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George W. Starr

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Recommended Citation
George W. Starr, The Position of the State in Economic Control and Regulation of Air Commerce, 15 J. Air L. & Com. 127 (1948)
https://scholar.smu.edu/jalc/vol15/iss2/1

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THE POSITION OF THE STATE IN ECONOMIC CONTROL AND REGULATION OF AIR COMMERCE

By George W. Starr

Director, Bureau of Business Research, Indiana University since 1927; Chairman of the Aeronautics Commission of Indiana since its organization in 1945; Ohio State University, B.Sc., 1921; M.S., 1924; graduate work at Northwestern and Wisconsin Universities. Formerly, Assistant Director of Bureau of Business Research, Ohio State University, 1924-27. Author of numerous articles in the field of transportation.

BACKGROUND OF ECONOMIC REGULATION

The transportation of persons and property by air involves both interstate and intrastate commerce; consequently, as has long been the case in the land transportation of persons and property, regulation will be attended by conflicts between state and federal authority. These differences of opinion on the role of the states or the Federal Government have been most common in the field of public utility and transportation regulation, but are in nowise peculiar to these fields. They are a by-product of the operation of the dual form of government under which we live and stem directly from the distribution of power under the Constitution.

The basic principles governing the respective spheres of state and national action in the regulation of commerce are explicit, and can be set forth briefly and simply. The Constitution provides that Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."¹ Furthermore, "The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people."²

The powers not delegated to the United States or prohibited to the state governments embrace practically all authority over persons and property within the boundaries of the different states. From the standpoint of transportation regulation the police power of the

² U.S. Const. Amend. X.
states is the most important of the powers reserved to the states. As currently construed, the police power of the states covers such wide fields as the safeguarding of public health, protecting the morals of the people, enforcing safety, and doing whatever necessary to promote the general welfare and the convenience of the people. Justice Holmes in Noble State Bank v. Haskell, 219 U.S. 104, said:

"It may be said in a general way that the police power extends to all the great public needs... It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

This wide scope of authority was retained by the states apparently with the thought that conditions affecting public health, morals, safety, general welfare and the convenience and necessity of the people, were such that they could be met best by political bodies conversant with local needs and circumstances attending them. Much of the controversy which has arisen between the states and the Federal Government in the regulation of transportation agencies has grown out of the attempts of the states to regulate transportation agencies in the light of local conditions.

The interpretation of the Supreme Court of the powers of the Federal Government and those of the states in the regulation of commerce has divided the field of control into three parts: That in which federal power is exclusive; that in which state power is exclusive; and that in which federal and state power are concurrent. Over matters of a national character which require uniformity of regulation, such as the transportation of persons and property in interstate commerce, exclusive control apparently resides within the Federal Government. In the interstate transportation of persons and property where uniformity of regulation is not paramount, the states have been allowed to assume control. Where persons and property move wholly within the boundaries of individual states, control lies wholly in the state, largely on the grounds that such movements are matters wholly of local concern. In those instances where a diversity of control appears feasible, and where interstate commerce is affected only indirectly, the states and the Federal Government have concurrent jurisdiction.

The concept of concurrent jurisdiction may need some clarification at this point. The concept of concurrent jurisdiction recognizes the existence of concurrent power of the national and state governments to regulate in those matters permitting a diversity of regulation, but does not recognize simultaneous regulation by both authorities. In those instances where the Federal Government has seen fit to assert control, the states are estopped from occupying the field. Where the Federal Government has not chosen to occupy the field, the states may regulate until such time as the Federal Government takes over.

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the regulation.

In those matters permitting a diversity of regulation, or in matters affecting interstate commerce only indirectly, it lies within the legislative discretion of the Congress whether the Federal Government or the states shall regulate. The Congress may waive federal regulation in favor of state regulation, or it may require exclusive federal control in the field. While the right of the Congress to follow either course is never questioned, its methods are always subject to judicial examination by the Supreme Court. Thus in the end, some branch of the Federal Government, the Congress or the Supreme Court determines whether the Federal Government or the states shall assume jurisdiction in such areas in which diversity of regulation is permissible, or in matters affecting interstate commerce only indirectly. The Supreme Court, of course, determines the scope of power granted to the United States or reserved to the various states by the Constitution, while Congress determines how far the Federal Government should go in occupying the field of concurrent jurisdiction. The Supreme Court also determines in matters of concurrent jurisdiction as in the case of all legislation passed by the Congress, the national will expressed or implied in the acts of the Congress.

