurate estimate as to what the Au-

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\(^6\) See Sec. 405 (g).

\(^7\) See Sec. 406 (a); see also Sec. 401 (m).

\(^8\) That his views and recommendations will carry the greatest weight with the Authority goes without saying.
The second alternative—that the Postmaster General should request the necessary funds from Congress after the certificate is issued, withholding the mail until the appropriation is made—is open to obvious objections. For such a course might involve serious delays, depending entirely upon the time when the certificate is issued. Particularly in the international field, it sometimes is very important that a service be inaugurated promptly. And even in the case of routes within the United States, a long delay in instituting a service, found to be required by the public convenience and necessity, might work seriously against the best interests of the nation. Yet if the Postmaster General were to have to await a new appropriation, it would be entirely possible that a service could not be inaugurated for anywhere from eight months to a year after the certificate was issued. For if the Authority reached its decision toward the close of one session of Congress so that an appropriation could not be made at that session, there would be no choice save to mark time until well along in the following year when another appropriation bill could be considered and adopted.

The Postmaster General is limited to neither of the foregoing alternatives by the Civil Aeronautics Act. On the contrary the Act is carefully framed to permit—indeed to require—him to proceed expeditiously to meet the needs of the postal service on new routes even though current appropriation acts were not adopted with the new service in view.

Section 405 (g), to which we have already referred, provides:

"From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section."

The force of this mandate can hardly be escaped. It does not make the Postmaster General's duty contingent upon further legislative action in an appropriation measure. The duty applies "from and after the issuance of a certificate." No such clear provision appears in the Railway Mail Act or in other mail legislation; it is a mandate related especially to the air mail service.

9. H. Rep. 88, 76th Cong., 1st Sess., at p. 38. The Committee did relax its view to the extent of including the sum of $800,000 for "new routes, extensions, and frequencies" in order, apparently, to bridge the gap during the transition from the contract to the certificate basis for the air mail service.
The meaning of the provision is even clearer in the light of its legislative history. In the bills considered by Congress in 1937, favorably reported by committees in both houses, the comparable mandate was confined to the certificates to be issued for existing routes under the grandfather clause. But Congressman Lea, in the first of his bills introduced in 1938, broadened the mandate so as to apply not only to the grandfather routes, but to all new routes as well. In this form the House committee approved the measure, and in the Senate a committee amendment to Senator McCarran’s bill adopted the same broad mandate. Thus the bill became law.

Therefore, unless some other statute intervenes, the Civil Aeronautics Act not only authorizes, but directs, the Postmaster General to proceed with the transportation of mail on a new route, to the extent required by the postal service, at once upon the issuance of a certificate for the route.

The Anti-Deficiency Act appears to be the only other statute which might affect the situation. That Act provides:

“No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law . . . .”

If the cost of a new route, together with the cost of existing routes, would exceed the amount of a current appropriation, would the Anti-Deficiency Act bar the inauguration of mail service over the new route?

In the first place it may be questioned whether the Postmaster General, in tendering mail for transportation, can be said to “in-
volve the Government in any . . . obligation." The obligation has been created by Congress in the Civil Aeronautics Act. The Act itself says that mail shall be tendered and transported on certificated routes, that the carrier shall be entitled to compensation, and that the compensation shall be at rates fixed by the Authority. The Postmaster General is merely carrying out a mandate; the situation is quite different from that obtaining when the air mail system was on a contract basis.

In any event, the Anti-Deficiency Act does not say that the Government shall not be involved in any obligation exceeding available appropriations. It prohibits such involvement only if the obligation is not "authorized by law."

That the provisions of the Civil Aeronautics Act do by law authorize the obligation in this case is abundantly demonstrated by an Opinion of the Attorney General, approved by Attorney General McReynolds, rendered to the Postmaster General on July 18, 1913.

The Postmaster General asked the Attorney General whether he could "contract for star route service in excess of the appropriation therefor" for the current fiscal year. The appropriation in question had already been adopted by Congress. Prior to its adoption, the Postmaster General had informed each House of Congress that it would be necessary to have more funds for the star route service than the funds included in the appropriation bill, and he had requested a specific increase, but this increase had not been authorized by Congress.

Thus the request for a ruling by the Attorney General had to do with a case where Congress had already refused funds.

The Attorney General's opinion states that the following provisions of the Revised Statutes (as they then stood) affected the establishment of star route service:

14. The statutory restrictions respecting the exceeding of appropriations are somewhat more severe in the case of entering into contracts than in the case of incurring other obligations. With respect to some types of contracts, the amount of current appropriations is made the absolute limit. See Sutton v. United States, 256 U. S. 576, 578 (1921). Moreover, within four months after the adoption of the Anti-Deficiency Act in its present form, Congress adopted the following statute:

"No act of Congress shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed." 34 Stat. 764, 31 U. S. C., Sec. 627.

