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WHAT PART SHALL FREIGHT FORWARDERS HAVE IN THE DEVELOPMENT OF THE AIR FREIGHT INDUSTRY?

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O N September 26, 1946, the Civil Aeronautics Board issued an order1 "instituting an investigation into all matters relating to and concerning services of air carriers indirectly engaged in the air transportation of property." This investigation is one of wide scope and encompasses the great freight forwarding industry. The basic purpose of the investigation is a determination as to what part the freight forwarders should play in the further development of air freight within the United States.

The Board was moved to institute this investigation for at least four reasons:

First, the Board on March 13, 1941,2 assumed jurisdiction over the operations of the Railway Express Company (a freight forwarder in its broadest sense) in the transportation of express, through the medium of air carriers, and issued to that company an exemption permitting it to continue to operate until the Board, through further investigation, determined whether it should be given a certificate pursuant to Section 401(e) of the Civil Aeronautics Act of 1938 as amended.3 The Board has never completed its investigation relative to the issuance of such a certificate to the Railway Express Agency and the exemption order in amended form remains in effect.4

Second, Universal Air Freight Corporation, organized on September 16, 1940, for the purpose of extending freight forwarding operations to air transportation, began its operations on July 10, 1941. This was apparently the first incursion of a freight forwarder (other than the Railway Express Agency) into the air transport field since the passage of the Civil Aeronautics Act of 1938. On November 14, 1941, Universal filed an application with the Board for authority to operate via scheduled air carriers between all States of the

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3 Ibid.
4 Order amending order temporarily exempting Railway Express Agency, Inc. from provisions of Sec. 401 (a), C.A.B. Order Ser. 5149 (Sept. 3, 1946).
A prehearing conference was held on this application on January 26, 1942. At this point, the Board decided that an investigation of Universal's operations was in order and took no further action on the application, which is still pending before the Board. On March 9, 1942, the Board issued an order pursuant to which a hearing was held investigating Universal's existing operations. The result of this action was a cease and desist order to Universal.

Third, with the cessation of hostilities of World War II, the unparalleled expansion in air freight through the many nonscheduled operations which have sprung up, and the inauguration by the scheduled airlines of cargo flights, have stimulated a flood of applications to the Board for certificates as indirect air carriers or as forwarders by air. These are at present pending Board action.

Fourth, the Board is in possession of little or no operating data with respect to the operations proposed by the forwarders. The Railway Express Agency data which is available will not, in most instances, be applicable to the proposed operations. For this reason, it is practically essential that the Board gather such information as is available on which it can make a determination.

The Board has consolidated the matter of the issuance of a Certificate of Public Convenience and Necessity to the Railway Express Agency together with the proceedings involving the numerous freight forwarder applicants and the general investigation heretofore mentioned in one proceeding. All these related matters will thus be considered together, making it possible for a review of the freight forwarding industry and its operations as they may affect air transportation before determination is made by the Board.

This paper sets out the legal phases of the historical and operational developments of freight forwarding. The role of the freight forwarders in air transportation is also suggested in the light of the discussion here undertaken.

I. HISTORICAL DEVELOPMENT OF THE FREIGHT FORWARDERS

The freight forwarder has played an unheralded but important role in the development of our transportation system as we know it today. Freight forwarders have developed lucrative incomes by dealing in transportation. They are said to purchase the right of transportation at wholesale and to sell it to the public at retail.

The express companies' operations are probably the better known

5 C.A.B. Docket 681.
7 Order of Consolidation — Freight Forwarder Case (Docket 681 et al., Order Ser. E-103, Nov. 15, 1946). 42 applicants are listed in this order. Hearing commenced before an Examiner of the Board on February 17, 1947.
8 Prehearing Conference Report, Freight Forwarder Case, Docket No. 681 et al., issued August 30, 1946.
freight forwarding operations in this country. Other operations exist which today do a greater amount of forwarding business than the express companies. These operations are known as freight forwarding in contrast to express as carried on by the express companies.

A. Express Companies

1. Their Origin

The first organized forwarding agents of any consequence in America were the express companies which appeared shortly after the advent of the railroad.10

Where the idea originated of performing the function of an expressman is not known. Probably, it was first performed in America by the post rider of Colonial days, who, unofficially, for the convenience of those along his route and his own profit,11 carried small packages to be delivered to others living farther along his way.

As turnpikes and roads were made usable in the Colonies, the stage-driver took over this function and performed it on a larger scale. The stage-driver was a man of unquestioned reputation and honesty and to him were given commissions of great trust. Among the packages and bundles which he carried were many of great value.12

When the railroads forced the stage-coaches out of existence, many of the stage-drivers were employed as conductors. In this capacity, they found it profitable to continue the service which they had hitherto performed as stage-drivers.13 This service was limited, however, inasmuch as the major portion of a conductor’s time was devoted to his regular employment. The service was, therefore, not always satisfactory. These circumstances, together with the increasing trade and commerce within the country, created a very favorable situation for the establishment of an organized forwarding company.

William F. Harnden of Boston is usually credited with the establishment in 1839 of the first express business, when he traveled as an ordinary passenger four times weekly, valise in hand, between Boston and New York.14 Others quickly discerned the profits to be derived

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10 For the origin and rise of the express business in America see Alvin F. Harlow, Old Waybills (1934); Stimson’s Express History (1881); Express Business in the United States, op. cit. supra, note 9; H. Wells (of Wells and Fargo) Sketch of the Rise, Progress, and Present Condition of the Express System, a paper read before the American Geographical and Statistical Society, February 4, 1864; and T. W. Tucker, Waifs from the Waybills of an Old Expressman (1872).

11 Harlow, Old Waybills, op. cit. supra, note 10, c.1.

12 Ibid.

13 Ibid. Steamboat clerks found it profitable to perform such a service and many private travellers were imposed upon to carry packages and execute commissions for friends and private business houses because of the lack of organized forwarding facilities.

14 As a matter of fact, this was not true. At least one express or forwarding agent had begun operations as early as 1836. See Harlow, op. cit. supra, note 10, c.1. Harnden, however, was the first to adopt the name of expressman:

Tucker, op. cit. supra, note 10, at 34.
from such an enterprise and it was not long before express companies were prospering throughout the country. Within a few short years, a consolidation of express companies was taking place\(^\text{16}\) and three large express companies emerged to claim certain sections of the country as zones of operations.\(^\text{16}\)

2. The Function of the Express Company

The function of the express company was to solicit and consolidate small package freight and other commissions for forwarding and execution with the greatest amount of expedition.\(^\text{17}\) Their service from the beginning was identified with passenger trains, as that was the fastest mode of transportation.\(^\text{18}\)

Express companies, however, did not restrict their activities to the forwarding of package freight. They were agents for the execution of every sort of commission.\(^\text{19}\) Their publicity slogan was “Nothing too difficult, nothing too unusual.”\(^\text{20}\)

Today, the major function of the express company remains that of forwarding small package freight.\(^\text{21}\) In the performance of this function, express companies have from a very early date been held to be common carriers and liable to shippers as such.\(^\text{22}\) This status as common carriers has never seriously been questioned.

3. Agreements Between Express Companies and the Railroads

The first expressman travelled as an ordinary passenger, carrying

\(^{15}\) In 1845, Harnden’s company, which had been taken over by James M. Thompson, was consolidated with other express companies under the title of “Adams and Co., Express.” (Harnden died in 1845.) Harlow, op. cit. supra, note 10, c.II.

\(^{16}\) Express Cases, 117 U.S. 1, 25 (1885). These express companies were the Adams, the American and United States. Besides these three many smaller companies prospered throughout the country.

\(^{17}\) Ibid. The following advertisement appeared in two Boston newspapers in July, 1839:


“Wm. F. Harnden, having made arrangements with the New York and Boston Transportation and Stonington and Providence Railroad Companies, will run a car through from Boston to New York and vice versa, via Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes and bills, and will transact any other business that may be intrusted to him.

\(^{18}\) The Interstate Commerce Commission referred to express companies as “freight forwarders by passenger train.” In the Matter of Express Rates, Practice, Accounts and Revenues, 24 I.C.C. 380, 431 (1912).

\(^{19}\) Express Business in the United States, op. cit. supra, note 1, at 7.

\(^{20}\) Harlow, op. cit. supra, note 10, c.XXV.


\(^{22}\) Bank of Kentucky v. Adams Express Company, 93 U.S. 174 (1876); Express Cases, 117 U.S. 1, 20 (1886); In re the Express Companies, 1 I.C.C. 349, 351 (1887); Hearings Before Committee on Interstate Commerce of the Senate, on S. Res. 146, 76th Cong., 3d Sess., (1940) 511. See New Jersey Steam Navigation Co. v. Merchants’ Bank, 6 How. 344 (1849).
his packages and commissions in a valise. These accommodations were soon outgrown, forcing him to make other arrangements. Special agreements with the railroads and shipping companies resulted which varied according to facilities needed, the compensation to be paid, and other general provisions.23

Such agreements, however, gave no guarantee of perpetuity to the express companies. Upon the giving of stipulated notice by either party, the agreements could be terminated. As a result, the express companies found themselves subject to the whims of railroads24 and were able to continue in existence only because the majority of the railroads found it to their advantage to farm out to the express companies their small package freight business.25

The independent companies, however, were opposed by some of the railroads,26 and a number of railroad-sponsored express companies were successful in taking over the express business on a few lines. Such incursions were not made without resistance. Injunctions were obtained from several federal courts denying the railroads the right to interfere with an independent express company's traffic, either directly, by termination of the agreement with such a company, or indirectly, by discriminatory rates.27 In 1885, the question of the right of the

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23 See Harnden's agreement with the New Jersey Steam Navigation Company, New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344 (1849). For general types of agreements see Express Cases, 117 U.S. 1, 3-13 (1886). These agreements provided that for a stipulated compensation, payable periodically, according to the weight of express carried, or on the basis of a percentage of the gross income of the express companies (as is the case in the existing agreement between the railroads and the express company) necessary facilities would be furnished. Provisions were also made to prevent the railroads or any others from encroaching on the express business while the agreements were in effect.

24 Commissioner Lane, in speaking for the Interstate Commerce Commission, said: "These carriers live by the grace of the railroads, and their existence may be justified only to the extent that their service is more efficient and more reasonable than that which would be given by the railroads themselves." Express Rules, Practices, etc., 24 I.C.C. 380, 384 (1912). See also page 423.

25 Hearings Before Subcommittee of Committee on Interstate Commerce of Senate, on S. Res. 146, 76th Cong., 3rd Sess. (1940) 478; In re Express Companies, 1 I.C.C. 349 (1897).

26 HARLOW, op. cit. supra, note 10, c. XVII.


"(1) A railroad company is a quasi public corporation and bound by the law regulating the powers and duties of common carriers of persons and property."

"(2) It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms."

"(3) The business of expressage has grown into a public necessity. It is the means whereby articles of great value may be carried over long distances with certainty, safety, and celerity, being placed in the hands of a special messenger, who is to have the charge and care of them en route. The railroad companies must, in common with the public, recognize the necessity for this mode of transportation, and must carry express packages, and the messenger in charge of them, for all express companies that apply, on the same terms, unless excused by the fact that so many apply that it is impossible to accommodate all — a state of things not likely to occur. If it be said that this is giving to the express companies privileges not afforded to other shippers, the answer is that the nature of
railroads to exclude express companies, with whom they had had contracts, from their lines and to permit railroad sponsored companies of their own choosing the exclusive use of their facilities for the shipment of express, was decided by the Supreme Court.28 While this decision was a legal victory for the railroads it also had the effect of establishing express companies in a legal near-monopolistic status upon the railroads of the country.29

4. Abuses and Regulation of the Express Companies

In 1887, the railroads became subject to federal regulation with the passage of the first Interstate Commerce Act.30 Paragraph 1 of Section 1 of that Act reads:

“That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water...”

In considering the applicability of this statute to the independent express companies, the Interstate Commerce Commission determined that they did not fall within the quoted definition.31 The Commission said at page 682 of the opinion:

the express business makes special facilities for its transaction necessary, and the case is, therefore, properly exceptional.

“(4) It is not necessary now to determine whether the respondent railroad company may, under its charter, engage in the express business, and undertake to carry and deliver express packages beyond its line. It is enough for the present to say that if it possesses the right to engage in this business at all, it must do so upon terms of perfect equality with all other express companies, and the court will see that it does not take to itself any privileges in this regard that it does not extend to the complainant.”

28 Express Cases, 117 U.S. 1, 27 (1886). Chief Justice Waite, in delivering the opinion of the Court in favor of the railroads, reviewed the history of express-railroad agreements and concluded: “In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.”


31 In re Express Companies, 1 I.C.C. 677 (1887). Thereafter, two federal courts also held independent express companies not subject to the Act: United States v. Morsman, 42 Fed. 448; (E.D. Mo., 1880), Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659, (C.C. Ind. 1898), aff’d 92 Fed. 1022 (1899).
"The word 'wholly' in the first section of the Act may have been used in contradistinction to the word 'partly' in the next clause — 'wholly by railroad or partly by railroad and partly by water' — and not as a limitation upon the method of carriage with the meaning by railroad solely, or by railroad and not otherwise, as claimed by the express companies; nevertheless, the literal application of the word 'wholly' would exclude a great part of the business transacted by express companies, for it can be truthfully said as to the larger percentage of their shipments that they are not 'wholly by railroad' or 'partly by railroad and partly by water.' A great amount of team and messenger service is involved, as well as the use of other vehicles of transportation which are not within the language of the Act. The use of that word in a section which was evidently framed with the greatest care affords a fair foundation for the claim that the Act does not describe the mode of transportation employed by express companies with sufficient precision to bring them within its terms."