Although the basic principles under which the control of commerce is divided between the Federal Government and the various states are simple and readily understood, the application of the principles to concrete cases is far from simple. Transportation agencies use the same facilities in most cases in both intrastate and interstate operation, and functionally transportation does not divide itself into intrastate and interstate operations. The Federal Government in its attempt to free commercial intercourse from local control has moved in the direction of dominating the field of concurrent jurisdiction. The states, on the other hand, have objected to uniformity of regulation, since uniform regulation under varying conditions must be average regulation, often quite inflexible to the needs of local communities. It has been these two different concepts of the needs of commerce in the field of concurrent jurisdiction which have given rise to the many conflicts between state and federal regulatory agencies.

Division of control in the zone of concurrent jurisdiction has followed public opinion down through the years. During the periods when the trend of the powers of the Federal Government was ascending, there was an expansion of federal control in the zone of concurrent jurisdiction. Any return to an expansion of the powers of the various states and a curtailment of the powers of the Federal Government in governmental regulation will result in a wider participation of the states in the zone of concurrent jurisdiction, since over the longer period it may be presumed that the will of the people will be reflected in the legislation of the Congress and in the reasoning of the courts.
In the field of transportation regulation, jurisdictional conflicts did not arise until railway transportation became largely interstate in its operation. Also since thoroughgoing regulation by state administrative bodies preceded the creation of the ICC by more than ten years, it was only reasonable that the states in their zeal to regulate commerce within their borders would from time to time attempt to at least indirectly regulate commerce beyond their borders. Originally, the Supreme Court was disposed to permit the states to regulate interstate commerce, as well as intrastate commerce on the grounds that the regulation of interstate commerce was incidental to the regulation of rates and services of the railways which was of domestic concern.4

Thus, for the time being at least, the Court failed to take the position that the interstate transportation of persons and property was a matter of national concern which required uniformity of treatment, and apparently following the reasoning that while the regulation of interstate commerce was involved, state regulation through the lack of uniformity did not place a burden on interstate commerce.

The increased importance of interstate commerce was recognized by the Court some ten years later in the Wabash case, in which the Court decided that the states might not regulate interstate commerce even though the Federal Government might not at the time see fit to regulate it.5

Since the Supreme Court's decision in the Wabash case in 1886, there has been no doubt about the supremacy of the Federal Govern-

4 Munn v. Illinois, 94 U.S. 113 (1876). In the Munn case, establishing the right of governmental regulation of carriers, Chief Justice Waite said: “The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.” The same reasoning was applied in Peik v. Chicago Ry. Co., 94 U.S. 164 (1876), when the Chief Justice said: “The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.”

5 In its attempt to distinguish the Wabash case from some of the Granger cases decided some ten years earlier, the Court said, “By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or whole of the continent, over the territories of half a dozen States, through which they are carried without change of car or breaking bulk.”
ment in the regulation of transportation which is interstate in character, but the extent to which states may regulate intrastate commerce without interfering with or placing a burden upon interstate commerce has been the subject of many judicial disputes. The decade from 1913 to 1923 probably marks the zenith of federal domination in the field of transportation regulation, as evidenced by the acts of the Congress and the decisions of the Supreme Court. Since 1923 both the Congress and the Court appear to have moved in the direction of giving the states more leeway in the regulation of intrastate commerce without finding such regulation burdensome to interstate commerce, or discriminatory to persons or localities in interstate commerce.