It will be observed from the amendment to the Anti-Deficiency Act, discussed in n. 13, supra, that Congress has distinguished between a "contract" and an "other obligation." That the obligation to pay for the transportation of the mail under the Civil Aeronautics Act is a statutory obligation independent of contract seems quite clear. New York Central R. Co. v. United States, 65 Ct. Cl. 115, 125-128 (1928), aff'd 273 U. S. 73 (1927).


"Sec. 3956. No contract for carrying the mail shall be made for a longer term than four years . . . 

"Sec. 3965. The Postmaster General shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

"Sec. 3968. The Postmaster General may contract for carrying the mail on any plank-road in the United States, when the public interest or convenience requires it.

"Sec. 3975. The Postmaster General may, when he deems it advisable, contract for the transportation of the mails to and from any post office . . . ."

It will be observed that these statutes are far less specific than are Section 405 (g) of the Civil Aeronautics Act and its related provisions. In the Civil Aeronautics Act the provisions have been worded in the most explicit manner to provide not only a continuing authority, but a positive duty to place mail on certificated routes from and after the issuance of certificates.

Nonetheless, the Attorney General's opinion holds that the Anti-Deficiency Act would not prevent the Postmaster General from contracting for star route service in an amount which would have exceeded the amount for which Congress had then provided appropriations.

The opinion states that the quoted provisions of the Revised Statutes expressly authorize contracts for carrying the mail, "without regard to the appropriations therefor. A contract of that kind, therefore, would be 'authorized by law'" within the meaning of the Anti-Deficiency Act, the opinion says, unless the appropriations made by Congress are to be construed as limiting the power to contract for the particular fiscal year in question.17

The opinion recognizes that, in view of the detail with which Congress makes its annual appropriations, it might be argued that the appropriations are intended as a limitation upon the Postmaster General's power to contract. On the other hand, the Attorney General adds, the fact that the amount of mail to be carried cannot be accurately estimated in advance, as well as the fact that Congress has seen fit to confer general authority to contract for several years in advance, may well argue that the appropriations do not prevent the Postmaster General from entering into contracts "which may possibly lead to a deficiency for that year."18

The opinion then quotes from a memorandum submitted by the Post Office Department19 in which the difficulties of making advance estimates had been pointed out and in which it was shown that ap-

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18. Id., at 189-190.
19. This memorandum was prepared by Joseph Stewart, Second Assistant Postmaster General in the Administration of President Taft. Mr. Stewart had a particularly distinguished record in the Department.
propriations necessarily are based upon estimates made eight or nine months before the beginning of the fiscal year; it was also emphasized that the same conditions obtained not only for star routes but for all other contracts for mail transportation. The memorandum stated further that it was impossible adequately to provide for the transportation of mail without the exercise of power to enter into contracts notwithstanding the fact "that the existing appropriation may not be adequate to cover the obligations."20

The Attorney General's opinion concludes:

"Under all the circumstances I do not think the authority expressly conferred upon you by law to contract for the transportation of the mail should be held to be limited by implication to the appropriation for star-route service made in the act of March 4, 1913, for this fiscal year. That appropriation indicates, of course, the amount Congress estimated it would be necessary to expend during this period for such purpose, and in the absence of express authority to incur any additional obligation you would be forbidden by section 3679, Revised Statutes, supra, from doing so. But express authority to contract for the transportation of the mails without regard to appropriations has been given you by the statutes above quoted, and the particular appropriation act does not undertake to limit that authority. It is to be assumed that Congress deemed the limitations expressly placed by law upon the making of contracts for the transportation of the mails, as well as the fact that it would be incumbent upon the Postmaster General to explain any deficiency incurred, sufficient checks upon the broad power which the nature of the subject matter involved required to be given him in this respect."21

This sweeping opinion of the Attorney General should set at rest any doubts concerning the Postmaster General's authority under the Civil Aeronautics Act. Not only were the statutes authorizing the Postmaster General to enter into star route contracts less explicit than are the provisions of the Civil Aeronautics Act, but the memorandum which had been submitted by the Postmaster General, and which was quoted by the Attorney General in his opinion, points out that the considerations supporting the authority of the Postmaster General to exceed appropriations in the case of star route service apply likewise to other forms of service. Furthermore, there is even less reason that the Postmaster General's power should be limited, where, as in the Civil Aeronautics Act, routes are selected after notice and hearing and according to a Congressional standard of public convenience and necessity, by an independent agency of government, than there is in the case of the star route service where the entire question of entering into contracts and providing the service was left to the judgment of the Postmaster General.