The railroad owned express companies, however, were considered to be common carriers "engaged in the transportation of . . . property wholly by railroad. . . ." The decision of the Commission apparently turned entirely on the wording "wholly by railroad." Because of the inconsistency of some express companies falling within the Act and others being left out, the Commission emphasized the need of further legislation.32

There were other reasons for desiring regulation of express companies than that suggested by the Commission. The vast usefulness of the express, and the multifarious services which express companies were able to perform on a virtual monopoly scale, on a very small investment for equipment, created an enormous source of income.33 This prosperity and the lack of any competition created an attitude of independence among the express companies. Subject as they were to no policing by a regulating body, they found it easy to abuse their privileges as public servants. The public was forced to accept their service or go without. Complaints of discrimination and excessive charges were frequently heard. However, in spite of this and the fact that regulation was recommended by the Interstate Commerce Commission in 1881, legislation for that purpose did not pass Congress until 1906.34

Pursuant to this authority, the Interstate Commerce Commission undertook the laborious task of investigating the express companies.35 In its report on pages 387-388 the Commission stated:

82 In re Express Companies, 1 I.C.C. 677, 683 (1887): "A careful examination of the history and the language of the Act to regulate commerce has brought the Commission to the conclusion that the independent express companies are not included among the common carriers declared to be subject to its provisions as they now stand. The fact that a part of the express business of the country is, as above shown, within the Act, while another and a much larger part of the same business is not so described as to be embraced in the same statute, clearly points out the necessity of further legislative action. Either the entire express business should be left wholly on one side or it should all be included."

83 Harlow, op. cit. supra, note 10, c. XXVI.
The act also by name recognizes the express company as a carrier subject to our jurisdiction. We must therefore regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own. . . . Our sole concern, therefore, has been to discover in what regard the express companies as existing were delinquent in rendering the service which they purported to give, or which should be given under reasonable, just, and non-discriminatory rates, and to discover what remedy could be applied under this law [italics added] . . .

The Commission has found that the complaints made against the express companies might be grouped into the following classes:

1. Double collection of lawful charges.
2. Overcharge and undercharge effecting discrimination between shippers arising out of an obscure rate system and ineffective revision and supervision of accounts.
3. Indirect routing of shipments by express carrier, resulting in unreasonable delays and defeating the reason for the existence of an express service as distinguished from ordinary freight service.
4. Failure or refusal to deliver parcels to consignees located outside of arbitrarily established free-delivery limits without notice being given either to the consignor or consignee as to the extent of free-delivery territory.
5. Unreasonableness of the terms of shipment imposed by the receipt given by the carrier.
6. Delays in the settlement of claims for loss and damage.
7. Excessive insurance charges when shipments are valued at more than $50.
8. A confusing set of rules governing the classification of express matter which lead to discrimination in rates between classes of shippers by providing obscure and insignificant conditions as the basis for classifications of which the initiated may take advantage to procure transportation at lower rates than are generally applied to the more uninformed portion of the public.
10. The obscure statement of rates making the public dependent almost entirely upon the information furnished them by express agents.
11. The unreasonableness of the rates charged by the carriers."

Express companies were also found to have made huge profits by obtaining especially favorable contracts with the railroads through internal pressure of the railroad's own directors, or external pressure of financial interests allied to the express companies.

At the conclusion of the investigation, the express companies were ordered to desist from these unlawful practices and to conform with the orders and regulations of the Commission. Since that time their profits and practices have been strictly controlled by the Commission.

The courts have recognized that the express companies became subject to the Interstate Commerce Act by the passage of the Hepburn amendment.36 But in recognizing express companies as common carrier

riers subject to that Act, the United States Supreme Court has distinguished between them and "carriers by railroad" for purposes of regulation under some sections of the Act. Thus, it was held, that the term "carrier by railroad," in Section 15(4) of Part I did not include express companies, but that the term meant one who "operates a railroad, not one whose shipments are carried by a railroad." The Court further said that the language used in that section "describes aptly a single railroad system, but not a system of express routes extending over many railroad systems." The Supreme Court further held that the phrase "common carrier by railroad" used in the Employers' Liability Act did not include express companies.

The coverage of the Hepburn Act over express companies was held not to extend to operations of other than "the transportation of property wholly by railroad, or partly by railroad and partly by water," and not to "... express companies handling property by truck, airplane, or other method of transportation not invoking railroad service." The specific question involved in the latter case was whether the wholly owned subsidiary of the Railway Express Agency, the Railway Express Motor Transport, which engaged in motor truck operations in competition with other motor truck operators, was subject to Part I of the Interstate Commerce Act.

The enactment of the Motor Carrier Act in 1935 raised the question of the status of express companies under that legislation. On February 11, 1936, the Railway Express Agency filed an application for a determination of whether the provisions of the Motor Carrier Act applied "to any or all of its operations in connection with the transportation of property by motor vehicle, in interstate or foreign commerce, with particular reference to the definition of a common carrier by motor vehicle in Section 203(a)(14) of that Act, which includes the 'motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I.'"

Division 5 of the Commission found the motor vehicle operation of the Railway Express Agency to be subject to the jurisdiction of the Commission under the Motor Carrier Act with the exception of those associated with the pick-up and delivery of express package shipped

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90 Wells, Fargo & Co. v. Taylor, 254 U.S. 175 (1920).
42 American Hy. Freight Ass'n, Inc. v. Railway Express Agency, Inc., 201 I.C.C. 755, 759 (1934). A fair reading of all of the pertinent provisions of Section 1 leads to the conclusion that the express business which is subject to our jurisdiction is that which is handled over railroads, or partly by water within the conditions stated in the Act. The law has no application to a highway transportation service under the circumstances here involved.
wholly by railroads or partly by railroad and partly by water for which no additional charge is made by the shipper, those incidental to transportation by aircraft, and those where pick-up and delivery service within a terminal service is rendered a railroad.

5. The Express Company Today

With the entrance of the United States in the War in 1917 and the taking over of the railroads by the Government, the express companies found themselves in an almost impossible position.\(^{46}\) They were happy, therefore, when the Government took them under its control and consolidated them into one system, the Consolidated Express Company, which name was changed later to American Railway Express Company.

At the close of the War, none of the old companies wished to take back its business. Consequently, the express business continued as the American Railway Express Company under private control.\(^{47}\)

On March 1, 1929, a company created by the railroads themselves took over the business of the American Railway Express.\(^{48}\) The result is the Railway Express Agency of today. With the advent of the motor truck, the Railway Express Agency has progressively made use of that medium of transportation in the performance of its operations, and, in at least one instance, as heretofore indicated, has undertaken direct motor carrier operations.\(^{49}\)

B. Freight Forwarders

1. Origin

While the express companies were welding themselves securely to the transportation system of the country, another type of freight forwarder made its appearance. Like the express companies, this latter forwarder established itself on the basis of superior service to that furnished by the railroads.\(^{50}\) The date of origin of these freight forwarders is a matter of conjecture.\(^{51}\)

\(^{46}\) Harlow, op. cit. supra, note 10, c. XXVII. During the first six months of 1918 Adams Express had an operating deficit of $5,980,173; the American Express, $1,265,754; and Wells, Fargo and Company $1,388,225.

\(^{47}\) Consolidation of Express Companies, 59 I.C.C. 459 (1920).

\(^{48}\) Securities and Acquisition of Control of Railway Express Agency, Inc., 150 I.C.C. 423 (1929). This did not include the Southern Railway and its subsidiaries, whose express business was handled by the Southeastern Express Company. That company has since been dissolved and the Southern Railway and its subsidiaries are now embraced in the agreement with the Railway Express Agency. Railway Express Agency, Inc., Pooling Application, 227 I.C.C. 517 (1938).

\(^{49}\) Railway Express Agency, Inc., Determination of Status, 21 M.C.C. 161 (1939). Francis B. Sheetz Common Carrier Application-Express, 10 M.C.C. 393 (1938).

\(^{50}\) Freight Forwarding Investigation, 229 I.C.C. 201, 299, 310, 311 (1938); Hearings Before Subcommittee of Committee on Interstate Commerce of Senate on S. Res. 146, 76th Cong., 3rd Sess. 479 (1940).

\(^{51}\) Senator Reed claimed that the oldest published tariff for freight forwarders was 100 years old: Hearings Before Subcommittee of Committee on Interstate Commerce of Senate on S. Res. 146, 76th Cong., 3rd Sess. 237 (1940). Alvin F. Harlow, op. cit. supra, note 10, c. II, p. 38, speaks of George E. Pomeroy in 1841 as a "western freight and passenger forwarder via the Erie Canal."
The railroads, prior to their regulation (1887) by the Interstate Commerce Act, charged a proportionately lesser rate for shipment of a carload of merchandise than they did for a less-than-carload shipment. The Interstate Commerce Commission, shortly after its creation, agreed to this practice. Approval was based on the difference which existed between the cost of service of a carload shipment from one consignor to one consignee and that incurred by a shipment in one car of many packages from many consignors to many consignees. The practice, while optional, became accepted. It was established, however, that such practice should apply only to those shipments made at one time to one consignee at a single destination. The rise of the freight forwarder under these circumstances is described by Chief Justice White in *Interstate Commerce Commission v. Delaware, L. & W. R. R. Co.*:

"There can be no doubt that the privilege of shipping at a lesser rate for the carload shipment than was asked for a less than carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association and to aggregate and ship them in carload lots in the name of one consignor to a single consignee at one destination by the use of commission houses, storage and other companies, etc. It is also undoubted that in consequence of the facility of shipping at a lesser rate for a carload than for a less than carload shipment there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less than carload rates."

2. Operations

Freight forwarders today have come a long way in the development of their operations. They have become great coordinators of transportation. From the days of pool car operations on the railroads they have progressed to utilizers of every form of transportation. Those who now engage in general forwarder operations, attract business no longer because of substantial savings in freight rates, but through their efficient coordination of transportation. Some specialized forwarders however, are still able to offer, as an inducement to use their service, a substantial freight savings. These forwarders usually handle

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54 However, see Buckeye Buggy Co. v. Cleveland C. C. & St. Louis Ry., et al., 9 I.C.C. 620 (1903) for a discussion of this point.
but one commodity, such as paper, porcelain, or used household goods, which requires special handling and facilities. Operations of freight forwarders today, whether they are general or specialized, proceed in the same general fashion.

Forwarders, through their organizations, offer efficiency in service which is generally not available through direct routing by railroad or other means of transportation. Speed in transporting and delivering freight in some instances equals and even outstrips that offered by railway express. A testimony to the attractiveness of their service is seen in the great number of shippers now utilizing it.

The operations of the forwarders had a decided effect on the service rendered by the railroads. Spurred on by the fear that the forwarder would win all their less-than-carload freight business — thus leaving the railroads as mere carriers of carload shipments — the railroads improved their service markedly and, in particular instances, sought to compete directly with the forwarder by offering pick-up and delivery service. In spite of the competition involved, the majority of the railroads now look upon the forwarders as performing a good service both to them and the shippers.

Freight forwarders collect, consolidate, ship, and distribute package freight and express by the most expeditious method of transportation. The late Commissioner Eastman said of them in his separate opinion in Freight Forwarding Investigation, wherein he dissents in part:

"... The general idea is to consolidate the shipments, so far as practicable, for carload movement, to concentrate these movements over direct and economical rail or water routes, and to utilize trucks in the collection and delivery processes and to some extent for through movements. The endeavor is to use each form of transportation to the best advantage, to avoid diffusion and light loading of cars, and to cut transfer and clerical costs to a minimum.... The forwarding companies are distinctively a means for the practical application of a method of handling less-than-carload or package freight designed for purposes of greater economy and efficiency in operation. Nor are they unique in the transportation field. They closely resemble the express companies (now combined into a single agency under collective railroad ownership) and, less closely, the Post Office Department. The Railway Express Agency, Incorporated, and the Post Office Department (particularly the parcel post) are both means for promoting the economical and efficient

67 Id. at 291, 329, 369.
68 Id. at 329.
69 Id. at 90, 93.
60 An example of service rendered by freight forwarders is seen in the fact that they are able to give information to customers of the whereabouts of shipments at any particular moment.
61 Hearings Before Subcommittee of Committee on Interstate Commerce of Senate on S. Res. 148, 76th Cong., 3rd Sess. 491 (1940).
62 Id. at 490, 491.
63 Id. at 235, 494. Forwarders have been exceedingly helpful to the railroads in competing with the motor truck and have by their coordination of transportation kept much of the traffic on the railroad which would otherwise go by truck. Freight Forwarding Investigation, 229 I.C.C. 201, 299 (1938).
64 229 I.C.C. 201, 309 (1938).
transportation of small articles or consignments of property and, like the forwarding companies, they utilize in their operations the transportation facilities of other carriers of every description."