After the Court, in the *Wabash* case, denied the right of the states to regulate interstate commerce, either directly or indirectly, even in the absence of Congressional action, the power of the Federal Government was progressively increased through legislation by the Congress and decisions of the Court until about 1923, when the Federal Government through the ICC had not only complete control over interstate regulation but almost equal control over intrastate commerce in the land transportation of persons and commodities, even though the Interstate Commerce Act provides that it is inapplicable to transportation "wholly within one State." It may be helpful to trace this expansion of federal control over intrastate commerce in the land transportation of persons and commodities.

The beginnings of federal control over intrastate commerce in the field of railway transportation originated in the *Minnesota* and *Shreveport* cases of 1913 and 1914. In the *Minnesota Rate* cases\(^6\) rate reductions on intrastate freight traffic ordered by the Minnesota Railroad and Warehouse Commission had reduced intrastate rates to Minnesota cities, such as Duluth, below the interstate level of rates to border cities, such as Superior, Wisconsin. Rail carriers serving border cities in Wisconsin and North Dakota reduced their interstate rates to the level of the intrastate rates of Minnesota.

In its decision in the *Minnesota Rate* cases the Court held that the power of the state to regulate commerce within its borders was not confined to a particular part of the state but "to cities adjacent to its boundaries as well as to those in the interior of the State," and consequently the carriers in interstate commerce had no recourse other than to follow the rate schedules prescribed by Minnesota for intrastate traffic, if the cities outside of Minnesota were to continue to compete with the cities across the border in the state. The Court did, however, indicate a way out of the dilemma, which was followed by the railways in the *Shreveport* case a year later. The Court noted that the finding that the intrastate rates were giving "an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or

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\(^6\) 230 U.S. 352 (1913).
disadvantage, would be primarily for the investigation and determina-
tion of the Interstate Commerce Commission and not for the courts."

In the Shreveport case\(^7\) it was charged that the railways in applying
intrastate rates in Texas were unjustly discriminating in favor of
traffic within the state as against similar traffic originating outside
the state, principally in Louisiana. The ICC found the Texas rates
to be giving an "unlawful and undue preference and advantage" to
certain Texas cities. One of the grounds upon which the Com-
misson order was attacked was that the Congress was without authority
to control intrastate rates "even to the extent necessary to prevent
injurious discrimination against interstate traffic."

In broad and sweeping terms the Supreme Court upheld the
right of the Federal Government to reach out and order any changes
necessary in the intrastate structure to remove the discrimination.\(^8\)
It was also apparent from the Court's decision that the power of the
Federal Government was over the removal of discrimination and
that such discrimination could be removed by adjustments in either
the intrastate or interstate rates. Since the ICC had approved the
interstate rates in the Shreveport case, it might be presumed that they
were reasonable and inferentially, that the intrastate rates were un-
duly low. Actually, the Commission found the commodity rates
prescribed by the state of Texas to be discriminatory, and the inter-
state class rates from Shreveport to points in eastern Texas to be
unreasonable, and ordered the latter reduced.

That the Supreme Court decision in the Shreveport case paralleled
the will of the majority of the Congress is shown in the wording of
some of the sections of the Transportation Act of 1920. In the latter
act the ICC was given extensive control over facilities, services, and
rates of the railways. While Section 13 (3) provided for conferences
and joint hearings with state regulating bodies on matters involving
rates, fares, charges, classifications, etc., Section 13 (4) follows rather
closely the reasoning of the Supreme Court in the Shreveport case in
the protection of interstate rates and services from interference on

\(^7\) 234 U.S. 342 (1913).

\(^8\) "It is manifest that the State cannot fix the relation of the carrier's inter-
state and intrastate charges without directly interfering with the former, unless
it simply follows the standard set by Federal authority... It is for Congress
to supply the needed correction where the relation between intrastate and inter-
state rates presents the evil to be corrected, and this it may do completely by
reason of its control over the interstate carrier in all matters having such a
close and substantial relation to interstate commerce that it is necessary or
appropriate to exercise the control for the effective government of that com-
merce." (pp. 354-55)

"There is no exception or qualification with respect to an unreasonable
discrimination against interstate traffic produced by the relation of intrastate to
interstate rates as maintained by the carrier. It is apparent from the legis-
lative history of the act that the evil of discrimination was the principal thing
aimed at, and there is no basis for the contention that Congress intended to
exempt any discriminatory action or practice of interstate carriers affecting
interstate commerce which it had authority to reach." (p. 356)
The observations of Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, on Section 13(4) are of interest:

"The committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court."