21. This section of the Revised Statutes was the Anti-Deficiency Act.
It is, of course, settled that where the sole authority for involving the United States in an expenditure of money is to be found in the appropriation itself, an officer of the government has no power to incur an obligation in excess of that appropriation. *Chase v. United States*, 155 U. S. 489 (1894), illustrates the point nicely.\(^{23}\)

In that case the Postmaster General had entered into a long term lease of a building to be used for a post office. Before the end of the term he breached the lease and the lessor sued for damages. The lessor urged that the statutory power of the Postmaster General "to establish post offices" implied an authorization to lease a building for post office purposes. The Court held, however, that the language of the statute, "to establish post offices," *gave no power to lease a building*, and therefore the power to lease—if any—could be implied *only* from annual appropriations of funds for rental of buildings for post office purposes. Therefore, the lessor encountered a statute comparable to the Anti-Deficiency Act,\(^{24}\) and the Court held that an authorization dependent *solely* upon an appropriation could not be construed to authorize the Postmaster General to involve the government in any obligation in excess of the appropriation.

If in the *Chase* case the general statutory power "to establish post offices" had been interpreted by the Court to mean "to lease buildings for post offices," it seems apparent that the decision would have gone the other way. It was only because the leasing power of the Postmaster General was found to arise *solely* from annual appropriation acts that it was held limited by the amount of the appropriation.

In the Civil Aeronautics Act, the power of the Postmaster General to place mail on properly certificated air routes does *not* rest upon the annual appropriation acts. Those acts are not the source of his power; his power—indeed his duty—springs from the Civil Aeronautics Act and is independent of the air mail appropriations, just as the power to enter into star-route contracts was held by the Attorney General in the opinion referred to *supra* to be independent of the star route appropriation.

A further illustration of the point is disclosed in *Shipman v. United States*, 18 Ct. Cl. 138 (1883). In that case the Secretary of War had contracted with the claimant to construct a road. The authorization for the contract was found solely in an appropriation

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\(^{23}\) See also *Sutton v. United States*, 256 U. S. 575 (1921).

\(^{24}\) The statute involved was *R. S. Sec. 3732*:

"*No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.*"
act which appropriated a fixed sum for the purpose. The claimant contended that, because of certain circumstances, a contractual obligation was owed to him to pay more than the amount appropriated.

The Court referred to the provision of the statutes involved in the Chase case, supra, and held that, since the only authority in law for the contract in question was that in the appropriation act, the alleged contractual obligation in excess of the appropriation could not arise. The Court said (at pp. 146-147):

"The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.

"In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract-specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.

"We have frequently held that where there is a liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it. (Collin's Case, 15 C. Cls. R., 35).

"But where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress. (McCullom v. United States, 17 C. Cls. R., 103; Trenton Co. v. United States, 12 ibid. 157.)"

Thus it is recognized that obligations in excess of currently available appropriations may be properly incurred where there is an authority independent of the appropriation act. To repeat: the Civil Aeronautics Act authorizes and directs the Postmaster General to place mail on all properly certificated air routes, and, as the Court said in the Shipman case, such a grant of power is independent of the amount of the appropriation.

It is true, of course, that no government official can make payments for a particular purpose if such payments would exceed current appropriations therefor. This restriction upon making payments is found not only in the Anti-Deficiency Act, which prohibits expenditures in excess of appropriations, but also in Article I, Sec. 9, Clause 7 of the Constitution, which provides:
"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

And the Comptroller General has ruled that an authorization to do a thing is not an appropriation of funds to pay therefor; so that an officer, merely because he is authorized to do an act, cannot make any payments in connection therewith in excess of currently available appropriations.\(^\text{25}\) Therefore if an air mail carrier has performed service the payments for which would exceed the amount of currently available appropriations, it could not be paid until appropriations are available for the purpose. It would have to await a deficiency act or a new appropriation act.\(^\text{26}\)

In thus providing for the inauguration of a new mail route in advance, if need be, of the adoption of an appropriation act contemplating the route, Congress has not taken some revolutionary step which will open the coffers of the Treasury to unlimited raids. No such view would have been supported by a distinguished official of a conservative Republican administration and upheld by an equally conservative Democratic Attorney General.\(^\text{27}\) Congress retains the final veto—just as it does with respect to decisions of the Court of Claims—by its power to refuse to appropriate or to limit the purposes for which appropriations can be spent. Moreover there is no possibility that new routes will be inaugurated willy-nilly, for Congress has imposed the very strict standard of public convenience and necessity which must be met before a certificate can be issued. To meet this standard there must be proof in a formal hearing, by sworn testimony subject to rigid cross-examination, which will convince an independent agency equipped with the facilities for expert analysis and with a peculiar knowledge of the subject matter.

