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Judicial and Regulatory Decisions

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THE problem of local and feeder airlines first came before the Civil Aeronautics Board in 1943, when, in Continental Air Lines, Inc., et al., Texas Air Service, 2 a temporary certificate was granted to Essair, Inc., (now Pioneer Air Lines, Inc.) to serve a local route between Houston and Amarillo, Texas. In 1944, the Board took up the problem in more detail in the Investigation of Local, Feeder, and Pick-Up Air Service. 3 In this opinion the Board recognized the marginal character of local and feeder air operations and the intense competition that operators would meet from surface transportation facilities. Yet since the investigation disclosed “an eagerness on the part of proponents of such service” and inasmuch as the experimental operation of local feeder services might result in public benefit, the Board assumed the responsibility of encouraging its development on a limited experimental basis. Accordingly the Board classified the applications for local and feeder service on the basis of regional trade areas. Seven of these area cases have been decided to date and form the basis for this comment. 4 They have added 14 new carriers and 11,717 route miles to the domestic air transportation system. 5 The Board has made no attempt to dif-

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1 This is the third in a series of comments on standards used by the Civil Aeronautics Board in deciding various cases. The first two were Paramount Public Interest In Domestic New Route Cases in 14 JOURNAL OF AIR LAW AND COMMERCE 117 (1947) and Recent Trends In Domestic Airmail in 14 JOURNAL OF AIR LAW AND COMMERCE 254 (1947). A comment on standards in international cases will appear in an early issue.

2 4 CAB 215, 478 (1943).

3 6 CAB 1 (1944). Chairman Landis has stated: “The value of such an investigation must be measured in terms of its probable benefits as against the time and effort consumed, as well as the time and effort thereby diverted from other pressing tasks . . . Under the impact of a series of concrete cases, such as the Texas-Oklahoma Case . . . and the North Central Case . . . The Board has moved far from the general principles it originally enunciated in the Local, Feeder, and Pick-Up Air Service investigation.” Petition of American President Lines, Ltd., et al., 7 C.A.B. — (Order E-386, Mar. 19, 1947, at p. 24 of Landis’ concurring, mimeographed opinion). The accuracy of Mr. Landis’ last statement, which does not indicate the manner of deviation, may well be questioned. The two cases mentioned by him (see citations note 4, infra) follow the general attack on the problems involved pursued in the earlier area cases. The earlier cases have not been accused of departing from the general principles. However, see text at notes 19 and 22, infra.

4 The decided cases are Service in the Rocky Mountain States Area, 6 CAB 695 (1946); Florida Case, 6 CAB 765 (1946); West Coast Case, 6 CAB 961 (1946); New England Case, 7 CAB 27 (1946); Texas-Oklahoma Case, 7 CAB—(Order E-136, Nov. 14, 1946); North Central Case, 7 CAB—(Order E-200, Dec. 19, 1946); Southeastern States Case, 7 CAB—(Order E-435, April 4, 1947). At this writing the Middle Atlantic Area, Mississippi Valley, Great Lakes, and Arizona-New Mexico cases are still pending. These cases also involve trunk line proposals which will not be considered in this comment. The cases also include applications for certificates of convenience and necessity for drop and pick-up service and for helicopter service. See North Central Case, supra. These applications are also beyond the scope of this comment.

5 The following carriers have been certificated: Florida Airways, Inc. (formerly Orlando Airlines); Central Airlines, Inc.; Aviation Enterprises; Monarch Air Lines, Inc. (formerly Ray Wilson, Inc.); Challenger Airlines Co. (formerly Summit Airways Co.); E. W. Wiggins Airways, Inc.; Southwest Airways Co.; West Coast Airlines, Inc.; and Empire Airlines, Inc. The following have been selected subject to a finding of adequate airport facilities; Wisconsin Central Airlines; Iowa Airplane Co., Inc.; Parks Air Transport, Inc.; Piedmont Aviation, Inc.; and Southern Airways, Inc.
ferentiate between local and feeder airlines. However, a feeder airline has been defined as "a common carrier performing the dual function of concentrating and disbursing mail, passengers, and/or property within a given marketing area from widely scattered points to a few terminal points."  

The Board has recognized that the provision of short-haul, local service with aircraft of conventional types will be largely an experimental operation concerning which practically no information from actual experience is available. Because of this fact there is great difficulty in reaching a sound judgment on the probable success of feeder lines in competing with surface transportation for conveyance of passengers on relatively short trips. The cities concerned in the various applications have often enthusiastically submitted briefs to show their need for air service, but the Board has recognized that the success of a route will not depend upon civic pride but rather upon the individual traveler's judgment.

The Board has considered it a duty to authorize a reasonable amount of local service throughout the United States on an experimental basis, and in so doing has kept in mind "the over-all economy of our air transportation system and the financial obligation of the Government in the form of mail compensation”. In all cases the certificates were limited to a three year period although applicants mentioned the difficulty at present of obtaining any flight equipment and argued that this limitation discouraged experimentation with new aircraft types. However, beginning with The New England Case, the Board provided that such three year period would commence either six months after the date of the certificate or when the carrier began to operate, whichever date occurred first.

Since the Board is concerned with establishing a sound over-all transportation pattern in each general area, it does not specifically consider the proposal of each individual applicant and makes no attempt to limit its inquiry to the particular points proposed. The Board has recognized that local service is not justified where it would compete with trunk line service; but recognized at the same time that trunk line service between two cities, being part of a national plan, may not serve their local traffic patterns. In addition, where a trunk line is certificated at the extremes of a segment, intermediate stops by such carrier may be more economically sound than establishment of local or feeder service. Where service is proposed to

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6 One member of the Board designated a local service as designed to link outlying communities with their principal metropolitan markets and feeder service as designed to connect with trunk line carriers for the onward passage of long distance travelers originating at or destined to smaller communities. Young, Concurring and Dissenting, Texas-Oklahoma Case, note 4, supra. It should be noted that the Civil Aeronautics Act of 1938 makes no distinction between local or feeder airlines and trunkline carriers but, on the contrary, broadly authorizes the development of an "air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States . . ." Section 2, 52 Stat 980 (1938), 49 USCA § 402 (Supp. 1946).