Section 15a of the Transportation Act of 1920 also broadened the scope of the responsibility of the ICC in fixing interstate rates and fares of the railways and permitted the Supreme Court in the Wisconsin Fares case to find additional ground for setting aside purely intrastate fares. In substance the Court pointed out that the statutory two cents per mile passenger fares of the states were a burden upon interstate commerce. It was the responsibility of the ICC under Section 15a to prescribe rates which were remunerative for the carriers as a whole, rather than the discrimination of the intrastate rates against interstate rates such as found in the Minnesota and Shreveport cases, which formed the basis for the Court decision. In discussing the new responsibilities of the ICC under the Act of 1920, the Court observed:

"If the rates, on which such receipts are based, are to be fixed at a substantially lower level than on interstate traffic, the share which the intrastate traffic will contribute will be proportionally less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rate the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

Thus in the Transportation Act of 1920 the ICC was not only given wide latitude over the regulation of intrastate rates and charges but also over railway service through an expansion of the Esch Car Service Act of 1917 and over railway facilities through control of line extensions and abandonments. The latter was included in the Transportation Act of 1920 in order to protect the credit of the carriers. The control of the ICC over the abandonment of railway facilities

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9 Section 13(4), added in 1920, reads as follows: "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."


was affirmed by the Supreme Court in the *Colorado Abandonment* case\(^\text{13}\) and that of requiring extensions in the *Oregon Extension* case.\(^\text{14}\) By the enactment of the Transportation Act of 1920 and subsequent court affirmation of most of its provisions, the Federal Government was given almost complete control, even though it may have been indirect, over intrastate rates, services and facilities. The provisions of the Transportation Act of 1920 as approved by the Congress, and the approval of many of the more important of these provisions by the Supreme Court mark the peak of federal control in the field of concurrent jurisdiction. The provisions of the Motor Carrier Act of 1935 indicate that the Congress was less sure that the Federal Government should assume control of matters which in the absence of federal control might be handled by the states.

Two sections of the Motor Carrier Act, one dealing with motor carrier rates and the other providing for joint boards, indicate a change of attitude on the part of the Congress. As indicated earlier, the Transportation Act of 1920 permitted the ICC to require that intrastate rail rates and fares be high enough so as not to be a burden on interstate commerce or discriminate against interstate commerce. In the Motor Carrier Act of 1935 the provision with respect to the fixing of intrastate rates was changed so as to remove this power of the ICC. Section 216 (e) of Part II of the Interstate Commerce Act, which deals with the fixing of rates, fares and charges of common carriers by motor vehicle, provides "that nothing in this part shall empower the Commission to prescribe or in any manner regulate the rate, fare, or charge for intrastate transportation, or for any service connected therewith for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

From the above quotation, it is evident that it was the intention of the Congress to remove the control of the ICC over intrastate rates which had been exercised over railway charges by the Commission since the Shreveport decision and which also had been specifically incorporated with respect to railway rates and fares in the Transportation Act of 1920.

It also appears that the Congress intended to give the states more voice in the fixing of interstate rates and fares by motor carrier when provision was made in the Motor Carrier Act of 1935 for the establishment of joint boards. The desirability of some kind of cooperation between the ICC and the various state commissions has been recognized by some members of the ICC for many years. As early as 1908, C. C. McChord in addressing the National Association of Railroad and Utilities Commissioners pointed out that the necessity for cooperation and concerted action between the ICC and the state railway commissions had been advocated and approved by every convention of the Association since it had been organized in 1889. In 1916

\(^{13}\) *Colorado v. United States*, 271 U.S. 153 (1926).

\(^{14}\) *Oregon Extension Case*, 288 U.S. 14 (1933).
Chairman B. H. Meyer of the ICC, in a speech before the NARUC, also advocated a plan whereby the state commissions would be given an opportunity to participate in the deliberations and to assist in the formulating of final conclusions of the ICC.