The course adopted, moreover, is the only one consistent with the purposes of the new Act. Had Congress refused to authorize the inauguration of a new route "from and after the issuance of any certificate" therefor, but had required that an appropriation for the purpose first be secured, the entire case as to the need and desirability of the route would, in the last analysis, be transferred to the legislative halls. Yet it was for the very reason that the industry had grown to the point where that complex and technical


\(^{26}\) Section 406 (a) of the Civil Aeronautics Act provides that payments shall be made by the Postmaster General "from appropriations for the transportation of mail by aircraft." This identifies the source of funds from which payment is to be made. But it does not limit the authority of the Department to secure service nor does it qualify the Government's obligation to pay. A comparable provision appears in the Railway Mail Act, 39 U. S. C., §551. When the Government urged that absence of available funds from current appropriations relieved it from the obligation to pay according to I. C. C. railway mail rate orders, the contention was overruled. New York Central R. Co. v. United States, 65 Ct. Cl. 115, 128 (1928), aff'd, 279 U. S. 73 (1929).

\(^{27}\) See supra n. 15 and 13.
issue demands the judgment of a specially qualified independent agency, acting under delegated power according to statutory standards, that the Act was adopted. The record of proof necessary to establish public convenience and necessity may, in important cases, run into several volumes, calling for cold and painstaking analysis. To impose such an inquiry upon the appropriations committees would load them with a staggering burden.

In importance next only to the question of authorizing new mail routes is the question of regulating the time and number of schedules on which mail is to be transported. The matter is covered in Section 405 (e) of the Act.

This subsection provides that each carrier shall keep on file both with the Authority and with the Postmaster General a statement of the points between which it is authorized to transport the mail and of the times of arrival and departure at each such point of all its schedules. The Postmaster General may designate any such schedule for mail transportation and may, by order, require that additional schedules be established for mail transportation. No mail can be carried except upon a schedule so designated or ordered to be established.

The carrier may make no change in any such mail schedule except upon ten days' notice filed with the Authority and the Postmaster General. The Postmaster General, by order, may disapprove any such change, and, by order, may alter, amend, or modify any such schedule or change.

None of the orders of the Postmaster General provided for in this subsection can take effect for ten days. Within that period a person aggrieved by such an order may appeal it to the Authority. Pending the appeal the Authority may postpone the effect of the order, and upon the appeal it may amend, revise, suspend, or cancel the order if the public convenience and necessity so require.

There was rather wide variation in the proposals that were made with respect to the regulation of mail schedules during the evolution of the Act. In Congressman Lea's first bill, 28 introduced on the day on which the President transmitted to Congress the Report of the Federal Aviation Commission, 29 and prepared, it is said, by that Commission, 30 it seems that mail schedules and all other details of mail service were subject to the approval of the proposed Air Commerce Commission. 31 On the other hand in the so-called

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30. See Hearings before House Interstate and Foreign Commerce Committee, 75th Cong., 3d Sess., on H. R. 9738, at p. 78.
Interdepartmental Bill provisions were included spelling out with great particularity the Postmaster General's exclusive powers as to weight of mail to be carried, space in the aircraft to be occupied, facilities to be required, stops to be made, and schedules to be operated.

Senator McCarran's first version of S. 2 in the 75th Congress simply provided that the carrier should provide "facilities and service" for, and should transport, the mail "whenever required to do so by the Postmaster General" under such regulations as he might prescribe, not inconsistent with the Act. His later version of S. 2 was in substantially the same form and so it was reported by the Senate Committee on Interstate Commerce, despite a contention by the Post Office Department at the hearings that the Postmaster General would have no control over air mail schedules under the provision in that form.

Congressman Lea's bill in the 75th Congress, as introduced, contained the same language as S. 2. When in the House hearings the Department contended that the bill would deprive the Post Office Department of all control over air mail schedules, Congressman Lea denied that such was his intention. And the bill reported by the House Committee stated that the carrier should provide facilities and service for, and should transport, the mail under rules, regulations "and schedules" prescribed by the Postmaster General, not inconsistent with the Act.

The carriers, before this amendment was made, had disagreed with the Post Office Department as to the interpretation of the bill. Whereas the Department had urged that the bill would entirely deprive it of the power to regulate mail schedules, the carriers argued that the bill gave the Department unrestricted power over schedules and urged that a provision be added which would require that, in

32. H. R. ...., 75th Cong., 3d Sess., Confidential Committee Print, Jan. 4, 1938. In 1937 the President appointed an Interdepartmental Committee to study proposals for legislation for civil aeronautics. It consisted of representatives of the Departments of State, Treasury, War, Navy, and Commerce and of the Postmaster General. It made no report, but drafted a bill incorporating its views, which it transmitted to Congressman Lea. See testimony of C. M. Hester, Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 5738, at p. 36.
33. Sec. 402, Interdepartmental Bill, supra, n. 32.
34. Sec. 305 (h) (1) of S. 2, 75th Cong., 1st Sess., Jan. 6, 1937.
35. Sec. 305 (g) of S. 2, 75th Cong., 1st Sess., Amendment in Nature of a Substitute, March 3, 1937.
37. See Hearings before a Sub-committee of Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., on S. 2 and S. 1760, at pp. 142, 158.
38. Sec. 305 (g) of H. R. 5234, 75th Cong., 1st Sess., March 2, 1937.
“specifying schedules,” the Postmaster General give “due regard to the requirements of classes of traffic other than mail.”