8 Investigation of Local, Feeder, and Pick-Up Air Service, note 3, supra.

9 Service in the Rocky Mountain States Area, 6 CAB 695, 730 (1946).

10 at 730-31.

11 See cases cited in note 4, supra.

12 The Board does not answer this argument, saying, "although we recognize these factors, we see no reason to change the three year effective period of the certificates issued." Texas-Oklahoma Case, note 4, supra, Order E-136 at 81 (mimeographed opinion).

13 In the New England Case at 80-81 the Board further provided: "If at the end of that time suitable equipment has not been fully developed but is in the final stages and conditions should warrant a further postponement in order to permit certificated carriers to take advantage of such equipment, an extension of the effective date of the certificate can be made upon appropriate showing to us." New England Case, note 4, supra, at 81. However, in this case the Board did divide the area into a number of sub-areas, probably in conformity to existing traffic patterns.

14 Texas-Oklahoma Case, note 4, supra.

15 New England Case, note 4, supra. In this case Portsmouth, N. H., and Saco-Biddeford, Me., were designated as intermediate points on Northeast's route no. 27 running between Lawrence, Mass. and Portland, Me. An application for feeder service to the two cities was accordingly denied.
cities located relatively near cities already certificated, the Board generally holds that a new route is not justified. Understandably, a route linking cities relatively close together would not be warranted. However, where the concentration of large towns and cities along the route impedes the flow of surface traffic an experiment with an air route is justified. Also, where local service would augment a trunk line, by providing air transportation to outlying communities from the center served by the trunk carrier, there is justification for establishing a feeder route.

Although at present no flight equipment has been certificated which would combine passenger and drop and pick-up service, it is possible for the carriers to experiment along this line. The certificates contain no limitation as to the type of equipment, and the Board has indicated it will approve such service when appropriate aircraft are available.

The earlier certificates granted contained a provision requiring service to each route point on each flight. The purpose of this provision was to insure a maximum amount of service to all points on the route. In practice however, Pioneer Air Lines found that this condition was unduly restrictive for it prevented additional schedules for the more heavily traveled route segments. While local feeder carriers must develop the short-haul traffic potentialities of their routes and cannot expect to engage in trunk line service, the Board has granted permission to several carriers to operate shuttle flights between any two points. This policy was severely criticized by Mr. Young, who recognized the need for flexibility in local service, but felt that the blanket authorization granted would tend to remove too much Board control over still experimental operations. Unregulated competition with trunk lines might also result.

Since decisions in the early cases were based upon the economic feasibility of the routes certificated, a finding of adequate airport facilities was not required. This policy was changed in The North Central Case where it appeared that a majority of points certificated had inadequate landing facilities. This inadequacy was aggravated by the trend toward the use of larger aircraft in local operations. Consequently, the Board stated that it would withhold the certificates until the selected carriers indicated that they could operate approximately in accordance with the Board's intention.

**Selection of Local and Feeder Air Routes**

With the above considerations as a background — all of which did not appear in each case — the Board proceeds to select the routes and points to be served on the basis of their economic feasibility and their importance in a national air transportation system. The three important factors considered by the Board in this connection are the community of interest between the cities to be served, the traffic potential, and the quality and availability of existing surface transportation facilities.

17 West Coast Case, note 4, supra.
18 New England Case, note 4, supra.
19 Ibid.
20 Ibid.; West Coast Case, note 4, supra; and North Central Case, note 4, supra.
21 E.g. Service in the Rocky Mountain States Area, note 4, supra.
24 Note 4, supra, at 79 (mimeographed opinion). The Board there said that: "If operations over the route pattern which we have established cannot be inaugurated within a reasonable period of time, or if service cannot be provided to a sufficient number of intermediate points, there will be no opportunity to test the value of such local service operations."
25 This decision was followed in the Southeastern States Case, note 4, supra.
26 Apparently the needs and desires of the Post Office have received scant attention in these cases, probably because of the lack of evidence of the effect upon air mail volume of local air service.
relations, agricultural markets, manufacturing activities, tourist trade, and others of similar nature. 27 Closely allied to this factor is traffic potential which is measured by consideration of population, hotel registrations, telegrams and telephone calls, and the volume of travel along the proposed route by other means of transportation. The traffic potential likely to be generated need not be adequate to support trunk line operation but it should be sufficient to tend to make the carrier self-supporting, thus reducing the cost to the Government. 28

Since the inherent advantage of air transportation over other means is reduced with shorter distances, the adequacy of surface facilities attains prominence. Where no direct surface transportation facilities exist between two points, the need for local air service is greater than where there are good surface means available. Although points may be connected by good highways, where the area is large and the population mobile — as in the Texas-Oklahoma Case — local air service is nevertheless justified. Finally, where cities are relatively isolated because of terrain and geographical barriers, local air service is also deemed desirable. 29

The use of all these factors in selecting local feeder routes indicates that in general the Board establishes the routes according to existing traffic flows and population densities instead of attempting to establish new and independent travel routes.