In the performance of these operations, forwarding companies issue their own bills of lading and assume the entire responsibility for the shipments from the time of their receipt until delivery, and otherwise perform the function of a common carrier. The shippers have no direct contract with the carriers by whom the transportation is actually conducted.65

Prior to the advent of motor trucks, forwarders were concerned generally with shipments by rail. They established profitable operations by consolidating package freight for which they charged the shipper less than the railroad less-than-carload rate and more than the railroad carload rate. A forwarder's operations were, therefore, necessarily restricted to centers of large production in order that expenses for solicitation, assemblage, distribution, accounting, etc. would not be larger than the possible gross profit.

With the coming of the motor carrier, the forwarders achieved a far greater success. In dealings with motor carriers, forwarders were not restricted to scheduled rates, but were able to make special arrangements with them, on a basis similar to that existing between the railroads and the express companies.66 Through the medium of the truck, forwarders were able to reach out into the smaller communities of the country, and through coordination of trucking and railroad facilities extend to these smaller communities the benefits of forwarding operations.67 In this regard, trucks are now used to bring package freight from smaller towns to assembling centers, where they are consolidated into carload or truck load lots and then shipped to a distributing point, where the package freight is again broken up and distributed by truck to outlying communities.

3. The Legality of the Freight Forwarder

The activities of the freight forwarder brought him into direct competition with the railroads and express companies. As a result, the railroads and the express companies, at the turn of the century, sought to eliminate him as a competitor by refusing him the benefits of carload and bulk rates. A federal district court judge supported the railroads in one endeavor.68 The Interstate Commerce Commission, however, did not feel compelled to follow the district court decision and gave an opposite ruling in to cases involving the same issue.69 The

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65 Hearings Before Subcommittee of Committee on Interstate Commerce of Senate on S. Res. 146, 76th Cong., 3rd Sess. 480 (1940).
66 Acme Fast Freight, et al., 8 M.C.C. 211, 225, 226 (1938).
67 Freight Forwarding Investigation, 229 I.C.C. 307, 309 (1938).
69 California Commercial Association v. Wells, Fargo & Co., 14 I.C.C. 422 (1908); Export Shipping Co. v. Wabash R.R. et al., 14 I.C.C. 437 (1908). In the former case the Commission held that a rule of the express company, the purpose of which was to prevent competition by refusing to the forwarder the benefits of its bulk rates, was discriminating against the forwarding agent as a shipper.
Supreme Court upheld the Commission in *Interstate Commerce Commission v. Del. L. & W. R. R.* by holding that a common carrier may not make the ownership of goods, i.e., whether the shipper is or is not the real owner, the criterion for measuring its charges for carriage.

The United States Supreme Court has been consistent in holding forwarders to be shippers, not only thereby preventing the railroads from discriminating against them, as in the *Delaware, R. R. case, supra*, but by preventing discrimination in favor of forwarders. Thus in *Lehigh Valley R. Co. v. United States,* the Court held a special allowance to a forwarder as an inducement to ship goods by a particular carrier an illegal rebate. The Supreme Court has also found freight forwarders to be shippers in the sense that a carrier may accept valuation and classification of freight shipped by the forwarders and is not liable for a value higher than that stated by the forwarder, when that freight is subsequently lost, even though the shipper claimed a higher value when entrusting the shipment to the forwarder.

Forwarders in their operations and relations with the public possess all the characteristics of common carriers. They accept the responsibility for the transportation of goods, issuing their own bills of lading. The owner of the goods has no contact with the actual transporting carrier. The courts recognized this characteristic in the forwarder's relations to the true shipper of goods and held them liable as such. That forwarders are common carriers, as much as express companies, can never be seriously questioned.

The forwarder's legal status is anomalous. He is both shipper and common carrier. As summed up by the Interstate Commerce Commission in *Freight Forwarding Investigation,*

"We find that the forwarder as described upon this record, in its relation to the rail lines, is a shipper.

"We further find that the forwarder as described upon this record, in its relation to the public, has characteristics of a common carrier transportation agency...."

The forwarder, however, is not a shipper as that word is commonly understood any more than a railroad, a motor truck, or a common

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70 220 U.S. 235 (1911).
71 243 U.S. 444 (1917).
72 In *Warehouse Company v. United States*, 283 U.S. 494 (1931) the court held payments made to a warehouse for assembling and loading freight in individual carload consignments and unloading and distributing like incoming freight, an unlawful rebate where such service resulted in obtaining carload rates for less than carload shipments for patrons of the warehouse. The relationship created here between the warehouse and carrier, the Court said, was not unlike that between the freight forwarders and carriers.
73 *Great Northern Ry. v. O'Connor*, 232 U.S. 508 (1914).
75 Commissioner Eastman, in a separate opinion in *Freight Forwarding Investigation*, 229 I.C.C., said "... The forwarding companies are not shippers in the ordinary sense, and have much the same relation to the railroads and other carriers whose services are utilized as have the Railway Express Agency and the Post Office Department."
carrier by water are shippers under certain circumstances,\(^7\) e.g., where through route arrangements are made by a common carrier to transport goods to the end of its trackage and deliver the goods to another carrier for further transportation. The courts in designating the forwarder as a shipper probably did so as the most convenient method of solving the issue before them. As a consequence, a legal hybrid was conceived by the courts which created instead of solved a problem for the freight forwarder.

4. The Motor Carrier Act

When the Motor Carrier Act became effective in 1936, the contractual relationships between the forwarding companies and motor carriers were abrogated. However, the forwarders assumed that they were included within the regulatory provisions of the Act, and continued their prior relationships with the motor vehicles by filing with the Interstate Commerce Commission their tariffs, including the forwarder-motor carrier joint rate arrangements.

On application, filed January 28, 1936, by Acme Fast Freight and others, who operated as forwarders and also as motor carriers, for the issuance of a single certificate of convenience and necessity under the “grandfather” clause\(^7\) of the Motor Carrier Act, Division 5 of the Interstate Commerce Commission held the applicant to be subject to the Act only as to its direct motor carrier activities.\(^8\) The “indirect” or forwarding operations of the applicant were held to be those of a broker. The tariffs of the forwarding companies were ordered stricken from the files. On reargument before the full Commission, findings of Division 5 were sustained with the exception of the determination that freight forwarders were brokers under the Act, and the Commission denied applicants’ request for authority to operate as licensed brokers.\(^8\)

\(7\) New Haven R.R. v. Interstate Commerce Commission, 200 U.S. 361 (1906); Rates on Railroad Fuel, 36 I.C.C. 1 (1915).
\(7\) Part II, Interstate Commerce Act, as amended, Sec. 209(a), 52 Stat. 1238, 49 U.S.C. §309(a) (1940).
\(8\) 2 M.C.C. 415 (1937). The Acme Fast Freight, Inc., Acme Transfer & Storage Company, Chaffee-Shippers Service, Inc., Shippers Service Express, and Southwestern Carloading Company were all controlled by T.A.B., Inc. These six corporations, all with headquarters in New York, made application for a single certificate “authorizing them to continue operations in interstate and foreign commerce as a common carrier of property, except commodities in bulk, by their own motor vehicles between certain points in the States of Massachusetts and New York over regular routes, and within the metropolitan area of New York over irregular routes, and by ‘merchandise dispatch’ through the facilities and services of motor, rail, and water carriers between points in all States and the District of Columbia over irregular routes. The prayer is in the alternative, and requests a permit to operate as a contract carrier by motor vehicle or a license to operate as a broker, in the event applicant’s operations are found to be either those of a contract carrier or a broker, and not those of a common carrier.”

\(8\) 8 M.C.C. 211, 225 (1938). There are persons known as forwarding agents who perform nothing but a brokerage service. They, however, are not shippers or common carriers in any sense of the word and should not be confused with the category of freight forwarders under discussion: Hearings on S. Res. 148, 76th Cong., 3rd Sess., page 279; Acme Fast Freight, Inc., 8 M.C.C. 211, 223-224 (1938).
Counsel for the applicants argued that forwarding operations were within the meaning of the term "common carrier by motor vehicle" of Section 203(a)(14) of the Act, which the Commission denied. Counsel also argued that forwarders had the legal status of express companies, but this question was not decided as it was pending before the Commission in another proceeding. It was further contended that as forwarders were common carriers under common law, they had the right to enter into special contractual arrangements with common carriers by motor vehicle. The Express Cases were cited in support of this position and were held by Commissioner Eastman, speaking for the Commission, not to be controlling precedent.

The holding of the Interstate Commerce Commission, that the applicant's "indirect operations" were not subject to the regulatory provisions of the Motor Carriers Act, was appealed to a three judge fed-

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82 Section 203(a)(14) is as follows: "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I." [Italics added]

83 8 M.C.C. 211, at 218 (1938): "The question is whether the definition of 'common carrier by motor vehicle' in the act can properly be construed, in the light of the provisions and purposes of the act as a whole, to include such indirect operations. The undertaking of applicant as a common carrier, so far as these indirect operations are concerned, strictly speaking, is not to transport property but to see that it is transported. The words of the definition are 'undertakes... to transport.' It is true that 'undertakes' is followed by the words 'whether directly or by a lease or any other arrangement,' but the word 'lease' clearly refers to the use so commonly made of vehicles which are not owned but held under lease, and the words 'any other arrangement,' which significantly are conjoined with the word 'lease,' can and should, we believe, be interpreted to cover any similar means, compatible with an undertaking 'to transport,' which permit the use by the carrier of the property of others under its own domination and control." [emphasis added]

84 Id. at 223. For a comparison of forwarders and express companies see Hearings on S. Res. 146, 3rd Sess., 76th Cong., held before Subcommittee of the Senate Committee on Interstate Commerce, pages 480-481; see also Freight Forwarding Investigation, 229 I.C.C. 201, 211, 285 (1938). In the latter proceeding the Commission held at 294: "Upon argument it was urged that the forwarding companies were embraced within the words 'express companies' in Section 1 (3) of the act, and hence are now within the purview of Part I of the act. We do not consider that the forwarding companies as now developed and as above described could have been within the contemplation of Congress as express companies when, by the Hepburn Amendment in 1906, the latter companies were brought within the operation of the Interstate Commerce Act."

85 8 M.C.C. 211, 226-227 (1938); 2 M.C.C. 415, 428 (1937).

86 See note 28, supra.

87 8 M.C.C. 211 at 227 (1938): "We shall not undertake to analyze the Express Cases, supra, and what was there decided. The date of that decision was March 1, 1886. At that time Congress had not exercised its power to regulate the rates or charges of interstate carriers, express companies had been operating in connection with railroads for many years, and customs and practices with respect to their relations had grown up and become established which were taken into consideration by the court. It is not clear that this case, decided in the circumstances indicated, can be deemed a controlling precedent in determining whether, in the light of the provisions of Part II, a motor common carrier can lawfully contract to furnish transportation service for a forwarding company, such as applicant, for special compensation not based upon its published local or joint tariffs on file with the Commission. It is our present view that a motor common carrier cannot lawfully so contract." See also 229 I.C.C. 201, 294.
eral district court. Judge Hand, in speaking for the court, agreed with the conclusions of the Interstate Commerce Commission that the applicant had no right to the issuance of a certificate for its "indirect operation." Judge Hand said:

"While the mode of transportation employed by forwarders is analogous to that of express companies the Commission has held that they are not express companies and we agree. Perhaps the distinctions of the Commission between express companies and forwarders based on the fact that express companies retain custody of the goods, ship the merchandise on passenger trains and charge higher rates than forwarders are not of great moment. Express companies, however, were brought under the Interstate Commerce Act by the Hepburn Amendment in 1906, 34 Stat. 584, and there has been a long course of subsequent administrative practice in which forwarding companies have been treated as shippers rather than as express companies. This practice and the enactment of the Motor Carrier Act without any provision bringing forwarders under it except when they are engaged in 'motor vehicle operations' satisfies us that the Act does not apply to them either as express companies or otherwise."

On appeal to the Supreme Court, the district court was affirmed without opinion. The effective date of the Commission's order which would have required forwarders to have paid the scheduled rates for transportation via motor trucks was postponed on several occasions awaiting the outcome of appeals. What effect such order would have had on the freight forwarding industry, which at that time was said to have a gross business of $200,000,000 a year, if the order were to become effective, may readily be seen from the findings of the Commission that between 35 and 50 percent of all forwarders line-haul traffic moves by motor carriers. Some of the motor carriers operating in and around Chicago

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89 Id. at 973.
91 Freight Forwarding Investigation, 229 I.C.C. 201, 210 (1938): "Exclusive of transcontinental forwarder freight between Chicago and St. Louis and the Pacific Coast, of which little moves over the highways, between 35 and 50 percent of all forwarder line-haul traffic moves by motor carriers. In some sections the percentage is greater. Out of an aggregate of about $3,500,000, Acme payments for rail, highway, and water transportation in 1936 averaged $1.54 per 100 pounds, and its collections from shippers $1.80. It paid for transportation an average of $30.80 per ton of freight originated, of which $7 went to motor operators and $23.80 to carriers by rail and water. After deducting amounts paid for transportation, the average remaining revenue per 100 pounds of freight originated was 26 cents. In November, 1936, a representative month, National paid for rail and highway transportation of all kinds an aggregate of $2,511,000, of which $968,000, or 38.5 percent, went to motor carriers. During the same month its expenditures for line-haul transportation between terminal points in central territory totaled $389,429, and 65.3 percent thereof was paid for motor-carrier service. Of $37,869,236 paid in freight charges by Universal in 1936, $11,213,103 was paid to over-the-road motor carriers."