World War I interrupted the program of the NARUC for cooperation with the ICC, and it was not until after the Wisconsin Fares case in 1922 that any further action was taken. In the Wisconsin Fares case the Supreme Court suggested in its decision of February 27, 1922, that “in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the ICC and the state commissions may dispense with the necessity for any rigid federal order as to intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.” Following this observation of the Supreme Court, the Chairman of the ICC addressed a letter to the President of the NARUC inviting a committee of the Association to confer with the ICC to formulate a plan of cooperation. In 1925 the NARUC and the ICC adopted a plan for cooperation between the ICC and the various state commissions, and presumably the two organizations still cooperate under this plan. It should be pointed out, however, that the rights and duties of each organization under this plan are not spelled out anywhere in any statute, and consequently they appear to have cooperated in joint hearings where similar issues were pending before the ICC and the various state commissions, and that state commissions have not sat with members of the ICC or its examiners in joint hearings where the states were advocates.

It apparently has been the intention of the Congress to give the various state commissions some legal status in determining issues in the motor carrier field which may come before the ICC. Section 205 (a) of the Motor Carrier Act provides for the establishment of joint boards for matters not involving more than three states.\(^{15}\) It should be noted that the submission of matters in Section 205 (a) to joint boards is mandatory on the part of the Commission and that

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\(^{15}\) Section 205 (a) provides: “The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, permits, or licenses, the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers... Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17...”
such joint boards are vested with the same rights, duties, and powers held by members or examiners of the ICC. Orders recommended by the joint boards become orders of the Commission and become effective in the same manner as recommendations by members or examiners of the Commission.

A study of paragraphs (a) to (j) under Section 205 of the Motor Carrier Act of 1935 indicates that the Congress was not willing to permit cooperation between state and federal authorities in the regulation of motor carrier rates and services to be left on a voluntary basis and consequently laid down specific statutory provisions for mandatory cooperation. Section 205(f) of the Act authorizes the Commission to confer with or hold joint hearings with state authorities on matters arising under the Act and provides for office space for the use of joint boards.\(^\text{16}\)

In 1940 the Congress further amended the Motor Carrier Act of 1935 when subparagraph (4a) was added to Section 204(a) in which the ICC was required "to determine upon its own motion or upon application by a motor carrier, a state board, or any other party in interest whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in transportation solely within a single state is in fact of such a nature, character or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce." In those instances where the Commission made a finding of this kind, sub-paragraph (4a) of Section 204(a) further provided: "In any case where a motor carrier has become exempt from the provisions of this part as provided in this sub-paragraph, it shall not be considered to be a burden on interstate or foreign commerce for a state to regulate such carrier covered by such exemption." Thus, in the Motor Carrier Act the Congress as late as 1940 saw fit to go even further than it had gone in 1935 in giving the states a voice in regulating transportation within their own borders.

In 1935 the Congress had given the states the right to regulate intrastate rates and fares of motor carriers without respect to the interstate levels of these charges. In 1940 it eliminated certain interstate carriers from federal regulation and turned the matter over to the states and in such instances where interstate operations were turned over to the states for regulation the Congress provided that any regulation of the carriers by the states under the exemptions set forth would not be construed as a burden on interstate commerce.

\(^{16}\)Section 205(f) provides: "... From any space in the ICC Building not required by the Commission, the Government authority controlling the allocation of space in public buildings shall assign for the use of the national organization of the State commissions and of their representatives suitable office space and facilities which shall be at all times available for the use of joint boards created under this part and for members and representatives of such boards cooperating with the Commission or with any other Federal commission or department under this or any other Act . . . ."
From the foregoing it may be seen that between 1920 and 1940 the Congress saw fit to change its attitude toward the regulation of some forms of land transportation; and moved from the position taken in Section 13 (4) of the Transportation Act of 1920 in which the ICC was given almost complete control over intrastate as well as interstate commerce to one in the Motor Carrier Act, as amended in 1940, wherein the states have been given complete control over rates and fares of intrastate carriers without regard to the interstate level and in certain cases have also been given control over the regulation of interstate motor carriers under certain conditions.