**SELECTION OF A CARRIER**

In general, the factors considered by the Board to be pertinent in determining the fitness, willingness, and ability of an applicant in accordance with Section 401 of the Civil Aeronautics Act 30 are “whether it has a proper organizational basis for the conduct of its proposed operation, an adequate plan of operation made by personnel qualified in such matters, and sufficient financial resources available”. 31 The applicant must demonstrate its ability to provide the service required, present its aeronautical experience, and state its capital resources and financing plans. An applicant also should be prepared with estimates of operating expenses, non-mail revenue expected, and mail revenue needed along with its proposed plan of operation. After weighing the relative merits, the Board makes its selection of a carrier. 32

The aim in such selection is to authorize a system which is neither so small as to make economical operation impossible nor so large that the carrier would not have an integrated system. 33 Although an existing trunk line carrier might be able to provide local service at less cost to the Government, the Board feels that it is not in the public interest for such carriers to enter the local field. 34 Because of the low traffic potential of smaller cities

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27 In the North Central Case, note 4, supra, community of interest was revealed by the previous use by a manufacturer of private air transportation and by the monthly average of air passengers per 1000 population in certificated cities during the Board's 1940-1941 test months.

28 North Central Case, note 4, supra. It should be noted that the Civil Aeronautics Act requires government support to enable the carrier “to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the postal service and the national defense.” 52 Stat 998 (1938), 49 USCA § 486 (b) (Supp. 1946). Service in the Rocky Mountain States Area, note 4, supra.

30 52 Stat 987 (1938), 49 USCA § 481 (Supp. 1946).

31 North Central Case, note 4, supra, at 47 (mimeographed opinion). The Board uses this identical standard in new trunk route cases and cited as authority American Export Air., Temporary New York-Foynes Service, 3 CAB 294, 298 (1941).

32 In one case where the Board was faced with a choice between two equally qualified applicants, it selected the carrier which first filed application. Service in the Rocky Mountain States Area, note 4, supra. Generally, of course, time of application is not a factor. Continental A.L. et al., Mandatory Route, 1 CAA 88 (1939).

33 North Central Case, note 4, supra. Of the ten carriers then certificated, four were authorized to operate less than a 1000 miles of route. Only four were authorized to operate more than 1500 miles, and none for as much as 2000 miles. Mr. Young is of the opinion that some of the systems authorized are not large enough to be economically successful. He favors certification of larger individual systems. Texas-Oklahoma Case, note 4, supra, dissenting opinion.

34 New England Case, note 4, supra.
and the greater competition from other forms of transportation, economical operation must be a primary concern of local feeder service operators. Because of this marginal character, large planes and luxury service are ill suited. It is felt that greater effort and managerial ingenuity can be expected from an independent local operator, devoting all his efforts to the development of traffic, than from a trunk line operator engaging in subsidiary operations. 35

Thus, in The Florida Case the Board early laid down the rule that the public interest requires a carrier backed by local capital and having a local management. Local experience and recognition plus a primary interest in providing service to the local area should enable a maximum development of the traffic potential. Where service is certificated over several routes in one state or area, the Board has held that operation by a single carrier would be desirable. 36 This would permit maximum flexibility in routing equipment and reduce terminal facilities expense, maintenance, and overhead costs.

Two cases have presented the problem of subsidiary operation of local feeder service by companies not otherwise engaged in air transportation. 37 The Board has consistently rejected such applications because of its view that such enterprises would not provide the full energies of management necessary to the successful operation of feeder routes, particularly where the application does not coincide with the service found necessary. Where the parent organization is engaged in a business completely unassociated with aeronautics, the likelihood that subsidiary operation by it would not be enthusiastically pursued is also a factor in the Board's decision. The Board believes that lack of experienced personnel militates against operation by a parent organization even though such personnel are easily procured. This argument may not apply to air freight applicants, for example, where the parent organization customarily handles freight. The arguments appear to be only makeweights for the decision can only be justified on the policy ground that feeder service must be provided by independent carriers, and that only air carriers will earnestly foster aviation in accordance with the policy of the Civil Aeronautics Act.

CONCLUSION

Because of the very nature of the proceedings and problems involved, it is difficult to generalize; but the above factors largely represent what the Board has considered important in these cases. In the applications the Board has been faced with many problems which can only be solved on the basis of actual operational experience. The policy of the Board in selecting feeder routes and carriers, while sound in general, may be criticized in a few particulars. Since the program is experimental in nature it may be questioned whether the Board is justified in completely eliminating the trunk line carriers from participation in the experiment. 38 The argument for trunk lines is based on the existing organization of the trunk line carrier, its maintenance facilities, traffic and sales department, communications system, and minimum additional investment and overhead requirements. It is also suggested that in view of the shortage of desirable equipment the public interest

35 Service in the Rocky Mountain States Area, note 4, supra. "We do not believe that the service authorized should be given to either of existing carriers, United or Western... The type of service contemplated herein involves a fundamentally new service to meet the needs of smaller communities and involving relatively short hauls. The service we believe is necessarily an experiment which will require the utmost economy of operation and unusual efforts to develop the traffic potentials of the smaller communities served. The luxuries of the conventional service must be curtailed sharply if the operation is to be commercially successful. We conclude therefore that an independent operator whose economic future is dependent upon its ability successfully to develop the traffic of the route should be selected..." West Coast Case, note 4, supra, at 599.

36 New England Case and North Central Case, note 4, supra.

37 Texas-Oklahoma Case, note 4, supra, (subsidiary operation by a railroad and by an aircraft manufacturer); North Carolina Case, note 4, supra (subsidiary operation by a railroad and by an automotive equipment manufacturer).