The effectiveness of the forwarder services, which would have been doomed to elimination by the I.C.C. order, was shown by those who have used this service: Hearings Before Subcommittee of the Committee on Interstate Commerce of Senate on S. Res. 146, 76th Cong., 3rd Sess. (1940), 429, 433, 440, 443, 446, 448, 451, 462, 527-537; Hearings Before Committee on Interstate and Foreign Commerce of House on H.R. 3684, 77th Cong., 1st Sess. (1940), 89, 185, 326.
sought to cushion the freight forwarders against the effects of the *Acme decision, supra*, by publishing certain proportional rates which, except for certain big shippers, would be available alone to the forwarders. The Interstate Commerce Commission suspended the proposed rates upon its own initiative, and after hearings before Division 5 ordered the rates cancelled. On reconsideration by the full Commission, the rates were again ordered cancelled. A three judge federal court in an unwritten opinion held this order of the Commission void and enjoined its enforcement. The Supreme Court reversed the lower court and sustained the findings of the Commission. The court based its decision on the premise that freight forwarders were shippers and, therefore, the Commission in the execution of its duties imposed upon it by Congress could not sanction a rate discrimination against other shippers in favor of forwarders. The late Commissioner Eastman dissented in both of the Commission opinions.

The freight forwarders found themselves in the position, where, unless remedial legislation was enacted, a vast part of their effective service as forwarders would be nullified inasmuch as they would be forced to pay scheduled rates for transportation via motor trucks. The benefits of such service would, consequently, be removed from those outlying districts which had been served so effectively through the

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92 The tariffs were to apply on "All freight" (except as otherwise provided . . .), which has been transported to . . . [an] origin station . . ., as a part of a truck-load consignment, or carload consignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission and immediately reshipped in the original packages as an L.T.L. [less than truck-load] shipment; or (b) "All freight," . . . which is to be transported to . . . [a named] destination station . . . as an L.T.L. shipment, and immediately reshipped in the original package as part of a truck-load consignment or carload assignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission."

93 Chicago and Wisconsin Points Proportional Rates, 10 M.C.C. 556 (1938).

94 Chicago and Wisconsin Points Proportional Rates, 17 M.C.C. 573 (1939).


96 Commissioner Eastman, supported by Commissioner Mahaffie, urged that "the record is devoid of any complaints from shippers and contains nothing whatever in the way of proof or allegation that the suspended rates would result in injury or prejudice or disadvantage to anyone. There was much evidence from shippers, both large and small, but it was all in favor of the suspended rates." The majority of the Commission relied on Section 2 of Part I of the Interstate Commerce Act; i.e., the prohibition in Section 2 against charging a greater or lesser compensation for any service rendered than is charged for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." To this, Commissioner Eastman found answer by contending that the record "is definite and clear that the circumstances and conditions which attend the movement of the traffic to which the suspended rates would apply are essentially different from the circumstances and conditions which attend the movement of strictly local traffic between the same points." These rates should, therefore, not be suspended. Commissioner Eastman pointed to prevailing rates existing between other carriers that had been accepted by the Commission as proper, which simulated the rates under discussion: 10 M.C.C. 556, 567 (1938); 17 M.C.C. 573, 586 (1939). The railroads, for instance, from time to time established certain published rates and practices which were favorable to forwarders and some few others who had similar operations. Thus, the railroads in the eastern section of the country, prior to 1920, published carload rates on mixed carloads of different articles, and adopted certain practices relating to carload minimum weights and stoppage of cars en route for loading and unloading which favored forwarding operations: *Hearings Before Subcommittee of the Committee on Interstate Commerce of the Senate on S. Res. 146, 76th Cong., 3rd Sess., 28, 500 (1940).*
coordinating efforts of the forwarders. The need for preventative legislation was apparent.

5. Proposed Regulation of Freight Forwarders

The need for legislation which would authorize regulation of the forwarding industry did not stem entirely from the crisis which faced that industry. Conditions existing within the industry itself originally actuated the first recommendations for legislation. As early as 1930, the Interstate Commerce Commission in its annual report recommended such legislation. This was repeated in 1931 and 1932.

In 1936, the Interstate Commerce Commission instituted a general investigation of forwarders, the results of which have been alluded to in several places in this paper. This investigation revealed many undesirable practices existing in interstate commerce due to the lack of forwarder regulation. Although these practices never reached the level of that attained by the express companies, it again indicated the consequences in those industries affected with public interest where there is not adequate control or regulation. Forwarders themselves apparently favored regulation.

The earliest bill introduced in Congress to regulate freight forwarding was H.R. 7047 introduced on May 14, 1937, by Mr. Gearhart. This bill sought to amend the Motor Carrier Act of 1935 to include within the definition of “common carrier by motor vehicle” all “indirect carrier operations.” No further legislation appeared until March 7, 1939, when Mr. Lea introduced H.R. 4827 which proposed a new Part III to the Interstate Commerce Act to be cited as the “Forwarding Carrier Act,” with general provisions for the regulation of forwarders.

Consideration was also given to the regulation of forwarding companies during House hearings in early 1939 on the omnibus transportation bills, H.R. 2531 and H.R. 4862, which resulted in House amendments to the Senate Omnibus Transportation Bill, S. 2009 containing a provision for the regulation of freight forwarders. In conference

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97 One consequence of the decision of the Interstate Commerce Commission was that it was instrumental in providing a medium whereby carriers were able, through the creation of subsidiary forwarding companies, to transport freight at special rates for individual shippers, thus circumventing laws against rate discrimination: Freight Forwarding Investigation, 229 I.C.C. 201, 317 (1938).
98 Annual Report of I.C.C. for 1930 at 81. Annual Reports of I.C.C. for 1931 and 1932 at 86-88 and 37, respectively. After 1932 the Commission has refrained from making any direct recommendation: H. Rep. No. 2901, 3rd Sess., 76th Cong., p. 4. However, see comment on Freight Forwarding Companies in Annual Reports of I.C.C. for 1938 and 1939 at pages 35 and 32, respectively.
99 Id. at 211. Id. at 211.
100 Id. at 236. Id. at 228.
101 This is apparent from the fact that there was no public demand for regulation of the time of the Freight Forwarding Investigation.
102 Freight Forwarding Investigation, 299 I.C.C. 201, 303 (1938).
103 1st Sess., 75th Congress.
104 Section 2 of S. 2009 as passed the House, July 26, 1939.
the provision was removed. Subsequently, two types of bills were introduced in both houses which, though varying to a certain extent in their definitions and terms, were identical in the method suggested for the regulation of forwarding companies; i.e., by subjecting them to the jurisdiction of the Interstate Commerce Commission. Under this authority, forwarders would obtain certificates of convenience and necessity to engage in the forwarding business and could not charge more than fair and reasonable rates for their services. General economic regulation was provided. Later, other bills designed to bring freight forwarders within the definition of "common carrier by motor vehicle" of the Motor Carrier Act were introduced.

6. Legislative History of S. 210 — Part IV of Interstate Commerce Act

With the convening of the first session of the 77th Congress, new proposals for permanent legislation were introduced in both Houses of Congress. S. 210 was introduced in the Senate on January 8, 1941, by Mr. Reed for himself and Mr. Wheeler. On the same date Mr. Lea sponsored H.R. 3684 in the House. S. 210 was referred to the Senate Committee on Interstate Commerce, which considered the bill without hearings and reported it to the floor on March 20, 1941, with amendments. The Senate passed the bill on March 25, 1941. Upon transmittal to the House, it was referred to the Committee on Interstate and Foreign Commerce.

S. 210 followed the general pattern adopted in regulation of common carriers. The Interstate Commerce Commission was given jurisdiction of forwarders by a new Part IV which was to be added to the Interstate Commerce Act. Certificates of convenience and necessity were required and forwarders were subject to general economic regulation. Through routes or joint rates with carriers subject to the Inter-
state Commerce Act were prohibited, although forwarders were permitted to establish through routes and joint rates with other forwarders. The proposed legislation, in this respect, stated that nothing in the bill was to be construed as giving freight forwarders the status of common carriers under the Interstate Commerce Act. One other provision of the bill, as introduced, is significant. Section 404 (b) prohibited forwarders from establishing rates or charges for transportation which would be lower than the "lowest rate published by any carrier or carriers" subject to the Interstate Commerce Act, "whose facilities were used for the handling of such transportation." This section was stricken from the bill by the committee amendment.110

H.R. 3684, upon introduction by Mr. Lea, was referred to the House Committee on Interstate and Foreign Commerce and that Committee scheduled and held extended hearings on the bill.111 This bill differed slightly from the general regulatory features of S. 210. Specific provisions in the bills, however, varied to extremes. The House bill made provisions for certificates of convenience and necessity and rate control as found in S. 210. H.R. 3684 also included a minimum rate section, but in more detailed language. In contrast, however, the House bill permitted through routes and joint rates with other carriers subject to the Interstate Commerce Act, but made no provisions for through routes or joint rates between forwarders themselves. H.R. 3684 did not deny the status of common carrier to freight forwarders.

During hearings on H.R. 3684, objections were made to the minimum rate provision on the ground that it was legislative rate making and therefore an undesirable practice. A more forceful objection was the adverse consequence it would have on the "specialized" forwarders who were still forwarding goods at a substantial savings to the shippers whose goods they forwarded. These groups found the provisions threatened their very existence.112

No member of the Interstate Commerce Commission appeared as a witness during the hearings. However, a statement, presenting the views of the Commissioners on the various sections of the bill was submitted to the committee.113 The majority of the Commissioners agreed that the best plan of regulation was one similar to that outlined in S. 210. They felt that inasmuch as forwarders were viewed as shippers in their relations with rail and water carriers that that should also be the relationship to motor carriers. Thus, through routes and joint rates with other common carriers should be prohibited. All of the Commissioners viewed the minimum rate provisions as setting up an arbitrary standard which should be eliminated and recommended leaving the Commission with power to prescribe the maximum or mini-

110 S. 210 as reported out from the Committee on Interstate Commerce of the House, March 20, 1941.
111 Hearings Before Committee on Interstate and Foreign Commerce of House, on H.R. 3684, 77th Cong. 1st Sess. were held March 11 to 26, 1941.
113 Id. at 127.
mum just and reasonable rates for forwarders, that is, with the same powers it then had with respect to other carriers subject to its jurisdiction.

A further recommendation of importance by the Commission was that the convenience and necessity provisions of the bill be eliminated on the ground that its administration would "be a source of great difficulty and confusion to all concerned" and it was not believed that the public interest would be adversely affected if this were avoided. Some of the commissioners, however, felt that a measure of control should be maintained over forwarders, which they felt could be done by the issuance of nontransferable licenses or permits as a prerequisite to engaging in business. The Commissioners also rejected as contrary to public interest provisions providing for control of forwarders by carriers or carriers by forwarders.

Commissioner Eastman in a separate statement disagreed with the majority of the commissioners on several points. His views are that nothing but good could be accomplished by according forwarders a common carrier status, if they did not already possess that status. As to joint rates, however, Commissioner Eastman agreed with the majority that forwarders should be required to pay published tariffs as this would be the best way to keep forwarders under proper control. He did not agree that forwarders should pay the same rates as other shippers. He also did not agree with the majority on the question of elimination of the section providing for certificates of convenience and necessity for forwarders. These provisions "have for their general purpose the stabilization of transportation conditions and the prevention of an unnecessary multiplication of facilities resulting in waste and financial weakness of carriers." Because of the large number of forwarders having their origin after the date of the original Acme decision (July 20, 1937) Commissioner Eastman suggested that all those

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114 Id. at 134.
115 Ibid. A substitute provision to this effect was suggested.
116 Id. at 136.
117 Id. at 137: "Some may fear that if forwarders are recognized as common carriers it will inevitably follow that they must be allowed to enter into joint rates with other common carriers subject to the Act, and that it would be inconsistent for them to have the status of shippers in their dealings with such other carriers. Neither of these things need follow and both are entirely within the control of Congress. The express companies, which like the forwarders use the services of common carriers, do not participate in joint rates with the latter, but pay for such services. The payment which they make is under special contractual arrangements, but could be under published tariff rates if Congress should so provide."
118 Ibid. "The joint rates between the forwarders and the motor carriers have been mutually satisfactory and profitable," said Mr. Eastman, "notwithstanding that the divisions received by the latter out of those rates differ materially from their local less-truckload rates. If joint rates of this character are not to be allowed, I believe that it should be made clear in H.R. 3684 that it will not be unlawful for the common carriers whose services the forwarders utilize to establish and publish for their use, and the use of others under like conditions, rates which differ from the corresponding local rates, where it can be shown that such difference is justified by a difference in the conditions under which the two types of traffic are handled..." This was in accord with his dissent in the United States v. Chicago Heights Trucking Co., 10 M.C.C. 556 (1938); 17 M.C.C. 573 (1939).
forwarders should be required to make proof of their convenience and necessity before being granted certificates.\footnote{Sec. 409(a), the “grandfather clause” of H.R. 3684, stated that all these beginning operations subsequent to July 20, 1937 must make a showing of the public convenience and necessity. Sec. 409(d) reads: “Any certificates issued under this section shall specify the nature or general description of the property to be transported, and the key points at which or between which, the territory within which, and the territory from which and to which, transportation subject to this part is to be conducted under authority of such certificates. . . .” Key point is defined by Section 402 (1): “The term ‘key point’ means (1) a point or place where shipments are assembled and consolidated for transportation as a unit, or (2) a point or place to which shipments so consolidated are consigned as a unit for breaking bulk or distribution and delivery to final destination.”}

The approach suggested by the majority of the Interstate Commerce Commissioners was open to the same criticism that could be leveled at Senate Bill S. 210, as introduced, namely, that they were misled by the dual status of shipper and common carrier accorded forwarders in the past. Commissioner Eastman’s approach was more nearly in line with logic when he said that forwarders should be given a common carrier status for all purposes. He, however, was not uniform in classifying forwarders as common carriers for he joined with the majority in rejecting the idea of joint rates between forwarders and other common carriers and proposed that they use published rates only.