Thus by the end of 1937 the matter of mail schedules was, to say the least, not clear. The Senate bill, according to the Department, deprived it of all power but, according to the carriers, gave it too broad power. The House bill seemed expressly to grant full power to the Department over mail schedules, although a qualification that the Postmaster General's rules, regulations, “and schedules” should not be inconsistent with the Act may have left the Department unsatisfied. In any case, as we have already seen, the recommendation in January of 1938 of the Interdepartmental Committee, upon which the Postmaster General was represented, would certainly have delivered full power to the Department.

The reason that the Department was so concerned about its power over mail schedules may be easily divined. “The railroads make their own schedules and there is no remedy for irregular operation,” and the Department seems to have had some trouble as a result, necessitating resort, in some cases, to star-route truck service which is much less expensive and over the running time of which the Department can exercise full control. But in the case of the air mail service, the Department contended that there could be no adequate star-route alternative. The Department also argued the peculiar necessity of coordinating the schedules of air carriers with the schedules of surface transportation because, among other things, of the fact that air mail is often carried a part of the way by surface transport. The Department likewise insisted—not very persuasively—that air carriers are primarily mail carriers.

Senator McCarran finally broke away from the language to which S. 2 had adhered when he introduced a revised S. 2 on March 3, 1938. This bill provided that the Postmaster General could prescribe such schedules and stops “as will best promote” the expeditious carriage of the mail, but added the proviso that in fixing rates of compensation the Authority “shall take into consideration the

42. The House Committee Report stated flatly that the bill would allow the Postmaster General “full supervision over mail dispatching, including the regulation of schedules . . .”. H. Rep. No. 511, 75th Cong., 1st Sess., May 28, 1937, at p. 18.
43. See Hearings before the subcommittee of the House Committee on Appropriations, 76th Cong., 1st Sess., on the Post Office Department Appropriation Bill for 1940, at pp. 181, 182.
44. Idem; see also Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 5234 and H. R. 4652, at p. 143.
46. Idem, at pp. 127, 142.
47. See Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., on S. 2 and S. 1760, at p. 108.
suitability or unsuitability of such schedules or stops for the transportation of persons or property . . . ." Since the rate-fixing body would undoubtedly take such facts into consideration in any case, this provision would seem to have been exactly what the Department wished.

In the meantime, however, redrafts of a House bill had been prepared. A Subcommittee Print of February 19, 1938,\(^{50}\) had presented as alternatives the proposal of the Interdepartmental Committee\(^{51}\) and a provision which would have permitted the Postmaster General to apply to the Authority in order to have it fix times of arrival or departure—the Authority's decision to be reached by "giving consideration not only to the carriage of mail, but also to all other service furnished by" the carrier.\(^{52}\) Then on March 4, 1938, Congressman Lea introduced H. R. 9738, in which Section 408 (e) set forth very much the same powers and procedure respecting mail schedules as those finally adopted by Congress and summarized at the outset of this discussion.

Hearings on H. R. 9738 soon opened and Mr. Clinton M. Hester appeared as the representative of the Interdepartmental Committee.\(^{53}\) Mr. Hester, who is now the Administrator in the Civil Aeronautics Authority, opened his statement with a discussion of the differences between H. R. 9738 and H. R. 7273, the bill which the House Committee had approved in 1937. Respecting mail schedules he said:

"H. R. 7273 requires mail schedules to be fixed by the Postmaster General. This was a somewhat controversial provision and Mr. Lea suggested the following proposal, which is agreeable to the air lines and to the Post Office Department, and in behalf of the Post Office Department, I would like to point out that here the Post Office Department is accepting something less than last year's bill gave to them. The present bill—that is, under Mr. Lea's proposal—the present bill permits mail schedules to be fixed in the first instance by the air carrier and it gives the Postmaster General power to change such schedules if he deems such action necessary. It further authorizes any person aggrieved by an order of the Postmaster General changing a schedule to apply to the Authority for a review of the order, and empowers the Authority to revise or revoke such order. It was felt that the final power to control mail schedules should be vested in the Authority so that in fixing such schedules proper consideration would be given to the interests of passengers and express as well as mail."\(^{54}\)

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\(^{49}\) See Sec. 316 (c) of S. 2, 75th Cong., 3d Sess., amendment in the Nature of a Substitute, March 2, 1938. The same language was included in Sec. 316 (c) of S. 3659, introduced by Senator McCarran on March 11, 1938.