38 Mr. Young is an insistent advocate of participation by trunk line carriers. See his dissenting opinions in the Texas-Oklahoma Case and the Southeastern States Case, note 4, supra.
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might better be served by having the three year effective period run from the date of inauguration of service. 39 Under the existing certificates the successful applicants have only six months in which to prepare for operations and are forced to procure whatever flight equipment is available within that time. 40 It would seem that the experiment would be more conclusive if appropriate flight equipment were available. 41

The cases taken together also raise the question of whether the Board is providing a nationally integrated air transportation network, or whether it is merely establishing locally useful air service. It may be questioned, too, whether the extent of the Board's experimentation in this field is too rapid in view of the present financial difficulties of the trunk line carriers and the overall cost to the government.

N. E. J.

PUBLIC INTEREST IN AIR CARRIER MERGER AND ACQUISITION OF CONTROL CASES — THE AMERICAN-MID-CONTINENT CASE

In The American-Mid-Continent Case 1 the proposed merger or acquisition of control was disapproved by the Board as inconsistent with the public interest on the grounds, primarily, that the route patterns of the two lines were so dissimilar as to preclude integration through their coordination, and secondly that American's size and economic power would give it an artificial competitive advantage over carriers competing and connecting with the present Mid-Continent system. 2 These factors were examined in the light of the policy provision of the Civil Aeronautics Act 3 and were held to tend to thwart its application. There is some indication that the Board was again expressing fear of having its hands tied in the unforeseeable future by the merger. 4 Mid-Continent's position as an independent North-South trunk line carrier was given some special importance, the Board holding that its merger with a through East-West carrier would work to the detriment of other connecting services by lessening competition, thus defeating public interest as defined by Section 2 of the Act. Having further found that Mid-Continent's future as an independent carrier was promising if given proper management, the application for merger was disapproved for the foregoing reasons on the grounds of its failure to satisfy the public interest required by Section 408(b) of the Act. 5

The case is essentially a 1946 reaffirmation of principles enunciated by

39 This proposal is also advanced by Mr. Young in his dissent in the Texas-Oklahoma Case, note 4, supra.
40 Feeder line operators have been advised to make a joint effort to develop a specially-tailored feeder line aircraft. But the pressure exerted by the limited time available tends to preclude such efforts. See 50 Am. Av. Daily 256 (April 22, 1947) and Issue of CAA Civil Plane Aid Revived, 10 Am. Av. 11 (April 1, 1947).
41 The view has been expressed that it is up to the Board to solve the equipment problem by certificating enough feeder mileage to create a feeder aircraft market for the manufacturers. See 52 Am. Av. Daily 46 (July 10, 1947).
1 American Air.—Acquisition of Control of Mid-Cont. Air., 7 CAB—(Order E-5205, Sept. 27, 1946).
2 The "mere volume and geographical scope of its (American's) operations . . . may enable it to divert a substantial amount of traffic from a competing carrier without at the same time rendering a service more attuned to the public convenience and necessity." Id., at 24. But Chairman Landis maintains that the decision is based solely on integration, an implicit denial of the import of this quotation. See: Landis, The Job Ahead for C.A.B., Proceedings, 1946 National Aviation Clinic, p. 39-51 (Harlow Publishing Co., 1946).
4 Note 1, supra, at 27-29; and see United A.L., Acquisition of Western A.E. 1 C.A.A. 739 (1940); United A.L.-Western A. S., interchange of equipment, 1 C.A.B. 729 (1940).
the Board in 1940. In *The United-Western Acquisition Case*, the question of merger of a major transcontinental carrier with a North-South connecting line was first considered and rejected by the Board. The cases are distinguishable; in the earlier opinion, United was already operating parallel to Western over much of the latter's routes as its only competitor. The desirability of competition on the West Coast was certainly a factor. But the concept of the independent North-South carrier feeding the larger latitudinal lines seems to have had, and still to have, some part in the Board's concept of the proper growth of the airlines.

The Board has been fairly consistent in its requirement of integration in merger cases, i.e., that merged units should operate over an area having a community of traffic potential. Only in the case of a proposed merger of an air carrier into an other-than-air carrier is integration expressly required by the Act. However, Section 408(b), among other things, requires mergers to be consistent with the public interest which is defined in the policy provisions of Section 2. The Board construes integration as one of the elements of public interest in that section which must be applied to Section 408(b). *The American-Mid-Continent Case* shows how the C.A.B. reads an integration requirement into the Act:

> "Since the first two statements of public policy set out for our guidance in Section 2 include the adjurations to encourage and develop an air-transportation system properly adapted to the country's needs, and to regulate air transportation in such a manner as to improve the relations between and coordinate transportation by air carriers, it is highly pertinent to inquire to what extent the proposed transaction would promote the development of a well-integrated, internally coordinated pattern of air transport."

In dealing with integration, it is difficult to determine the relative weight the Board will assign in a given case to the presence or absence of integration features. *The American-Mid-Continent* decision stated that a relatively clear absence of integration went far to justify a finding that the public interest would not be served by the approval of the proposed merger. On the other hand, in *The National-Caribbean Case*, where the merger was disapproved, lack of integration was stated not to be of itself the controlling factor in determining that public interest would be served...
by the merger.\textsuperscript{12} And again in \textit{The Western-Inland Case} a merger was approved despite the complete lack of integration because of the controlling importance of safety and efficient management.\textsuperscript{13} \textit{The Western-Inland Case} by disregarding integration and \textit{The National-Caribbean Case} by emphasizing integration represent extremes of the Board's holdings on the weight to be attached to integration. \textit{The American-Mid-Continent} approach is perhaps in the middle ground, in a field where the standards can only be analyzed in the light of the complete facts of a particular case.