In part, the attitude of the Congress with respect to the regulation of motor carriers refutes the contention of many that there has been a continuous trend since the early 1870's in the expansion of federal authority in the regulation of commerce in the United States. The action of the Congress in the regulation of motor carriers justifies the belief that, where local conditions are such as to require state control over transportation rates, services, and facilities, it is willing to waive federal control and to place the regulation in the hands of the various states.

Not only has the Congress retreated from its position in 1920 when it passed the Transportation Act of that date, but the Supreme Court in 1945 sustained the intrastate fares ordered by the Public Service Commission of North Carolina as not being discriminatory or burdensome to interstate commerce, even though they were materially lower than interstate fares, and applied to the use of the same facilities on the same trains used by persons traveling in interstate commerce. In reaching its decision the Court pointed out that:

"Neither Section 13(4) nor any other congressional legislation indicates a purpose to attempt wholly to deprive the states of their authority to regulate intrastate rates ... Intrastate transportation is primarily the concern of the state. The powers of the ICC with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. ...

"The effect of the ICC order under Section 13(4) automatically requires complete uniformity in intrastate and interstate rates. That argument is in short that under our national transportation system interstate travelers and intrastate travelers use the same trains; for a state to fix a lower intrastate rate than the interstate rate is therefore an undue advantage to intrastate passengers and unfair discrimination against interstate passengers. If Congress intended to permit such an oversimplified form of proof to establish unjust discrimination then its requirement of a full hearing was mere surplusage. In fact it need to have provided for no hearing at all. ..." 17

The ICC based its contention that the rates required by the State of North Carolina were discriminatory, and also burdensome to interstate commerce, on the fact that it had found the interstate rates of

2.2 cents per mile just and reasonable, and any rates on intrastate commerce less than the 2.2 cent level were unlawful for the reasons cited. The Supreme Court held that "the finding that interstate passengers paid higher fares than intrastate passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers."\(^{18}\)

From this decision it appears that, in the absence of specific legislation to the contrary, intrastate rates and charges which are lower than interstate rates and charges for the same facilities are not in themselves discriminatory against those using the facilities in interstate commerce, since in both the Wisconsin Fares case and in the North Carolina case the Supreme Court held that intrastate fares on a statewide basis could not be set aside by the ICC on the grounds that they were discriminatory against persons and places in interstate commerce. Whether such fares are a burden upon interstate commerce depends upon whether the rates in themselves are compensatory, a fact to be determined by the regulatory agencies, always subject to judicial review.

**Federal Regulation of Air Transportation**

In framing the economic regulation of air transportation, the Congress went to some length to be specific in its regulatory provisions. Congress did not go so far in the economic regulation of air transportation in the Civil Aeronautics Act of 1938 as it went in the Transportation Act of 1920, when it gave the Federal Government control over rates, fares, regulations, etc., "the law of any State or the decision or order of any State authority to the contrary notwithstanding," nor were the states specifically given control over the interstate operations of carriers under certain conditions as they were in the Motor Carrier Act in 1940.

The Civil Aeronautics Act of 1938 gives the Federal Government control over air carriers, and the latter are defined as "any citizen of the United States who undertakes, whether directly or indirectly by a lease or any other arrangement to engage in air transportation," and air transportation is defined as "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." Thus, in the economic regulation of air transportation, the Federal Government is definitely limited to interstate operations of air carriers, and nowhere is any reference made to the regulation of intrastate transportation by air either directly or indirectly by the Federal Government. The transportation of mail, whether intrastate or interstate is defined as air transportation over which the Federal Government exercises control. This is almost axiomatic, since the transportation of the mails has always been a federal function and cannot be delegated to the states.