The whole Commission was unanimous in rejecting the minimum rate provisions of the bill, thereby reaffirming its faith in its ability to protect the interests of all concerned. However, where joint rates were concerned the Commission became shy and dubious of its capacity to protect the interests of the prime carriers.\footnote{The fear of such abuses was expressed strongly in the debates on S. 210 on the floor of the House: Congressional Record, Vol. 87, Pt. 8, 77th Cong., 1st Sess., October 23, 1941, p. 8218.} There appears no reason to believe that joint rates between forwarders and prime carriers would provide any greater opportunity for circumventing the purpose of regulation than would specialized published rates.

A Subcommittee, appointed by Chairman Lea of the Committee on Interstate and Foreign Commerce of the House, after consideration of testimony and material submitted during the hearings on H.R. 3684, rewrote that bill. But, inasmuch as S. 210 was then before the full Committee for consideration, the Subcommittee proposed a substitute for that bill in the form of the rewritten H.R. 3684. In this form S. 210 was reported to the Committee of the Whole House on August 13, 1941, with the recommendation that it pass.\footnote{H.R. Rep. No. 1172, 77th Cong., 1st Sess., August 13, 1941.} The House passed the bill without further amendment on October 23, 1941.

This bill, as it passed the House, contained a number of unique provisions, although it retained the original general pattern of regulation. The Subcommittee apparently surrendered to Commissioner Eastman’s views that special rates — not joint rates — should be made available to forwarders by the prime carriers for assembling and dis-
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tributing services rendered the forwarders. Also, as suggested by Commissioner Eastman, a period of adjustment is permitted during which the carriers may work out special rates and during which motor carriers and forwarders may operate under joint rates and concurrences.

Under Section 410 of the bill as it passed the House, forwarders were required to obtain permits authorizing them to engage in forwarding service except those engaged in certain special types of forwarding operations. No "grandfather rights," however, were attached to these provisions. The Commission was directed to issue permits to any qualified applicant found "ready, able, and willing properly to perform the service proposed," if it found "that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this [Interstate Commerce] Act." Permits were not to be denied alone on the grounds of relationship between the applicant and common carriers subject to Parts I, II, or III of the Interstate Commerce Act, nor solely on the ground "that such service will be in competition with the service subject to this part performed" (122)

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122 Section 408, which is substantially the same as Section 408 of Public Law 558 of May 16, 1942, 56 Stat. 290, 49 U.S.C. §1008 (Supp. V 1946), made it lawful for any common carrier subject to Parts I, II or III of the Interstate Commerce Act to establish and maintain such assembling and distributing rates and charges which would be "applicable to freight forwarders and others who employ or utilize the instrumentalities or services of such common carriers under like conditions, and which differ from other rates or charges, classifications, rules, or regulations which contemporaneously apply with respect to the employment or utilization of the same instrumentalities or services, if such difference is justified by a difference in the respective conditions under which such instrumentalities or services are employed or utilized." H.R. Rep. No. 1172, 77th Cong., 1st Sess., August 13, 1941, page 10. No through routes or joint rates, however, were permitted between forwarders themselves or between forwarders and other common carriers.


125 Section 402 provided: "(b) The provisions of this part shall not apply (1) to service performed by or under the direction of a cooperative association, as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, or (2) where the property with respect to which service is performed consists of ordinary livestock, fish (including shellfish), agricultural commodities (not including manufactured products thereof), a single general commodity, or used household goods, if the person performing such service engages in service subject to this part with respect to not more than one of the classifications of property above specified." [Italicized words not found in Act of May 16, 1942.]

"(c) The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

126 Section 410(c); identical with portion of Section 410(c) of Act of May 16, 1942, supra.

127 Section 410(e). Cf. last sentence of Section 410(e) of Act of May 16, 1942, supra.
by any other freight forwarder or freight forwarders."\textsuperscript{128} Permits were transferable.\textsuperscript{129} Permits were to "specify the nature or general description of the property with respect to which service subject to this part may be performed, and the territory within which, and the territories from which and to which, service subject to this part may be performed, under authority of such permit."\textsuperscript{130} Reasonable terms, conditions, and limitations, as in the case of certificates, may be attached to the issuance of a permit.\textsuperscript{131} Permits do not authorize forwarders "to conduct any direct railroad, water, or motor-carrier operations, except motor-vehicle operations in the performance within terminal areas of transfer, collection, or delivery services."\textsuperscript{132}

Section 411 (a) of the bill as it passed the House prohibited acquisition of control of a carrier subject to Parts I, II or III of the Interstate Commerce Act by a freight forwarder. Section 441 (e), however, specifically sanctioned the acquisition of control of freight forwarders by those carriers.\textsuperscript{133} The latter section was a concession to those who felt

\textsuperscript{128} Section 410 (d), similar to same section in Act of May 16, 1942, supra. An explanation of this subsection was given by Mr. Wolverton on the floor of the House as follows: "The provision in paragraph (d) of Section 410, to the effect that no application for a permit shall be denied because of the existence of other forwarder service which would be competitive, is predicated upon the essential nature of forwarder service as a shipper service, so far as the actual carriers are concerned. Without such a provision, there might be a tendency to deny legitimate operations on the ground that the existing forwarder service was adequate. The committee was of the opinion that if the advantages of freight forwarder service are as great as are claimed for it then the greatest opportunity should be given to persons to go into the business and to make it available to the public to the greatest extent possible." Congressional Record, Vol. 87, Pt. 8, October 23, 1941, p. 8218.

\textsuperscript{129} Section 410 (g), similar to same section in Act of May 16, 1942, supra.

\textsuperscript{130} Section 410 (e), similar to same section in Act of May 16, 1942, supra.

\textsuperscript{131} Ibid.

\textsuperscript{132} Section 410 (h). In the Act of May 16, 1942, supra, the exception reads "except motor-vehicle operations in transportation which, pursuant to the provisions of Section 202 (c) (1) of this Act, is to be regulated as service subject to this part."

\textsuperscript{133} Mr. Wolverton explained the Committee’s view on these subsections in debate on the floor of the House as follows:

(a) It is fundamentally unfair to deny to a common carrier that has invested its money in transportation facilities the right to use those facilities to serve the public upon as favorable a basis as any forwarder can use them. A forwarder in effect employs the facilities, investments, and services of common carriers to do business with the public in competition with those carriers. At present the forwarder enjoys many competitive advantages over the carriers whose services he utilizes. Even under the proposed bill he will have certain advantages. For these reasons the common carriers should not be foreclosed from employing their properties and facilities in the public service upon as favorable terms as their forwarder competitors, provided it is done through a separate corporation subject to the same regulation as other forwarders.

(b) Forwarders, by reason of their lack of substantial investment, are free to withdraw their operations from one common carrier and transfer them to another. This may result in depriving some carriers and shippers of having forwarder service conducted over their lines. This may have the collateral result of diverting carload traffic formerly received from shippers who used the forwarder service for their less-carload traffic. This bill would allow a railroad, motor, or water carrier, for example, if other forwarder service were withdrawn, to establish forwarder service over its own line.

(c) Some carriers have had or now have an interest in or control of certain forwarders where legal control may have ceased, close commercial relations induced by prior financial interest may still persist. In either case a competitive situation may obtain which another carrier should not be prevented from meeting if it can do so through control of a forwarder." Congressional Record, 77th Cong., 1st Sess. Vol. 87 Pt. 8, October 23, 1941, p. 8220.
that the railroads should, through a railroad controlled organization, perform the service then rendered by the forwarders.\textsuperscript{134} The Interstate Commerce Commission in its statement to the House Interstate and Foreign Commerce Committee recommended complete independence for freight forwarders from carrier control or control by those who use its services as necessary in the public interest.\textsuperscript{135} This was in line with the conclusions of the Commission reached in \textit{Freight Forwarding Investigation, supra}.\textsuperscript{136}

The Senate refused to accept the House amendments and requested a conference on November 24, 1941, to which the House agreed the following day. Over five months elapsed before the Conference Committee was able to agree upon a compromise.\textsuperscript{137} The conference report was approved by the Senate and House on May 7 and 11, 1942, respectively, and S. 210, as amended, became a law May 16, 1942.\textsuperscript{138}

\textit{7. Part IV of the Interstate Commerce Act}

The changes made by the Conference Committee in S. 210, as it passed the House the first time, were not substantial. Most of the changes related to adjustment of minor differences between the Senate and House versions of S. 210 and the inclusion of a few provisions contained in neither version which were deemed essential to proper administration of the Act.

The Conference Committee recommended the omission of the exemption given under Section 402 (b) with respect to a “single general commodity.” The Senate provision relating to joint loading, under Section 404 (d), was restored to the Act permitting forwarders to enter into joint loading of traffic agreements with each other. A condition was added by the Conference giving the power of review to the Interstate Commerce Commission with authority to cancel or modify such agreements if the Commission found such agreements inconsistent with the national transportation policy declared in the Interstate Commerce Act. To the “rate making rule” of Section 406 (d) which is similar to Sections 15a (2), 216 (i), and 307 (f) of the Interstate Commerce Act, an additional factor, “the inherent nature of freight forwarding”; was added.

A new subsection, 410 (i), was inserted in the Act which was in neither the Senate nor House bills. It provides that “no freight forwarder which is controlled by, or under common control with a common carrier subject to Parts I, II, or III of this Act shall abandon” any or part of its services without first obtaining a certificate of abandonment from the Commission “that such abandonment is consistent with

\textsuperscript{135} \textit{Hearings Before Committee on Interstate and Foreign Commerce of House on H.R. 3884}, 77th Cong., 1st Sess. (1941) 194.
\textsuperscript{136} 229 I.C.C. 201, 293 (1938).
\textsuperscript{137} H. Rept. 2066, 77th Congress, 2nd Sess., May 4, 1942. No doubt the conference committee was delayed by the pressure of war legislation.
\textsuperscript{138} \textit{Ibid.}; Public Law 558, 77th Congress, 2nd Session, Approved May 16, 1942.
One of the main controversial differences between the Senate and House versions of S. 210 was the prohibition contained in the Senate bill of shipper control of forwarders. The House version contained no such prohibition and the House conferees agreed to this provision, under Section 411 (b), with the proviso that the Commission should have power to issue a permit to such a person when consistent with the public interest and the national transportation policy, and further that such shipper-controlled operations as then in effect might continue until further order of the Commission. Section 420 of the conference substitute bill provided special powers during time of war or other emergency. The House amendment did not contain this provision, although it was found in the Senate bill.

II. FORWARDING BY AIR

Forwarding by air is of comparatively recent origin. In the past, it was more commonly known as "air express." From experimental beginnings as early as 1918, a regular air express was started in 1927 as a subdivision of the Railway Express Agency. Prior to World War II, air express, the only way of moving freight via the scheduled airlines, increased from 9,074 shipments in 1931 to an all-time high of 1,078,189 shipments in 1940. Regularly scheduled airplanes of 17 domestic lines and one international line cooperated in moving this traffic.

Moving of freight by air, during the recent war and after cessation of hostilities, has seen unprecedented growth. Since VJ Day, freight shipments by commercial operator have increased many fold due to the great amounts which have been shipped by the non-certificated carriers and the exclusive and mixed cargo flights of the certificated carriers. For the first six months of 1946, the certificated domestic carriers flew 13,482,633 ton-miles of express and freight. Although the transportation of freight by air has increased a hundred fold in the last ten years, its possibilities remain practically untouched.

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139 C. G. Peterson (Chief Engineer, Railway Express Agency, Inc.), Air Express and Freight, the Past, Present and Future; Frederick and Lewis, History of Air Express, 12 Journal of Air Law and Commerce 203.
140 The Aircraft Year Book for 1940, 112 (pub. by Aeronautical Chamber of Commerce of U.S.).
141 The activities of the Railway Express Agency, in this field, have not been without competition. Frederick and Lewis, op. cit. supra, note 139. The express agency, however, has been the only agency whose schedules have been continuous throughout the years.
142 Freight by air prior to World War II was much more widely developed in other sections of the world, especially where other modes of transportation were of little utility. Jungle Gold, the Story of Guinea Airways, Vol. 3, The Intava World, No. 1 (October 1940), p. 2; Ralph Hancock, Taca: Gold Express, Vol. 3, The Intava World, No. 2 (December 1940) p. 38.
This is an industry of the present and future and its development may well carry with it the air freight forwarder if the latter’s activities are not too severely hobbled by unwise regulation.