\textit{The American-Mid-Continent} Case is also valuable as a precedent in its application of the competition standard for determining the public interest. Two sections of the Act require competition; first, Section 2(d) requires competition to the extent necessary to assure the sound development of an air transportation system. Having determined that the public interest is satisfied by this section, the Board is further required by Section 408(b) to determine that the proposed merger will not create a monopoly "and thereby restrain competition." The Board interprets the latter section as a further limitation on the broader provisions of Section 2, and hence may not approve a proposed merger because it would result in a monopoly under Section 408(b) even though it believes competition is not required in the public interest under Section 2.\textsuperscript{14} However, it would seem that the Board's definition of monopoly as a "condition embodying a particular degree of control"\textsuperscript{15} is vague enough to permit mergers which would allow an airline to become the only air carrier serving a particular route under circumstances where the "spirit of emulation" from connecting routes,\textsuperscript{16} or competition from alternative air routes or other forms of transportation would effectively prevent monopoly practices from arising.

Having found the public interest opposed to the merger, the American application was disapproved without examination into the financial terms proposed. In many merger cases the price factor has been largely determinative of the Board's public interest finding. The question of the valuation of intangibles in such sales was first considered in \textit{The TWA-Marquette Acquisition Decision}.\textsuperscript{17} When some measure of the price can definitely be allocated to the certificate of public convenience and necessity, the Board rejects the application because it disapproves of making these certificates marketable securities.\textsuperscript{18} However, the problem of the going-concern value of an airline is still perplexing. It should be noted that in a recent opinion in \textit{The Arizona Air.-TWA, Transfer Route No. 38 Case},\textsuperscript{19} the Board, while withholding approval until after the decision in \textit{The Arizona-New Mexico Area Case}, indicated that it might not look adversely upon the transfer of the certificate for this route if the price were reduced to a reasonable amount.

\textsuperscript{12} Note 10, \textit{supra} at 8, "Lack of integration . . . precludes approval . . . unless other considerations of public interest require a contrary conclusion." Lack of integration was the basis of decision, however.

\textsuperscript{13} \textit{Western A. L., Acquisition of Inland A. L.}, 4 C.A.B. 654 (1944).


\textsuperscript{15} See Note, (1941) 12 \textit{Journal of Air Law and Commerce}, id., and cases cited therein.

\textsuperscript{16} See Comment (1947) 14 \textit{Journal of Air Law and Commerce} 117, at 120 for an analysis of the Board's attitude toward competition in new route cases. Also see \textit{Acquisition of Marquette by TWA}, cit. note 14, \textit{supra}; and Melone, \textit{Controlled Competition: Three Years of the Civil Aeronautics Act} (1941) 12 \textit{Journal of Air Law and Commerce} 318.

\textsuperscript{17} Note 15, \textit{supra}.

\textsuperscript{18} \textit{Mayflower-Northeast Case}, note 10, \textit{supra}, at 684 (in the admitted absence of good will, the price above the value of Mayflower's stated assets was held to be the result of certificate bargaining, and so \textit{contra} to public policy).

\textsuperscript{19} 7 C.A.B.— (Order E-331, Feb. 19, 1947).
inasmuch as profitable operation of the route was apparently only possible if the route were connected with other routes. Excessive price or an unfairly distributed price are plainly conducive to a finding that public interest will not be served.\textsuperscript{20} The present proposal of Western to sell United Airlines its important Denver-Los Angeles route for a substantial payment and in furtherance of alleged better route integration for both carriers will furnish the Board a difficult case on this general problem.

Reading these cases with The TWA-Marquette Acquisition opinion, it would appear that bargaining on the basis of the “franchise” or “right to operate the route” will be acceptable whenever the applicant can prove an inherent value in that right beyond the bare certificate. The distinction can become very difficult; when the bargaining is at arms-length, the Board is more willing to make it.\textsuperscript{21} Moreover, the safer course for the applicant would be to avoid the appearance of assigning a value to a certificate by attributing the excess price over book asset value to an increase in market value in tangible assets, and the Board seems quite willing to accept such an explanation.\textsuperscript{22} It should be noted that the acquisition of a foreign air transport corporation which holds no certificate is handled differently. In such cases the Board has shown willingness to allow a purchase price reflecting good will and operating privileges.\textsuperscript{23}

The remaining principal consideration in determining the public interest under Sections 408(b) and 2 is that of safety and sound management.\textsuperscript{24} In The American-Mid-Continent Case the only consideration given to either safety or sound management was the Board’s expressed belief that proper management attitudes would do much to aid Mid-Continent’s future development.\textsuperscript{25} In The United-Western Case a finding of prospective satisfaction of both requirements by Western, the carrier to be acquired, was an element in the refusal of the application. The Board approved the merger in The Western-Inland Case almost solely on findings of poor management and an unsatisfactory record in the acquired line, notwithstanding the presence in that case of a complete lack of integration and a price reflecting considerable appreciation over book values and employment contract bonuses to some of Inland’s officer-stockholders. Such pessimism concerning the prospects of improving Inland’s management seems contrary to both The United-Western and The American-Mid-Continent opinions.\textsuperscript{26} To some

\textsuperscript{20} “Excessive price paid for an air carrier comes . . . out of the pockets of the . . . public.” National-Caribbean Case, note 10, supra, at 14. This case was also an extreme example of unfair distribution. Caribbean’s majority stockholders were paid $3.58 per share as against $.94 per share to minority holders. Bonuses to certain officer-stockholders in the form of employment contracts were approved by the Board in The Western-Inland Case, note 13, supra, over the protests of concurring members Warner and Branch.

\textsuperscript{21} The distinction was evidently not apparent to the dissent in the TWA-Marquette Rehearing, note 14, supra.

\textsuperscript{22} Western-Inland Case, note 13, supra. The Board accepted the contention that assets with a book value of $296,000 had appreciated on the market to $485,000 (the purchase price), so that neither good will nor franchise value was represented therein. In the light of this and The Mayflower-Northeast decision, note 10, supra, the practice of asserting a complete absence of intangible values in the purchase price whenever possible, would seem to be encouraged.