\(^{18}\) *Id.* at 514.
Since the Congress was silent on the matter when the Civil Aeronautics Act was passed, it apparently did not wish to give the Board authority to remove any discrimination which might arise to persons and places in interstate commerce because of different levels of intrastate and interstate rates, such as were provided in the Transportation Act of 1920. The Congress did, however, include in the Civil Aeronautics Act somewhat parallel provisions with respect to the level of earnings and the fixing of rate levels of air carriers. The provisions for determining the levels of air carrier rates are not dissimilar to those of the Emergency Transportation Act of 1933.

Section 1002 (e) requires the Authority to consider the following in determining the rates for the carriage of persons or property:

- The effect of such rates upon the movement of traffic;
- The need in the public interest of adequate and efficient transportation of persons and property by air carrier at the lowest cost consistent with furnishing such services;
- Such standards as respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
- Inherent advantages of transportation by aircraft; and
- The need of each air carrier for revenue sufficient to enable such carrier, under honest, economical, and efficient management to provide adequate and efficient air carrier service.

The present rule of rate making for railway transportation reads as follows:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The similarity of Section 1002 (e) to the above provision from The Emergency Transportation Act of 1933, suggests that the Congress did not evolve a new and distinct policy for the determination of air carrier revenues but adapted the policies prescribed for rail carriers to the needs of the air carriers.

A review of the work of the Congress in providing economic regulatory machinery for our various transportation agencies shows that it has not followed the same policy for all agencies, or the same policy continuously for any one agency. It is to be expected that this will continue to be the practice of the Congress; it will provide the machinery which appears necessary for each agency at any particular time, and continue to have an open mind with respect to the kind of economic regulation necessary for each transportation agency. Consequently, it must be presumed that the present economic regulation provided by the Congress for air transportation will be modified if it can be shown that a better plan is available.
Economic Considerations of Air Transportation

For many years the popular conception of air transportation has been that of long distance interstate and overseas operation by regularly scheduled commercial airlines. It is with these operations that the economic regulations of the Civil Aeronautics Act of 1938 have been principally concerned. Those familiar with the air transportation industry appreciate that many changes have taken place since 1938 and that, at the present time, the long distance regularly scheduled operations of the commercial airlines constitute only a part of the air transportation and traffic in the United States.

The development of many additional airports during and since the war, the expansion of private flying, the very large growth of fixed-base operators, as well as the operation of irregular passenger and cargo services, have completely changed the air transportation industry. While many commercial operations are still predominately interstate and the average haul is undoubtedly much longer by air than by land, particularly in the field of passenger transportation, it is still true nevertheless that an appreciable amount of passenger and somewhat smaller amount of cargo business is now intrastate in its movement. The recent increase in feeder lines, growing out of the North Central, the Great Lakes, and the Southeastern cases, is indicative of the rise in what is essentially short-haul cargo and passenger transportation. There has also been an increase in wholly intrastate passenger operations, which do not come under the economic regulations set forth in the Civil Aeronautics Act.

As a general rule, the long-haul operations of airlines have been the most profitable, since they connected cities of very large populations with a maximum saving of time. It is natural that in the development of any industry the more profitable operations are exploited first and the less profitable ones last. It may be that there will be considerable further expansion in long distance commercial airline operations in the United States, but it appears more likely that much of the expansion in the years just ahead will lie in the fields of medium and short distance operation largely through the expansion of feeder and wholly intrastate short distance operations. It is also reasonable to believe that technological progress in the field lies as much in the future as in the past and that a by-product of our technological advancement in the science of air transportation will be lower cost operations which will also bring about an increase in profitable medium and short distance air transportation facilities.

It is also true that in the field of commercial airline operation the carriage of mail has contributed a considerable part to the earnings of the airlines and that relatively few lines in the past would have shown satisfactory operating profits without mail contracts. Yet we must not overlook the fact that an occasional operation has shown a profit without air mail pay.
It is reasonable to suppose that if the air transportation industry is ever to become an important part of our transportation system it must be able to operate without substantial subsidies through air mail payments. In short, while air mail will undoubtedly constitute an important part of the revenues of many of our air carriers, it may be presumed that ultimately such payments will be related to the cost of transportation and will not be used to make up operating deficits incurred in passenger or freight operations. Over the longer term, ordinary postage rates will undoubtedly cover the cost of transportation of mail by air, just as they presumably do in the transportation of mail by land. It does not appear either safe or reasonable to predicate a regulatory plan for the industry based on the assumption that the air transportation industry will always have to be subsidized through mail payments. If the industry is to take its place along with our other transportation facilities, it must be self-supporting, and any contemplated regulatory policy, either at the national or the state level, should be formulated on this assumption.