A. OPERATIONS

Prior to October 15, 1944,145 no schedules of rates for the transportation of property by aircraft, with the exception of those of the Railway Express Agency, were filed by air carriers with the Civil Aeronautics Board. A few airlines solicited air freight, but property146 could only be shipped by scheduled air carrier by tendering such property, prior to the above date, to the Railway Express Agency. This exclusive agency to handle freight on the scheduled air carriers was the consequence of contracts147 between the Railway Express Agency and the individual air carriers, which were not unlike contracts existing between that agency and the railroads for exclusive handling of package freight via passenger trains. The Railway Express Agency, in conducting its business as an agent of the air lines, limited and today limits its operations “to the promotion and solicitation of traffic and the transportation of the same from consignor to originating airport and from terminal airport to consignee.” The shipments are delivered into the custody of employees of the air carriers at the originating airport, who, in turn, deliver them to the employees of the express agency on arrival at the terminal airport. Unlike railway express, no express messenger accompanies the shipments enroute.

The express agency also coordinates transportation of shipments between rail and air,148 operating in this respect much like the ordinary freight forwarder in his coordination of motor truck, rail and water transportation.

145 On this date American Airlines became the first certified domestic airline to file air freight rates with the Board.

146 Mail and certain company material were excepted by provisions in the contracts between the individual air carriers and the Railway Express Agency.

147 The contents of these contracts is described by the Civil Aeronautics Board, in Railway Express Agency, Grandfather Certificate, 2 CAB 531, 532 (1941): “. . . The contract with each air carrier is terminable at the will of either party on six months’ written notice, and is identical with every other contract except as to the routes involved. By the contract the air carrier agrees to furnish facilities for the transportation of property by aircraft between flying fields adjacent to enumerated points. The air carrier further agrees that during the term of the contract it will not accept property for transportation from any party other than applicant. Gross revenues after the deduction of promotional and operating expenses of the “air express” business are divided 87½ per cent to the air carrier and 12½ per cent to applicant. On its part, applicant agrees to engage as an independent contractor in the solicitation, promotion, collection, acceptance and delivery of parcels, packages, and other property for transportation by aircraft. Applicant further agrees not to enter into the air transportation business by operating its own aircraft in competition with the air carrier during the term of the agreement, and further agrees to perform the collection and delivery service for all property shipments to and from the airport regularly used by the air carrier, and between connecting air carriers at different airports.”

148 Ibid.; In 1940, air-rail shipments, which either started or finished or both started and finished by rail, totaled 192,429. The Aircraft Year Book for 1941, p. 130.
B. The Application of the Civil Aeronautics Act to Forwarding by Air

The jurisdiction of the Interstate Commerce Commission over the express companies under Part I and II of the Interstate Commerce Act has been outlined in prior sections of this paper. Operations of the express companies conducted wholly by railroad, or partly by railroad and partly by water, are subject to regulation under Part I of that Act. Motor carrier operations of the express companies, with certain exceptions, fall under Part II, or what is more commonly known as the Motor Carrier Act. The jurisdiction of the latter act, however, as we have seen, was held not to cover the "indirect operations" or "forwarding operations" by motor vehicle.

The Railway Express Agency, in the light of the limited jurisdiction of the Interstate Commerce Act, cannot claim any status under that act for its "air forwarding" operations. These operations, if subject to regulation, receive that status under the Civil Aeronautics Act.

On October 19, 1938, the Railway Express Agency, Inc., filed application \(^{149}\) with the Civil Aeronautics (Board) Authority for a certificate of public convenience and necessity under the "grandfather" provision of the Civil Aeronautics Act, authorizing it to continue "to operate an 'air express' business over the existing lines of certificate air carriers pursuant to the terms of certain contracts between applicant and the air carriers." No authority was requested to engage in the operation of aircraft. The Board was, by this application, forced to meet squarely the question of the status of the express company under the Civil Aeronautics Act.

The Board placed heavy reliance on precedent and cases relating to express companies and forwarders in their operations on the railroads and with motor trucks, to which space has already been given in this paper, in making its determination.\(^{150}\) It concluded that those who "forward by air, whether the Railway Express Agency or some other type of forwarder, should be 'air carriers,'" within the meaning of the Act. Nevertheless, the Board found that Section 401 (e), the "grandfather" section, under which the applicant was claiming a certificate because of past operations, granted "grandfather rights" only to those engaged in direct air carrier operations. The result was that the applicant, while required to possess a certificate of convenience and necessity for lawful air operations under Section 401 (a),\(^{151}\) could not be issued that certificate under these proceedings. Accordingly, the Board, pursuant to the proviso to Section 1 (2),\(^{152}\) relieved the ap-

\(^{149}\) CAB Docket No. 19-401 (E)-1.

\(^{150}\) 2 CAB 581 (1941).

\(^{151}\) Section 401 (a): "No air carrier shall engage in any transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation..."

\(^{152}\) Section 1 (2): "'Air carrier,' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, that the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest."
plicant from the requirement that it possess a certificate until an inves-
tigation of the contractual relation between the express company and the airlines was completed.

The Board argued that the Act, in view of the language of the definitions of "air carrier,"153 "air transportation"154 and "interstate, overseas, and foreign air transportation,"155 contemplated "dividing air carriers into two classes, one consisting of those who undertake directly to engage in the carriage by aircraft of persons, property, or mail, and the other of those who undertake, indirectly, or by lease, or some other arrangement, to engage in the carriage by aircraft of persons, property or mail." The issue was, therefore, reduced to whether the definition of "air carrier" contemplated persons other than those engaged in the physical operation of aircraft. Pertinent language of the Board reads:156

"Applicant holds out to the public that it will undertake to transport property by air, and enters into contracts with shippers wherein it binds itself to discharge such an undertaking with respect to particular shipments. So far as the shippers are concerned, they are dealing solely with applicant in obtaining transportation of their property by air. Even though it be an intermediary between the shipper and the ultimate operator of the aircraft in which the shipment is carried, it is apparent that applicant is engaged in the business of transporting property by air. Moreover, it is engaged in the business as a common carrier.

"We are of the opinion that the definition of 'air carrier' includes a person engaged in such operations. The natural meaning of the language used in the definition appears to lead necessarily to that result. The use of the word 'indirectly,' in addition to the terms 'directly' and 'by lease or any other arrangement,' appears to represent a studied effort to make the scope of the definition extremely broad. While reference is made in the definition to 'carriage by aircraft,' there is no direct reference made to the 'operation' of aircraft.

"The closest analogy to the definition of 'air carrier' is found in the definition of 'common carrier by motor vehicle' set out in the Motor Carrier Act. As they relate to operations of the kind here involved, however, the two definitions are entirely dissimilar. It will be observed that there is one significant difference — that is, the insertion in the definition of 'air carrier' of the words, 'or indirectly' and the absence of those words from the definition of 'common carrier by motor vehicle'.

"The Motor Carrier Act was enacted on August 9, 1935; the Civil Aeronautics Act on June 23, 1938. Between these two dates there arose before the Interstate Commerce Commission significant litigation involving the definition of the term 'common carrier by motor vehicle' as it applied to forwarders and to Railway Ex-

153 Ibid.
154 Section 1 (10): "'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."
155 Section 1 (21): "'Interstate air transportation,' 'overseas air transportation' and 'foreign air transportation,' respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce. . . ."
156 Railway Express Agency, Grandfather Certificate, 2 CAB 531, 536 (1941).
press Agency. The significant feature of this litigation, for our purposes, is that, throughout, the operations of forwarders and those operations of Railway Express Agency in which the facilities of other carriers were used, were described by the Commission and the courts as 'indirect operations.' They were so described repeatedly by Division V of the Commission in its decision nearly a year prior to the enactment of the Civil Aeronautics Act and the same case was under consideration by the full Commission during the Congressional debates on the latter Act. The decisions, of course, rejected the contention that such 'indirect' operations were those of a 'common carrier by motor vehicle.'

"The conclusion is inescapable, therefore, that the addition of the words 'or indirectly' in the definition of 'air carrier,' at a time when the Interstate Commerce Commission was dealing with operations which it terms 'indirect,' reflected an intention to embrace within the regulatory provisions of the Civil Aeronautics Act all common carrier operations by air, whether direct or indirect, and that those who, as common carriers forward by air, whether Railway Express Agency or some other type of forwarder, should be 'air carriers.' No other conclusion reasonably could give adequate context to the words 'or indirectly' as distinguished from the words 'or by a lease or any other arrangement.' No other conclusion is necessarily required by the express terms of the Act."

The Board further pointed out the significance of Section 1107 (j) of the Civil Aeronautics Act, which amended the Motor Carrier Act to exclude from the regulatory provisions of the latter Act, motor vehicle operations which are "incidental to transportation by aircraft," in avoiding conflict of jurisdiction between the Board and the Interstate Commerce Commission in this field.

In support of its conclusion that the Express Company was not entitled to a certificate under the "grandfather" provisions of the Act as a matter of right, the Board argued as follows:

"Section 401(e) (1) provides that upon the making of the requisite showing an applicant shall be given a certificate authorizing it to engage in air transportation 'between the terminal and intermediate points between which it . . . so continuously operated' during the 'grandfather' period, and 'with respect to all classes of traffic for which authorization is sought except mail.'

"We are of the opinion that the first of the quoted phrases, by referring to 'operations' between terminal and intermediate points, contemplates physical operations directly conducted by an applicant in transportation between such points. This same terminology is used in the proviso to Section 401(a) wherein the continuance of services operated on the date of enactment of the Act is authorized for a temporary period. The activities of the present applicant have not been operations between terminal and intermediate points in this sense. The actual physical operation of aircraft conducted in connection with the services rendered by applicant to the public"

157 49 U.S.C. §677 (j) (Supp. V 1934): "Section 203(b) of the Motor Carrier Act, 1935, is amended by inserting after the words '(7) motor vehicles used exclusively in the distribution of newspapers' a semicolon and the following: 'or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.'"

158 Railway Express Agency, Grandfather Certificate, 2 CAB 531, 539 (1941).
is that of the airlines. The only physical operations directly performed by the applicant are its pick-up and delivery functions.

"The use of the term 'operations' in this section is in sharp contrast to the failure to use that term in the definition of 'air carrier,' except in connection with the proviso of Section 1 (2). This definition and related definitions of air transportation and interstate, overseas, and foreign air transportation use such terms as 'the carriage by aircraft,' 'the transportation of mail,' and 'to engage in air transportation.' The significance of this contrast is emphasized by the language of Sections 604 and 610 of the Act. These sections provide for the issuance of 'air carrier operating certificates' designed to control the safety of operations by air carriers, and from their nature clearly could not have been intended to apply to applicant. In recognition of this, Section 604 provides that the Board may establish minimum safety standards for 'the operation of the air carrier' that any person desiring 'to operate as an air carrier' may apply for a certificate, that a certificate shall be issued if it is found that the person is able to conduct 'a safe operation,' and that the certificate may prescribe, among other things, the airways over which the person may 'operate as an air carrier.' Similarly, Section 610(a) provides that it shall be unlawful 'to operate as an air carrier' without an 'air carrier operating certificate.'

"The language of Section 401(e) cannot, therefore, be said to include within its scope applicant's operations."

C. EXTENSION OF FREIGHT FORWARDER ACTIVITIES TO AIR TRANSPORTATION

On July 10, 1941, as stated at the beginning of this paper, Universal Air Freight announced an expansion of its operations to include forwarding by air. As in the case of operations on the railroads, this forwarder planned to take advantage of the lower bulk rates by consolidating a number of small packages and dividing the savings in the freight rate with the shipper. An example of the attractiveness of the service was apparent in the offer to forward a one pound package, which would cost one dollar by ordinary air express, for 65 cents.\footnote{Universal Air Freight Investigation of Forwarding Activities, 3 CAB 698, 703 (1942).} Universal Air Freight, a subsidiary of the United Freight Company, had a far reaching organization capable of serving a great number of large cities.\footnote{Id. at 701.} Through the cheaper rate which it made available, the forwarder had hopes of tapping an hitherto untouched spring of air freight.

The relationship of this forwarder in shipping by air to the Express Agency resembled that existing between the forwarder and the railroads in its operations via those carriers. This forwarder paid the published rate and requested no service which was not available to an ordinary shipper under similar circumstances. In this operation, however, there existed no competition between the forwarder and the air carrier, since the exclusive right was vested in the Express Agency to handle all freight by air.
In view of the determination by the Board that the Express Agency is an "air carrier" and, therefore, must possess a certificate of convenience and necessity before engaging in air forwarding operations, the question was raised of whether the ordinary freight forwarder also comes within the definition of "air carrier" in the Act.

On November 14, 1941, Universal filed an application with the Board for authority to operate via scheduled air carriers between all States of the United States. A prehearing conference was held on this application on January 26, 1942. At this point, the Board decided that an investigation of Universal's operations was in order and took no further action on the application which is still pending before the Board. On March 9, 1942, the Board issued an order pursuant to which a hearing was held investigating Universal's existing operations. On September 15, 1942, the Board issued a cease and desist order to Universal. In reaching a decision in this investigation, the Board stated with respect to Universal's claim that it was a shipper and not an air carrier within the meaning of the Act:

"Prior to the issuance of the examiners' report the respondent took the position that it is a shipper and not an air carrier within the meaning of the Act. There is no doubt that in its relation with Express Agency the respondent is a shipper. However, as the Board pointed out in Railway Express Agency, Grandfather Certificate, supra, one who, as a common carrier, forwards by air, is an air carrier within the meaning of the Act. It is clear that respondent, i.e., Express Agency, between the respondent and the airlines which actually perform the physical carriage of the property by air, it would seem that the respondent's attempt to distinguish on that basis ignores the spirit of the Act as manifested by the inclusion of 'indirect' operations within the scope of the Board's regulatory jurisdiction."