\textsuperscript{23} United A.L., Acquisition of Lamsa, S. A., 4 C.A.B. 409 (1943). For a case where no real operating privileges were found to exist, see Branif Air. et. al., Acquisition of Aerovias Branif, S.A. 6 C.A.B. 947 (1946).

\textsuperscript{24} Section 2(b) note 3, supra, “assure the highest degree of safety in, and foster sound economic conditions in such transportation,” and 2(e) “The regulation of air commerce in such manner as to best promote its development and safety.”

\textsuperscript{25} Note 1, supra, at 36.

\textsuperscript{26} As was noted in Mr. Lee’s dissenting opinion, which also pointed to the financial burdens to be incurred by Western. The majority opinion is perhaps the most difficult to explain of any rendered under Section 408 (b).
extent, at least, The American-Mid-Continent opinion represents a retreat from the emphasis given the appraisal of management found in The Western-Inland Case.

The American-Mid-Continent decision, as the most recent interpretation by the Board of the public interest provisions of Section 2 in Section 408 cases, is perhaps most important for the questions it leaves unanswered. Chairman Landis' interpretation of it as simply a matter of integration cuts away most of the difficulties. But there is some language in the opinion that leads to a suspicion that the Chairman oversimplified. With some justification it can be read as an expression of caution during the postwar period. If that policy did in fact lie somewhere behind this decision, it appears likely that its validity will be severely tested in the months to come.

ROBERT I. LOGAN*

STATUTE AUTHORIZING SERVICE ON NON-RESIDENT AVIATORS

Statutes authorizing the commencement of suit against a non-resident motorist by substituted service on a public official of the state where the cause of action arises have been widely accepted. Their constitutionality is now unquestioned and they are recognized as a desirable procedural device. By making non-residents amenable to local law through substituted service they purport to regulate the operation of motor vehicles for the safety and convenience of all who use the highways. However, their most practical objective is to afford residents a workable remedy for torts committed by non-resident motorists.

Following the usual wording of the automobile statutes, the Minnesota legislature has enacted a law which may well become universal throughout the United States. It provides that the operation of an aircraft within the state by a non-resident or his agent, shall be deemed an appointment of the Commissioner of Aeronautics as his attorney for the service of process in

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1 Culp, Process in Actions Against Non-Resident Motorists (1934) 32 Mich. L. Rev. 325; Culp, Recent Developments in Actions Against Non-Resident Motorists (1938) 37 Mich. L. Rev. 58. Only one state, Utah, has made no provision for such service.
3 Scott, Jurisdiction Over Non-Resident Motorists (1926) 39 Harv. L. Rev. 563.
6 "Section 1. The use and operation of an aircraft by a non-resident or his agent in the State of Minnesota or by a resident owner or his agent who has remained without the state continuously for thirty days prior to the commencement of an action against him, shall be deemed an appointment by such non-resident or absentee of the Commissioner of Aeronautics, to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of an aircraft in the State of Minnesota resulting in damages or loss to person or property, and said use or operation shall be a signification of his agreement that any such process in any action against him which is so served shall be of the same legal force and validity as if served upon him personally. Service of such process shall be made by serving a copy thereof upon the Commissioner or by filing a copy in his office, together with the payment of a fee of $2.00, and such service shall be sufficient service upon said non-resident or absentee, provided that notice of such service and a copy of the process are within ten days thereafter sent by mail to the plaintiff to the defendant at his last known address, and that the plaintiff's affidavit of compliance with the provisions of this act are attached to the summons..." Laws 1946, c. 46, §1, Minn. Stat. Ann. c. 360, §0215 (March 1947 Pamphlet Service).
any action growing out of such operation. Minnesota is the fourth state to enact such legislation.\footnote{\citenum{7}}

Although the legality of statutory provisions for substituted service on non-resident aircraft owners has yet to be determined, their constitutionality would seem to rest on the same power as that of the non-resident motorist statutes. In Hess v. Pawloski,\footnote{\citenum{8}} it was suggested that such statutes had their basis in the power of the state to exclude non-resident motorists; and having the power so to exclude, the state may declare that the use of the highways by the non-resident is equivalent to the appointment of a state official as agent on whom process may be served.\footnote{\citenum{9}} However, the subsequent view taken of that case in Wuchter v. Pizzutti,\footnote{\citenum{10}} and the difficulties of reconciliation with accepted notions as to state interference with interstate commerce\footnote{\citenum{11}} and the privileges and immunities clause,\footnote{\citenum{12}} cast doubt upon the validity of a strict power of exclusion doctrine. The power to exclude is only possible as a consequence of the reasonable exercise of the police power. This same police power affords the real constitutional basis for statutes of the type enacted.


The original Uniform State Law for Aeronautics, \textit{11 Uniform Laws Ann.}, 159, which was approved by the National Conference of Commissioners on Uniform State Laws in 1922, contained no provision for service of this type. This act was substantially adopted by 21 states, but in 1943 was withdrawn from the active list of uniform acts recommended for adoption. See \textit{Handbook of the National Conference of Commissioners on Uniform State Laws} 66 (1943). However, §702 of the Uniform Aviation Liability Act, which was approved in 1938 though never promulgated, provides for substituted service on non-resident aviators who commit torts which result from flights within the state. \textit{Handbook of the National Conference of Commissioners on Uniform State Laws} 345 (1938). For a criticism of the first draft of this provision see Godehn, Brophy, Butler and Hale, \textit{Proposed Law of Air Flight} (1937) 8 \textit{Journal of Air Law} 505, at 543-48. Insofar as the adequacy of notice to the defendant is concerned, §702 appears superior to the Minnesota statute by providing that “service shall not be complete until the plaintiff shall have served by registered mail, return receipt requested, to the registered owner of the aircraft at the address stated in the owner's registration with the proper agency of The Government of the United States a notice that suit has been instituted and that process has been served upon the [Secretary of State].”