\(^{50}\) The print had no bill number.

\(^{51}\) Sec. 805 (a) of the Subcommittee print.

\(^{52}\) Sec. 408 (e) of the Subcommittee Print.

\(^{53}\) See supra, n. 32. See Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 9738, at p. 35.

\(^{54}\) Idem, at p. 44.
The provision was approved by the Committee.\textsuperscript{55} And thus it was adopted by the House. It differed from the Act as finally approved principally in that it did not give the Postmaster General the power to order the establishment of additional schedules and in that the standard according to which the Authority was to determine appeals from orders of the Postmaster General was the "public interest" rather than the "public convenience and necessity."

Shortly before the House Committee made its report Senator McCarran introduced another bill, S. 3845, on April 14, 1938. He now treated mail schedules much as they were dealt with in the House bill, except that he permitted the Postmaster General to order the establishment of additional schedules.\textsuperscript{56} The Senate Committee, in reporting his bill on April 19, 1938, eliminated even this difference and conformed the provision to that in the House bill. The Committee amendment was adopted.\textsuperscript{57} Thus identical provisions went to Conference.

In Conference the provision was reworded. While the rewording was described as designed to "clarify the policy"\textsuperscript{58}("clarify" is such a useful term!), it did make the substantive changes already noted, one of which conformed to S. 3845 as introduced.\textsuperscript{58a}

Section 405 (e) of the Act represents, then, a laboriously formulated resolution of apparently conflicting points of view. A recent writer has said of the section that it "can cause just as much ill feeling between the Post Office Department and the Authority as existed between that Department and the Interstate Commerce Commission" by virtue of certain sections of the Air Mail Act of 1934; "the Post Office Department will not in all probability take very kindly orders of the Authority cancelling Post Office Department orders . . . ."\textsuperscript{59} However, Mr. Hester, in explaining the provision to the Senate Committee on Commerce, stated that the Department participated in conferences leading to its formulation and had judged it to be "completely satisfactory."\textsuperscript{60} That the matter dealt with is delicate, and that the Department is eager to provide the most convenient and best possible transmission of the mails is abundantly demonstrated by its testimony before the Committees in 1937. But there is no more reason to believe that the Department would insist that the needs of a convenient passenger and express

\textsuperscript{55} See Sec. 409 (e) of H. R. 9738, Union Calendar No. 831, Report No. 2254, 75th Cong., 3d Sess., April 28, 1938.
\textsuperscript{56} See Sec. 405 (d) of S. 3845, 75th Cong., 3d Sess., April 14, 1938.
\textsuperscript{57} 83 Cong. Rec. 6753-6764.
\textsuperscript{58} House Rep. No. 2635, 75th Cong., 3d Sess., June 7, 1938 (Statement of the House Managers), at p. 72.
\textsuperscript{58a} See also footnote n. 76 infra.
\textsuperscript{59} Rhyne, Civil Aeronautics Act Annotated (1939), 130.
\textsuperscript{60} Hearings before Senate Committee on Commerce, 75th Cong., 3d Sess., on S. 3760, at p. 4.
service should be ignored than there is to believe that the Authority is lacking in appreciation of the pressing requirements of the postal service. The section gives to the Department a means for securing schedules according to its needs which is entirely lacking in the case of other mail carriers, except those on a star-route basis; but in granting this unprecedented power it preserves as a final check the test of public convenience and necessity. Unique the provision is, and it illustrates clearly the earnest thought and effort which were devoted, not only by the Congress but by the Post Office Department, to securing a workable adjustment of functions between agencies of government.

Schedules, then, are not fixed by the Authority. Their designation for mail transportation is a matter for the Postmaster General to decide, and he can require changes in time and in stops, or can order new schedules to be established. Even when he has made his decision the Authority has no power to act unless an aggrieved person appeals. Only then can the Authority exert a revisory power, guided by the requirements of the public convenience and necessity.

We have already suggested that there is no reason to believe that the Post Office Department, in the exercise of its power over the air mail service, will blind itself to the needs of passenger and express service. The Department's splendid record during its twenty years of primary responsibility for the development of a system of air transportation is ample proof that it will not suddenly forget the need for a balanced growth of the system. However, occasions may sometimes arise when the best interest of the postal service and that of the passenger and express service will clash and when there may be honest differences of opinion as to which should prevail.