The Board further commented with respect to Universal's liability as a common carrier:

"Forwarders by rail and motor carrier, however, have consistently been charged with the liability of a common carrier with respect to the property received by them for transportation, the courts holding that they possess the attributes of a common carrier. Likewise, the Interstate Commerce Commission has in recent decisions concluded that forwarders by rail and motor carrier, which shippers in their relationship with the carriers to whom they entrust the transportation of the property are common carriers in their relationship with the public. There is ample precedent, therefore, to support a finding that respondent is a shipper and at the same time a common carrier, if the facts of record reveal this to be true."

In commenting on its determination in the Railway Express Agency, Grandfather case the Board said:

"This determination by the Board appears to have received the approval of Congress as a correct interpretation of its legislative

\[161\] Id. at 704.
\[162\] Id. at 705.
\[163\] Id. at 706.
intent. Legislation was recently enacted amending the Interstate Commerce Act so as to provide for regulation by the Interstate Commerce Commission of freight forwarders. However, the Amendment specifically excludes from the Commission's jurisdiction 'that part of the undertaking of any such person (forwarder) for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized . . .'

"This legislation included certain amendments to the Civil Aeronautics Act with respect to permissible activities of air carriers not directly engaged in the operation of aircraft in air transportation. Such persons were therefore under consideration, and the Civil Aeronautics Act was one of the objects of amendment. Accordingly, it is a reasonable deduction that by allowing the wording of Sections 1 (2) and 401 to remain unchanged Congress gave tacit approval to the Board's interpretation that forwarders are within its jurisdiction."

D. FORWARDING BY AIR AND THE FREIGHT FORWARDER LEGISLATION

Several of the earlier bills introduced to regulate freight forwarders took cognizance of possible air operations of freight forwarders. The bills S. 210 and H.R. 3684, heretofore discussed, as introduced made no mention of such possibilities. S. 210, as passed by the Senate, permitted the forwarders to use the services of "air carriers operating under the Civil Aeronautics Act of 1938, provided that the published tariff rates are paid for all services rendered in accordance with rules and regulations of the Civil Aeronautics Board." The House Committee, in revising S. 210, apparently accepted the determination of the Board that those indirectly engaged in air transportation were air carriers. Under Section 418, forwarders were permitted "to employ or utilize the instrumentalities or services of . . . air carriers subject to the Civil Aeronautics Act of 1938, as amended." However, the bill provided amendments to the Civil Aeronautics Act in the following language:

"Section 4. (a) The first sentence of subsection (b) of Section 1003 of the Civil Aeronautics Act of 1938, as amended, is amended to read as follows:

'Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly
engaged in the operation of aircraft in air transportation (other than companies engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act.'

"(b) Subsection (b) of Section 412 of the Civil Aeronautics Act of 1938, as amended, is amended to read as follows:

'Approval by Authority

'(b) The Authority shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Authority may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.'"

The apparent purpose of these amendments was to give to freight forwarders who may be solely authorized to forward by air — the Railway Express Agency excepted — the same status in their relationship with other common carriers, other than air carriers, that freight forwarders who have no air operations have with those carriers. It is submitted that the exception placed here for the Railway Express Agency, or evidently any other company engaged in air express business, is entirely too broad to accomplish that purpose. Universal Air Freight, whose operations have been discussed, would also be engaged in the air express business just as completely as the Railway Express Agency, with the exception of the contractual relationship between the air carrier and the forwarder. Unless a more definite wording replaces the present language, confusion will certainly follow.

E. THE CIVIL AERONAUTICS BOARD INVESTIGATION

The Board’s Order Docket No. 2540, Re-Indirect Air Services in the Transportation of Property, dated September 26, 1946, reads:

"BOARD ORDER, Serial No. 5203, instituting an investigation into all matters relating to and concerning services of air carriers indirectly engaged in the air transportation of property, such investigation to include inquiry into the following matters:

(a) The question of whether the public interest requires the continuance, limitation, modification or revocation of the exemption order of March 13, 1941 (Orders Serial No. 941), by which Railway Express Agency, Incorporated, was and is temporarily exempted from the provisions of Section 401(a) of the Act requiring a certificate of public convenience and necessity to engage in air transportation;

(b) The extent to which there is or may be a general need for air freight forwarder, air cargo forwarder, air express forwarder, or other similar indirect air carrier services;

(c) The type or types of operation best adapted to performance of the services required to meet such need;"
(d) The extent to which the facilities of the various types of direct air carriers by air may or should be utilized by such indirect air carriers to meet such need;
(e) The extent to which the facilities of the various types of surface carriers may or should be utilized by such indirect air carriers to meet such need;
(f) The extent to which there is a need for classification of indirect air carriers, and the extent to which there is a need for subclassifications within such possible indirect air carrier classifications;
(g) The extent to which indirect air carrier operations should be subject to restrictions to prevent uneconomical competition, and the nature of any such restrictions;
(h) The extent to which existing requirements of law, or their application to such operations, can or should be modified;
(i) Whether or not certificates of public convenience and necessity should be required for such operations, whether a general exemption order should be entered, or whether special exemption orders should be entered; and if the exemption order technique should be utilized by the Board, whether such action should be taken under Section 1 (2) or Section 416 of the Act, and the nature and type of any such exemption orders;
(j) The provisions of Section 408 of the Act in their application to indirect air carriers of property;
(k) The extent to which indirect air carriers of property should, in the public interest, be affiliated with any other carrier or carriers;
(l) The terms, conditions and limitations which should be attached to any certificate or exemption issued to engage in such services.

It is believed that the material discussed in the foregoing pages of this paper may suggest answers to a number of the above problems.

1. The Railway Express Agency

The Board certainly will want to consider the pioneering efforts which Railway Express Agency has expended in making a determination on this point. There would seem to be no question of granting an exclusive right to the Express Agency, since that question has been resolved.\textsuperscript{165} Whether the Express Agency should receive a certificate, or some modified authority, to continue its operations on the airlines of the country should be decided in the scheduled competitive hearing with other forwarders desiring to expand their operations to air transportation. The Express Agency, as far as the air carriers are concerned, should not receive preferential treatment.\textsuperscript{166} It has the advan-

\textsuperscript{165} Railway Express Agreement, 4 CAB 157 (1943).
\textsuperscript{166} Hearings Before a Senate Subcommittee of the Committee on Interstate Commerce, 76th Congress, 3rd Session, on S. Res. 146, p. 481. Commissioner Eastman made the following comment in comparing the activities of the Express Company and the forwarders: "As the forwarders have expanded and as general transportation conditions have changed, the resemblance between express companies and forwarders has continually grown closer. It would be difficult by an inspection of the general run of traffic which they handle to draw the dividing line. Express traffic is still largely handled in passenger trains, but by no means always, and the carload-freight service which the forwarders employ is rapidly approaching passenger-train speeds. Both are specialized organizations for the handling of package freight through the use, very largely, of the facilities of
tage of being a going concern in the shipping of property by air with the disadvantage of ownership by the railroads of the country.\textsuperscript{167} Placed on a competitive basis in air transport business, the Express Agency will be forced to render a competitive service or retire from the field.

2. \textit{The Need for Air Freight Forwarding}

The Board will have a host of material from which to draw. This material has been touched on in the foregoing discussion. In addition, the freight forwarding industry has much operating data which will undoubtedly be submitted to the Board.

Mr. Paul C. Kelly of the American Retail Federation, Washington, D.C. in a hearing before Congress\textsuperscript{168} made the following statement:

"Many retailers use freight-forwarder services. Slower deliveries would require retailers to carry more stock and would require additional capital for the goods which are in transit. Slow deliveries would also cause fewer reorders for seasonal merchandise, especially at the tail end of the season. This not only would reduce the sales and profits of retailers but would also cut down the output of the producer and, therefore; reduce the earning power of labor and the sale of raw materials.

"On the other hand, if the retailer's goods were shipped by express, his transportation costs would be more than doubled. There are no accurate figures on the possible amount of this increase, but we have estimated, and I believe conservatively, that this increase may amount to more than $100,000,000 annually. This amount represents between one-fifth and one-sixth of the retailers' profits for the past year, and during this year retailers' profits were less than 2 percent net of sales. This additional expense must naturally be reflected in the cost of the goods. Retailers cannot possibly absorb this sum. It must be passed on to the consumers in the form of higher prices. Thus, without freight-forwarder services, the consuming public as well as the producer and distributor would suffer."

The advantages to the public and to private industry, which Mr. Kelly states have come through freight forwarding operations via surface transportation, would be amplified if forwarders were permitted to use air transportation.

Mr. Lea, in presenting the Conference Report\textsuperscript{169} on the Freight Forwarder Bill to the House, commented as follows on the usefulness of the freight forwarder:\textsuperscript{170}

"... The enactment of this bill will give the freight forwarders a legal status and place them in their proper relation to the transportation system of the country. Their true field of usefulness is not as a substitute for our regular common-carrier system, but as an auxiliary service which can supplement and improve the carrier

\textsuperscript{167} Id. at 479.
\textsuperscript{168} Id. at 437.
\textsuperscript{169} H.R. Rept. No. 2066, 77th Congress, 2nd Session.
\textsuperscript{170} Congressional Record, 77th Congress, 2nd Session, May 11, 1942 p. 4064.
supply of the Nation and frequently answer the needs of the small shipper which cannot otherwise be supplied.”

Mr. Wolverton, at this same time, in commenting in favor of the adoption of the legislation, stated:\footnote{171 Id. at 4065.}

“To an important extent the forwarder business is concerned with long-haul traffic which involves use of the services of more than one carrier with quite frequently of more than one type of carrier. Since shipments tendered to forwarders are customarily handled on their own bills of lading and since they are the only ones with whom the owner of the goods is in privity of contract, the actual carriers of the freight are not, or need not be known to the shipper. Under this method of freight the forwarder assumes the entire responsibility to its shipper for the accomplishment of a complete transportation service, but then makes its own arrangements with carriers of its own choosing for the accomplishment of the actual transportation for it. The forwarder is thus free to select the type of carriage and the particular carriers whose services it will utilize, and the identity of the carriers used by a forwarder in the performance of a particular service may vary from time to time and even from day to day as it may find necessary to the prompt accomplishment of the transportation it has undertaken to provide. Being free to offer service to the shipping public wherever it can obtain transportation service to enable it to effectuate its contracts, a forwarder can and does bring about a practical coordination of the transportation efforts of rail, motor, and water carriers in the movement of the higher grades of less-carload freight.”

There are numerous other comments and facts indicating the usefulness of the freight forwarder, many of which have been mentioned in previous parts of this paper.\footnote{172\footnote{Hearings Before a Senate Subcommittee of the Committee on Interstate Commerce, 76th Congress, 3rd Session, on S. Res. 146, pp. 387-462.}}

Special interests of railroads, motor carriers and water carriers have been barriers to any extensive coordinated efforts amongst themselves. Commissioner Eastman in the \underline{Freight Forwarding Investigation}, wherein he dissented in part, stated:\footnote{173 229 I.C.C. 201, 312 (1938).}

So far as the trucks are concerned, the forwarding companies have no doubt deprived them of considerable long-haul traffic, but it is clear that these companies have utilized trucks very extensively in their operations, not only in terminal, but also in line-haul service, in taking advantage of every opportunity to use them where greater economy or efficiency would result. They have been among the most successful practical exponents of the principle of coordination between rail and truck service.

The method of handling less-than-carload or package freight which the forwarding companies have developed has, therefore, demonstrated in practical operation its public value. . . .

There is little reason to expect that the air carriers of the country will be any less affected by their own special interests than other types of common carriers, thus being willing to work out with the railroads and the motor carriers coordinated transportation with the best inter-
ests of the public in mind. Should the airlines have an altruistic attitude they must also find the surface carriers in a like mood if such an end is to be attained.

The air carriers have already announced that they will oppose certification of the Railway Express Agency and of the freight forwarders. This action is based on the belief that the Air Transport Association’s plan for a coordinated scheduled air cargo service will enable the airlines to offer a service equal or better than that which could be offered by the Railway Express Agency and the forwarders. Certification of the forwarders in the view of the Air Transport Association would merely provide “duplicate and wastefully competitive services.” This reasoning appears to be lacking in logic.

There is little doubt that the air carriers are acting as the surface carriers have acted in the past in their fight against forwarders.

Public necessity and convenience would seem to dictate the need for a neutral agency which could arrange for that type of transportation most advantageous to the public being served. To satisfy this special need, the freight forwarder can be used and with proven results. A public interest requirement for freight forwarders with the authority to use air transportation in their operations is apparent, and any action by the Civil Aeronautics Board in the scheduled investigation should give appropriate consideration to this need.