\footnote{\citenum{8} 274 U.S. 352 (1927).

\footnote{\citenum{9} Kane v. New Jersey, 242 U.S. 160 (1916) had previously recognized the power of the state to exclude a non-resident until he formally appoints a public official as his agent for service of process.

\footnote{\citenum{10} Referring to the holding in Hess v. Pawloski, Chief Justice Taft said: “We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highways by the non-resident may by statute be treated as the equivalent of the appointment of him as agent upon whom process may be served...” 276 U.S. 13, 18 (1928).

\footnote{\citenum{11} The exercise of the police power by excluding vehicles which are dangerous or which cause unnecessary wear on the highways is valid; but exclusion for a purpose which is not within the police power of the state is a burden upon interstate commerce. Buck v. Kuykendall, 267 U.S. 307 (1925); Bush & Sons v. Maloy, 267 U.S. 317 (1925).

\footnote{\citenum{12} The privileges and immunities clause permits free ingress and egress as to all the states. William v. Fears, 179 U.S. 270 (1900); Ward v. Maryland, 79 U.S. 418 (1870). Individuals are protected by the privileges and immunities clause, Flexner v. Parsons, 248 U.S. 289 (1918), but corporations, not being citizens do not come within it. Paul v. Virginia, 75 U.S. 168 (1869). Likewise, cases involving exclusion of foreign corporations are not applicable since a state may exclude a foreign corporation but may not exclude a non-resident person. Flexner v. Parsons, supra.}
by Minnesota. It would be difficult to justify a non-resident aircraft statute on the power to exclude alone since the state neither builds the airways nor is its power of control or exclusion absolute. However, if the states may exercise their police power over aircraft as they now do over automobiles, the Minnesota statute is undoubtedly constitutional.

The principal objection which might be raised to this exercise of the police power by the state is that it is in conflict with the authority over civil aviation which the federal government has already assumed. The extent to which Congress has asserted jurisdiction over civil aviation and the amount of control remaining in the states has not yet been determined.

In the Air Commerce Act of 1926, Congress declared that the United States has “complete and exclusive national sovereignty in the air space” over this country. A literal interpretation of this provision could support the contention that the federal government meant to exclude the states from regulation of the air space. However, a reading of the statute as a whole indicates that Congress merely intended to define the sovereignty of the United States in relation to the aircraft of other nations, and the Supreme Court has indicated that it was not to be construed as a blanket appropriation of the air space by the federal government. In United States v. Causby, it was argued that this provision gave the federal government complete sovereignty in the air space above the plaintiff’s property and consequently the use of that air space by Army aircraft could not amount to a taking of property by the United States. The Supreme Court rejected this argument and cited with approval a North Carolina statute which provided that sovereignty in the air space rests in the state “except where granted to and assumed by the United States.” Other North Carolina laws governing the plaintiff’s claim to the superadjacent air space were also considered binding on the court. This decision may indicate that the Supreme Court will be reluctant to in-

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13 For an excellent discussion of this question see Culp, Process in Actions Against Non-Resident Motorists (1934) 32 Mich. L. Rev. 325.


15 Even though Hess v. Pawloski, 274 U.S. 352 (1927), seems to be based upon the power of exclusion, the court there stated that “In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways.”

16 In upholding non-resident motorist statutes some courts have stated that the case was at least partially based on the police power.


18 However, the lower federal courts have upheld the application of federal safety regulations to strictly intrastate flights. Rosenhan v. United States, 131 F. (2d) 932 (C.C.A. 10th, 1942) (Intrastate flight within a designated federal airway); United States v. Drumm 55 F. Supp. 151 (D.C. Nev. 1944) (Interstate flight which did not enter a designated federal airway).

19 N.C. Gen. Stats. (1948) §63-11. This provision is practically identical to §2 of the 1922 Uniform State Law for Aeronautics, 11 UNIFORM LAWS ANN. 160, which has been adopted by eighteen states.

20 N.C. Gen. Stats. (1945) §63-12 (Ownership of air space vested in the owners of the surface beneath); Id. at §63-13 (lawfulness of flight). These provisions are identical to §§3 and 4 of the 1922 Uniform State Law for Aeronautics, 11 UNIFORM LAWS ANN. 160.
terpret federal air laws so as to leave the states with little or no power over the air space. 21

The Civil Aeronautics Act of 1938 grants any citizen of the United States "a public right of freedom of transit in air commerce through the navigable air space of the United States." 22 The Act defines "navigable air space" as that air space above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority. 23 If this provision could be said to constitute a clear intent to exclude the states from control of any part of the air space above the minimum safe altitudes, the Minnesota statute could not apply to actions arising out of operations above this altitude, but would be limited to those committed below it. Such a result is unlikely under existing decisions interpreting the doctrine of federal supremacy. It is well settled that a state's exercise of its police power is superseded by federal action only where the conflict is so direct and positive that the two acts cannot be reconciled, 24 or where Congress manifests a clear intent to regulate to the exclusion of the states. 25 However, by this provision Congress has merely declared a federal policy to maintain freedom in air commerce which was not intended to exclude the states from a reasonable exercise of their police power, and does not conflict with the act of a state which grants its citizens a procedure whereby they may effectively pursue a purely private cause of action.