As to schedules, such a clash is subject to the arbitrament of the Authority. But the matter of schedules is only one of several different points of potential conflict between the needs of the various classes of service. Space to be reserved for the mail, mail loads to be carried, and other such matters might furnish troublesome issues. With respect to all such matters, the Postmaster General is given broad power. Section 405 (d) provides:

61. No provision of the Act, other than Section 405 (e), gives the Authority the power to regulate schedules, except in so far as such regulation might perhaps be involved indirectly in taking action to secure compliance with the requirement that "adequate service" in interstate and overseas air transportation be provided, Sec. 404 (a), or to prevent unfair practices, Sec. 411. Sec. 401 (f) bars terms in certificates restricting a carrier's right to add to or change schedules. See the discussion of terms of certificates in the Authority's opinion in the case of the application of Pan American Airways Company for a certificate for the trans-Atlantic operation. Docket No. 163, decided May 17, 1939.

62. Sec. 405 (e), after providing for an appeal to the Authority by a person aggrieved by an order of the Postmaster General says, in a new sentence, that "The Authority may review ... such order ..." The fair interpretation seems to be that the review can occur only upon the appeal, and not upon the Authority's own initiative.
"The Postmaster General is authorized to make such rules and regulations, not inconsistent with the provisions of this Act, or any order, rule, or regulation made by the Authority thereunder, as may be necessary for the safe and expeditious carriage of mail by aircraft."63

In addition, and of equal importance, there is the Postmaster General's general power to require that the mail be transported, coupled with the carrier's duty to transport.64

Thus the powers of the Postmaster General are sweeping, and their exercise is subject to no express provision for appeal to or approval by the Authority.65 However, the postal rules and regulations must not be inconsistent with other provisions of the Act or with the Authority's action thereunder.

Section 404 (a) provides that a carrier must provide adequate "service, equipment, and facilities" in connection with interstate and overseas air transportation. We may pass the question whether or not "air transportation" in that section includes mail transportation.66 In any case, the section certainly requires adequate service, equipment, and facilities for passengers and express. And if the section does not impose a duty upon the carrier respecting the mail, Section 401 (m) fills the breach by making it the carrier's duty to provide necessary and adequate "facilities and service" for the mail.67

Both Section 404 (a) and Section 401 (m) may, presumably, be the subject of Authority rules and regulations,68 and certainly can be the subject of Authority orders.69 Hence, if the Postmaster General were to act, under Section 405 (d), in a manner which allegedly would cause the carrier to run afoul of Section 404 (a), it is conceivable that the Authority could be called on to pass judgment upon the postal rule or regulation in a proceeding involving Section 405 (e).

63. The subsection does not say that the Postmaster General may act by order, although in the same sentence it refers to orders of the Authority. Section 405 (e) empowers the Postmaster General to act by order in relation to schedules. Section 401 (a), providing for civil penalties, refers only to "any rule or regulation issued by the Postmaster General." Section 405 (g) states that a carrier shall transport mail "in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section." The likely interpretation appears to be that except as to schedules the Postmaster General can act only by rule or regulation. The matter is probably of only academic interest.

64. Sections 401 (m) and 405 (g).

65. The Authority's power to fix maximum mail loads is discussed infra.

66. Cf. Section 1 (10).

67. The omission of the word "equipment" in Section 401 (m) and its inclusion in Section 404 (a) may some day provide a subject for a lawyer's brief. See also Sections 405 (f) and 406 (a). Section 405 (f) states that when the Authority fixes a maximum mail load, the carrier must, nevertheless, to the extent it is reasonably able, furnish "facilities" for the transportation of any mail in excess of the maximum load. The statement of the House Managers on the Conference Report describes the comparable provision in the House bill as one requiring the carrier "to furnish additional equipment" for mail transportation. House Rep. No. 2635, 75th Cong., 3d Sess., at p. 69. Thus one might argue that the word "facilities" may be synonymous with or inclusive of "equipment."

68. Section 206 (a).

69. Section 1002 (c).
404 (a), if not 401 (m). Procedural difficulties might be presented in framing an issue, unless the Authority were to act upon its own initiative, but an issue so presented would seem to be a happier means of resolving conflict than the means of inviting a penalty under Sections 901 or 902.

If an issue thus presented posed the abstract question whether the needs of the postal service should prevail over the needs of passengers and express, the Authority would have a very nice case to decide. The question cannot be answered by adopting the easy principle that if the satisfaction of postal needs hurts passenger or express business the carrier need not suffer because of the availability of increased mail pay. In the first place such a principle would not work with perfection and in the second place it is the need of the passenger or shipper which should command attention rather than merely the need of the carrier. Nor can the question be answered by saying, without more, that the postal service is paramount. For the declaration of policy places in equal rank the postal service, national defense, and commerce. Moreover a rule or regulation admittedly necessary for the safe and expeditious transportation of the mail must still be “not inconsistent” with the Act, of which Section 404 (a) is an almost fundamental provision.