Air transportation of freight is in its infancy. Much effort towards growth is missionary work which will require contact of prospective

175 Ibid.; Commissioner Eastman had this to say about the special interests of the railroads and their inability to provide a competitive service to the freight forwarders: “It will, I think, be clear to you why the railroads alone could not duplicate this service, in view of their freighthouse handlings, their transfers in route, their way freight trains, and the complexities of their terminal and intermediate switchings of cars; but you may wonder why the railroads and the trucking companies have provided such service by cooperative effort without the interposition of the forwarders. A single railroad, if it is big enough, can go quite far along such lines with the use of trucks under its own control as auxiliaries, and the Pennsylvania Railroad appears to be an object lesson in this respect. You must remember, however, that there are more than 100 independent railroad systems, to say nothing of the scores of so-called short-line railroads, each intent upon holding the traffic which it gets to its own rails as far as possible, and that many communities are served by two or more of these railroads under widely varying conditions. All of this makes for diffusion and uneconomical multiplication of facilities in the handling of the package freight, if the railroads deal independently with this problem. The forwarders were able to avoid much of this diffusion and multiplication of facilities and to effect a concentration of the traffic which brought with it economy and expedition. They also built up highly trained organizations which could specialize in the handling of package freight, and it most certainly calls for specialization.” Hearings Before a Senate Subcommittee of the Committee on Interstate Commerce, 76th Congress, 3rd Session, on S. Res. 146, p. 480.
176 Quoting from John F. Budd’s Article “Why Orphan the Domestic Freight Forwarder?” — Air Transportation, November, 1946, p. 28: “The domestic freight forwarder is a recognized and important cog in the American transportation wheel. His wares are lower rates through freight consolidation, speedier service, and full responsibility for shipments from the shipper to the consignee’s door. The railroads always went out themselves for the full carload business, but experience has taught them that the freight forwarder can do a better job in the LCL (less than carload) business. As a middleman between the shipper and the carrier, the freight forwarder derives his profits from the difference in rates between carload and LCL shipments.”
customers in order to convince them of the advantages of air transportation. Freight forwarders are primarily soliciting organizations. They are in daily contact with important shippers who can be the source of many items of freight which as yet have never been shipped by air. They are in a most favorable position to give air freight a boost and as it becomes economical to ship additional items by air to precipitate change from surface to air transportation.

It is difficult to understand how the air carriers will gain by the exclusion of the freight forwarder from the air transport field. It will be an expensive addition to the airlines to create special freight soliciting organizations as effective as the freight forwarders. It is not argued, however, that soliciting should be left entirely to the freight forwarders. The freight forwarder can be an effective adjunct to any other soliciting organizations the air carriers may feel necessary to set up. That air carriers should fear for their ability to compete for the trade that freight forwarders will be in a position to offer them is unreasonable, since air carriers possess all the advantages of speed and, as new equipment is developed, economy will favor air transportation in many classes of freight.

It will be recalled that the railroads were at first not pleased with the business which they saw the freight forwarder taking from them. Yet they complained of the out-of-the-pocket costs of the less-than-carload freight.\(^{177}\) Today the majority of the railroads recognize the freight forwarders as an asset to them and have turned over to them a considerable portion of their less-than-carload freight.\(^{178}\)

Having determined that there is a need for the forwarder in air transportation the Board should not stultify such a determination by narrowing his opportunity to serve.

3. Classification of Air Forwarders

In reference to classification and subclassification of indirect air carriers under item (f) of the Board's order above, little comment was made in this paper as to the specialized freight forwarders.\(^{179}\) This is a classification that apparently will be essential for the Board to make. This group of forwarders have special circumstances and conditions under which they operate.\(^{180}\) They usually limit themselves to one commodity and devote their skill, equipment and energies towards the furnishing of transportation which will fit the needs of their select

\(^{177}\) *Hearings Before a Senate Subcommittee of the Committee on Interstate Commerce*, 76th Congress, 3rd Session, S. Res. 146, p. 478; See also *Freight Forwarding Investigation*, 225 I.C.C. 201, 311 (1938).

\(^{178}\) Note 197 supra.

\(^{179}\) Page 16, supra, note 57, supra.

\(^{180}\) For instance the forwarder who specializes in the movement of used household effect considers himself engaged in a distinct and different type of transportation, involving a personal service to a householder who may move but once or twice in a lifetime, and, therefore, the service rendered is individual rather than routine. *Practices of Motor Common Carriers of Household Goods*, I.C.C. Ex parte MC-19, 17 M.C.C. 467. Handling of household goods uncrated requires special skill and experience in the use of pads, manner of packing, and an intimate knowledge of the nature of the commodity.
group of customers. Because of their specialized skill and equipment they have the strongest argument for single responsibility in transportation goods via the various mediums of transportation.

4. Should Certificates of Public Convenience and Necessity or Other Restrictions Be Required to Prevent Uneconomical Competition

The Board may well consider the action taken by Congress under the Freight Forwarder Act in determining whether or not to require certificates of public convenience and necessity. A freight forwarder need only show under Part IV of the Interstate Commerce Act that he as an applicant "is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy."\(^{181}\) The Interstate Commerce Commission is specifically directed not to deny authority to engage in the whole or any part of the proposed service covered by any application made under this section solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders.\(^{182}\)

To what extent these provisions of the Freight Forwarder Act of 1942 have been effective in preventing uneconomical competition can probably be determined from the available records of the Interstate Commerce Commission. It is possible, however, that the intervention of the war since the adoption of the forwarding legislation will not have permitted an adequate period to test the quality of the above provision.

Mr. Wolverton on the floor of the House stated:\(^{183}\)

"As received from the Senate the bill (Freight Forwarder Bill) contained provisions for the issuance of certificates of public convenience and necessity and for special recognition of "grandfather rights" with respect to forwarding operations in existence on July 20, 1937, the date of the Commission's first decision in the Acme Case (2 M.C.C. 415). Your committee, however, has concluded that the reasons which justify such provisions in the case of carriers subject to Parts I, II, or III of the Interstate Commerce Act are not paralleled in the case of forwarders. The substitute proposed therefor makes provision for the issuance of permits without reference to any "grandfather rights."

"Some of the differences in the two situations may be noted. One of the basic reasons for requiring certificates in the case of carriers which perform a physical transportation service is predicated upon the fact that such carriers invest large sums in plant, facilities, and equipment, and look to the public to pay rates which shall yield a fair return thereon over and above the costs of operation. It is therefore important that such investments be not made if not needed, and if the result would be to burden the public with unnecessary transportation costs, or by affording an excess of

\(^{181}\) Section 410 (c) ; U.S.C. Title 49 Sec. 1010 (c) ; 56 Stat. 291 May 16, 1942.
\(^{182}\) Section 410 (d) of Act of May 16, 1942, 56 Stat. 291, 49 U.S.C. §1010 (d) ; May 16, 1942.
\(^{183}\) Congressional Record, 77th Congress, First Session, October 23, 1941, p. 8219.
transportation facilities make it unprofitable for existing carriers to operate. Certificates are appropriate in such cases, and their issuance properly restricted to a showing of public convenience and necessity.

"The case of the forwarder discloses no comparable situation. He makes no substantial investment in plant, facilities, or equipment, and devotes no material property to the public service. He is primarily a solicitor, consolidator, and shipper of the traffic of others over the transportation lines and facilities of others. The public, therefore, needs no protection against improvident investments by the forwarder in transportation property, facilities, and equipment.

"Because forwarders, whether large or small, are essentially shippers in their relation to the carriers whose services they utilize, they properly should acquire no rights by reason of prior operation which would place them in any more favorable a position than any new shipper also desiring to utilize the same carrier services. For this reason your committee has concluded that it would be contrary to sound policy to give special "grandfather" rights to the comparatively few forwarders, to the disadvantage of other shippers seeking to perform similar services."

The Civil Aeronautics Act of 1938\(^\text{184}\) apparently was drafted to permit the Board great flexibility in attacking this problem. The flexibility given the Board by Congress may well have been the result of the indefinite status of forwarders at the time of the passage of the Civil Aeronautics Act of 1938.\(^\text{185}\) The Board is directed by Congress\(^\text{186}\) to permit competition sufficient to maintain a healthy condition among the air carriers. In line with the action of Congress in the forwarding legislation, the Board may feel it wise not to hobble this new phase of air transportation with too rigid requirements for the purpose of obtaining certificates or authorization to operate as air forwarders.

5. Control of Air Forwarders by Other Common Carriers

It is significant that Congress saw fit to permit control of freight forwarders under the Freight Forwarder Act of 1942 by other common carriers subject to Parts I, II, and III of the Interstate Commerce Act. Mr. Wolverton of the House Interstate and Foreign Commerce Committee who guided the freight forwarder bill through the House gave the following reasons on the floor for permitting this:\(^\text{187}\)

"While both the Senate and House bills permit the control of freight forwarders by common carriers subject to Parts I, II, or III of the Interstate Commerce Act, the Senate provisions, by reason of their relation to the certificate provisions in the same bill, were more restrictive. In concluding to adopt the more liberal policy expressed in the House amendment, the conferees were impressed


\(^{185}\) The Interstate Commerce Commission did not complete its investigation of the freight forwarders until October 11, 1938 (229 I.C.C. 201) and hearings were not held before Congress on S. Res. 146 until June 1940.

\(^{186}\) Section 2 (d), Civil Aeronautics Act of 1938, 52 Stat. 980, June 23, 1938; U.S.C. Title 49 Sec. 402 (d).

\(^{187}\) Congressional Record, 77th Congress, 2d Session, May 11, 1942, p. 4067.
by several considerations favoring carrier control of forwarding operations. Among these were the following:

"First. The two largest forwarding operations in the country were developed under railroad affiliation and no complaint of their service appears to have been made by the shipping public.

"Second. Because of the universality of the service which railroads are required to perform, as among persons, localities, and as to different kinds of freight, their control of forwarding operations would tend to be more universal and less discriminatory than forwarder service conducted by individual operators having narrower rights and obligations.

"Third. The investments made by rail, motor, and water carriers in transportation properties, facilities, and equipment furnish a substantial incentive on their part to provide and maintain for the public a permanent and stable service, and as a result their control of forwarding operations should insure to the public a greater permanency of service than if forwarding operations were only in the hands of those who have no real substantial investment in the properties and facilities which make such forwarding operations possible.

"Fourth. The needs of commerce, the convenience of the shipping public, and effectuation of the national transportation policy all require that for the future there shall be a closer and more effective integration of the services of all common carriers of property. Aside from such preferences as freight forwarders have been able to secure, and such competitive advantages as they have had due to an absence of regulation, the rapid rise of the freight forwarding industry in recent years has been due primarily to its accomplishment of an effective coordination of all transportation services under a single responsibility to the owner of the goods. In view of this, it seemed to your committee manifestly unsound and unjust that the Congress should give preference, in the business of integrating and coordinating transportation services, to forwarding companies which have no investment whatever in transportation facilities, equipment and other properties, and to deny the railroads, the motor carriers, and the water lines which have an investment in the transportation plant of the country, by which the forwarder's service is accomplished, the opportunity to engage, in an appropriate manner, in similar operations upon equal terms."

The Board, on the other hand, in a number of cases has stated a strict policy against acquisition of air carriers by other common carriers. This policy is outlined in Boston and Maine and Maine Central Railroads, Control - Northeast Airlines, Inc. The provisions of Section 408 carry into the Civil Aeronautics Act a well-established national policy that the various forms of transportation should be mutually independent. That this has long been the prevailing Congressional intent is conclusively established by the legislative background of the various transportation acts and by the language of the Civil Aeronautics Act itself. We are convinced that a construction of this Act which rigidly limits the participation of other forms of transportation in the air transport


189 4 CAB 379, 381 (1943).
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field is in harmony with the intent of Congress, and is necessary to attain a full and sound development of our national air transportation system. Congressional action clearly indicates a conclusion that the public interest requires that the various forms of transportation be kept distinct, so that each can operate in its own sphere independently of the others. We must therefore scrutinize carefully each situation in which there exists a relationship between an air carrier and another common carrier in order to determine, first, if there has been an acquisition of control within the meaning of the Act, and, if so, whether such acquisition would be consistent with the public interest and in accord with the provisions of Section 408(b)."

Probably a policy of noncontrol by those owning substantial interests in direct transportation operations whether surface or air ultimately would prove the most sanguine with respect to all forwarders engaging in air freight forwarding. In order to obtain the greatest efficiency from the freight forwarders, however, there should be an exception made covering control of air freight forwarders by surface freight forwarders or vice versa, so long as they remain free of control by other common carriers.

The writer is not entirely convinced that adequately regulated and controlled freight forwarders owned by other common carriers would not provide a good non-discriminatory service. This would be particularly true where sufficient competition was available between freight forwarders themselves to prevent any monopolistic practices by the controlling carrier, which would force use of a particular type of carrier by its subsidiary forwarder without regard to the type of carriage which might be the most efficient for the purpose in hand.

In permitting control of freight forwarders by other common carriers under the Freight Forwarders Act of 1942, Congress apparently felt that it was providing adequate safeguards against monopolistic practices by first not requiring the proof of the public convenience and necessity as a prerequisite to the issuance of a permit to operate, and secondly making it "unlawful for any common carrier subject to Parts I, II, or III of the Interstate Commerce Act to give any undue or unreasonable preference or advantage to any freight forwarder, whether or not such freight forwarder is controlled by such carrier, to any undue or unreasonable prejudice or disadvantage."190

III. CONCLUSION

With the great wealth of information which will be available to the Civil Aeronautics Board concerning forwarding operations, and the broad powers under which it functions, the Board is in a well-fortified position to take what action it deems to be wise in bringing the freight forwarder into the air transport field.

The forwarder has won for himself a place in the great and efficient surface transportation system of this country and he can be extremely useful in bringing air transportation into its proper sphere in our economic life, if permitted to do so under proper and wise regulations.