Though the fields of safety and economic regulation of aircraft are dominated by the federal government, 26 there has been no federal legislation on aviation tort liability. 27 The safety measures promulgated by the Civil

21 Some courts have stated that the state as a sovereign is under a duty to exercise its police power over the air space. In Smith v. New England Aircraft Co., Inc., 270 Mass. 511, 521, 170 N.E. 385, 389, 1930 USAvR 1 (1930) the court stated that "It is essential to the safety of sovereign States that they possess jurisdiction to control the air space above their territories. It seems to us to rest on the obvious practical necessity of self protection . . . That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of police matters in the interests of all persons on the face of the earth . . . It is the proper function of the legislative department of government in the exercise of the police power to consider the problems and risks that arise from the use of new inventions and endeavor to adjust private rights and harmonize conflicting interests by comprehensive statutes for the public welfare." In Erickson v. King, State Auditor, 218 Minn. 98, 104, 15 N.W. (2d) 201, 204, 1944 USAvR 41 (1944) the power to control air traffic was said to be "subject only to the constitutional powers of Congress over interstate traffic, post roads, and national defense and the general welfare. Otherwise, the state has not only the jurisdiction to control air traffic above the territory within its boundary, but the responsibility of a sovereign to protect such traffic and its passengers and freight." 22 574 (1926), 49 USCA §180 (Supp. 1946). A similar provision in the Air Commerce Act of 1926 provides that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." 23 44 Stat. 521 (1938), 49 USCA §403 (Supp. 1946). While the state cannot, under cover of exerting its police powers, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. Savage v. Jones, 225 U.S. 501 (1912).

25 The intent of Congress to supercede the exercise by the state of its police power will not be inferred unless the act of congress, fairly interpreted, is in actual conflict with the law of the state. Savage v. Jones, 225 U.S. 501 (1912).


27 Attempts have been made to pass federal aviation liability legislation but they have been unsuccessful. H.R. 1012, 78th Cong., 1st Sess. (1943); H.R. 532, 79th Cong. 1st Sess. (1945); H.R. 4912, 79th Cong., 1st Sess. (1945); S. 1904, 79th Cong. 2nd Sess. (1946). See the thorough study of this legislation made for the Civil Aeronautics Board in Sweeney, REPORT TO THE CIVIL AERONAUTICS BOARD OF A STUDY OF PROPOSED AVIATION LIABILITY LEGISLATION (1941).
Aeronautics Authority are designed to promote the public welfare by accident prevention, whereas the Minnesota Statute pertains to the private tort remedy. Though there are many proponents of a federal aviation liability act, until such a statute is enacted, it is the responsibility of the state to provide adequate remedies for its residents.

The bulk of commercial air traffic presents no problem of jurisdiction since process may be served within the state upon airline companies which have agents and facilities and may be said to be "doing business within the state." However, this rule is applicable to only one type of defendant, and does not cover at least three classes of non-resident fliers: (1) The private plane owner who uses his plane as the present day motorists uses his automobile; (2) The non-scheduled air transport carrier whose operations within the state are infrequent; (3) The large airline which conducts no regular operations and has no facilities within the state but whose planes may become lost over or diverted to the state in an emergency.

The Minnesota Statute is a direct approach to the problem of obtaining jurisdiction over all non-resident aviators. Insofar as commercial aircraft are concerned, it eliminates completely the necessity and uncertainty of establishing the jurisdictional requirement of "doing business within the state." As to the private aircraft owner who leaves the confines of the state before he can be served, it avoids the necessity of forcing the injured resident to go to the expense of bringing suit in a distant state or abandoning his cause of action altogether. Though the need for this statute may not be currently pressing, the potential widespread use of aircraft justifies its enactment.

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29 One of the latest cases discussing this theory of jurisdiction is International Shoe Co. v. Washington, 326 U.S. 310 (1945). See Comment (1946) 41 ILL. L. REV. 228. In Morrell v. United Air Lines, 1939 USAVR 178, 1 C.C.H. Aviation Cases 886 (S.D.N.Y. 1939) (Not officially reported), the maintenance of a ticket office in New York City and the occasional landing of planes in New York in unfavorable weather was sufficient for service of process on the defendant airline in New York despite the fact that defendant was incorporated in Delaware, had its main office in Chicago, and did not operate planes from any New York airport. Contra: Dineen v. United Air Lines, 166 Misc. 422, 2 N.Y.S. (2d) 567 (1938) (Same circumstances).

30 For examples of the detailed evidence required to show the factors which constitute "doing business," see International Shoe Co. v. Washington, 326 U.S. 310 (1945); Morrell v. United Air Lines, 1939 USAVR 178, (S.D.N.Y. 1939) (Not officially reported).

31 The Massachusetts Director of Aeronautics has stated that their non-resident aviator statute, supra note 7, has been used for substituted service on only one occasion. (Letter of July 17, 1947). The Connecticut Director of Aeronautics has stated that their statute, supra note 7, has never been invoked. (Letter of July 17, 1947).

32 The total of registered aircraft in the United States on July 1, 1947 was 33,920, only 902 of this number being classified as scheduled air carriers. Press Release, CAA Aug. 1, 1947. The Civil Aeronautics Authority estimates that by 1958 this registration will reach 400,000, exclusive of the scheduled air carrier fleet. Of this number it is estimated that 280,000 will be privately owned, while 120,000 will be used for non-scheduled commercial purposes. The scheduled air carrier fleet is estimated to reach a total of only 1,200 planes. CIVIL AVIATION AND THE NATIONAL ECONOMY, Civil Aeronautics Authority (1945).

Only six years after the Wright Brothers made their initial flight, it was predicted that the development of air transportation would necessitate the enactment of special laws for substituted service on aviators. One writer envisioned the following possibility; "... Perhaps summonses might be painted in letters three or four feet long upon bill boards turned skyward, and illuminated at night with electric bulbs, — although there is a serious question whether that would be 'due process of law' in case of non-residents sojourning above the state." Editorial (1909), 18 BENCH AND BAR 49, 61.

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