There is little profit in pursuing this inquiry. It is of remote practical importance because of the Post Office Department’s undoubted vision and its well known sympathy with the ideal of an improved air transport system. If the appropriate answer is not clear, that is probably because Congress realized that a degree of ambiguity may often be wise.

However, with respect to one point of potential conflict, other than schedules, Congress did speak out. Its voice is recorded in Section 405 (f). The provision empowers the Authority to prescribe the maximum mail load “for any schedule or for any aircraft or any type of aircraft.” The bill adopted by the Senate stopped at that point, but in the House bill further wording appeared which was revised in Conference to read:

“. . . but, in the event that mail in excess of the maximum load is tendered by the Postmaster General for transportation by any air carrier in accordance with any schedule designated or ordered to be established by the Postmaster General under subsection (e) of this section for the transportation of mail, such air carrier shall, to the extent such air carrier is reasonably

70. Could a carrier complain to the Authority that it itself is, or will be led to, violating the Act? Can it lodge with the Authority a complaint against the Postmaster General? The answer to each question probably is in the negative. Section 1002 (a). But one never knows . . . . It is likewise of interest to observe that Section 404 (a) seemingly does not apply to foreign air transportation.

71. Section 2 (a).
able as determined by the Authority, furnish facilities sufficient to transport, and shall transport, such mail as nearly in accordance with such schedule as the Authority shall determine to be possible."

Senator Copeland, Chairman of the Senate Committee in charge of the bill, referred to the Authority's power to fix a maximum mail load as a "very important power." And so, indeed, it is. Weight capacity of aircraft is limited by many factors. This is one of the basic technological characteristics of the industry. Senator McCarran's bills as far back as 1935 contained a maximum mail load provision, and such a provision appeared in both the House and the Senate bills in 1937.

If the Post Office Department were free to require the transportation of unlimited amounts of mail on any one aircraft, there might be serious interruption to passenger business. It has sometimes happened, heretofore, that a carrier has found it necessary to put passengers off a plane, even at intermediate points, because of the weight of the mail loads accumulated from point to point. It is easy to imagine circumstances in which some action would be in order to protect passengers. We have already seen that the Authority might be able to take necessary steps to assure the adequacy of passenger facilities by virtue of Section 404 (a) of the Act. However, this particular question is of such importance that a special grant of power is appropriate, through the exercise of which the Department and the carriers alike may be put on notice respecting permissible loads.

It is too early to judge how extensively the Authority will be required to exercise this load-fixing power. In the case of many carriers, the occasion for exercising the power may prove to be rare if the Department designates all schedules as mail schedules under Section 405 (e). Such blanket designation by the Department certainly would ease its problem, for it can have mail carried only on designated schedules. If, however, the Department adopts a policy of designating limited numbers of schedules, the most serious problems might arise, making it necessary that the Authority fix maximum loads for every particular trip.

72. 89 Cong. Rec. 6770.
73. Rhyne, Civil Aeronautics Act Annotated (1939), 9.
74. Sec. e. g., Sec. 410 (h) of S. 3420, 74th Cong., 1st Sess., Cal. No. 1381, Report No. 1329, Aug. 15, 1935.
76. As stated in our discussion of the mail schedule provision, Section 405 (e), the Conference Committee rewrote the subsection to "clarify" it. As the bill went to Conference neither the House nor the Senate had included any requirement that there be designation of mail schedules. The provision as adopted by both House and Senate would have permitted mail transportation between certificated points on all schedules operated. The Conference Committee's redraft permits transportation of mail only on designated schedules.
If loads are thus fixed, and if excess mail is tendered, there will come into play the language, quoted above, which the Conference Committee took in revised form from the House bill. This language appears to contemplate that excess mail must be transported to the extent that the Authority determines that the carrier is reasonably able to do so. But how the Authority could effectively determine this question after the mail is tendered is difficult to understand; equally difficult is it to understand how the question could be determined before it arises. As a practical matter, the Conference Committee might just as well have accepted the Senate provision, which simply conferred upon the Authority the power to fix maximum mail loads.

The new Act reflects a careful effort to leave the maximum of freedom to the Post Office Department in respect to postal matters. Provision is made for expansion of the air mail system through the certificating of new routes which, upon full inquiry, prove to be desirable according to the test of convenience and necessity. When the certificate is issued, the route is available for the needs of the postal service, to be used by the Department as those needs dictate. Regulation of the transportation of air mail is vested exclusively in the Department, except to the extent that some supervening interest prompts the Authority to the exercise of limited powers designed to preserve the proper balance in a system dedicated not only to the postal service but also to the nation's commerce and security.