During the past year we have seen a very rapid expansion in the transportation of cargo by air. It may be assumed that cargo will become an increasingly important part of the revenues of many air carriers. It also appears safe to assume that much of the cargo transportation may be relatively short distance transportation in comparison with that of the present day.

Looking to the future then, and in planning for the regulation of an industry, we may anticipate that the non-scheduled and also the non-commercial part of air transportation will become increasingly important, that shorter and shorter hauls will become profitable, that the carriage of mail—at least unitwise—will become increasingly important, and that the handling of cargo will become increasingly important. All these developments in the field of air transportation, which will take place very rapidly, point to an increasing need on the part of the states to consider the feasibility of increasing their part in the economic regulation of air transportation within their borders.

STATE ECONOMIC REGULATION

STATE REGULATION OF AIR TRANSPORTATION

There are many well-informed persons, both within and without the industry, who shudder at the thought of any expansion in the regulation of the industry at the state level. Some very carefully worded arguments have been presented which reached the conclusion that the Federal Government should not only regulate interstate air transportation but should have control of all economic regulation of air transportation whether interstate or intrastate. This attitude is unfortunate for the future development of the industry and may lead to competitive regulation on the part of the states and the Federal Government. It is within the discretion of the Congress to preempt the field of concurrent jurisdiction in the air transportation industry
if it chooses to do so; there is nothing, however, to prevent the states, if they choose to do so, from regulating that part of the air transportation industry which is purely intrastate. The rather consistent attitude of the Supreme Court over the past 25 years, as shown in the Wisconsin Fares case and in the North Carolina case indicates that the states may legally regulate the intrastate charges and operations of airlines even though those regulations discriminate against the interstate operations of these same carriers, notwithstanding recent expressions by the Supreme Court in United States v. Wrightwood Dairy¹⁰ and Wickard v. Filburn.²⁹

Inasmuch as there is nothing in the Civil Aeronautics Act of 1938 which gives the Federal Government any specific economic control over intrastate air transportation as such, the growth of intrastate air transportation may make it desirable that the states regulate the latter to prevent undue discrimination against interstate air carriers by intrastate carriers. On the other hand, the states can easily go too far in the economic regulation of air transportation within their borders and, in so doing, duplicate much of what is being done by the Federal Government at the interstate level. It is doubtful whether practices such as requiring interstate operators to obtain certificates of public convenience and necessity from state regulatory bodies for those points which they serve within the state as a part of their interstate operations, or requiring interstate operators to file copies of interstate rates and charges with the state regulatory body serve any useful purpose.

In taking this position, it is recognized that the states have original jurisdiction over intrastate commerce and furthermore they have authority to establish statewide intrastate rate levels even though such rate structures may discriminate against interstate rates along the border points.²¹ It is also recognized that there is nothing in the Civil Aeronautics Act of 1938 which prevents a state from applying such economic regulations as it feels justified in regulating wholly intrastate air transportation. The development of air transportation since World War II has been largely an expansion of additional local stops on trunk line carriers, the addition of many thousand miles of feeder line operations, and the inauguration of charter service and contract cargo service. To a very large extent this has introduced many flight segments and irregular operations which are intrastate, or nearly so, in character. The extent to which a state may wish to exercise economic regulation over the intrastate operations within its borders will doubtless be governed by the stage of development of the air facilities and the position of the regulatory body toward economic regulation of intrastate air transportation. If the development of intrastate air transportation follows the pattern of land

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¹⁰ 315 U.S. 110 (1942).
²⁹ 317 U.S. 111 (1942).
²¹ See note 6, supra.
transportation it may be presumed that ultimately all states will 
engage in the economic regulation of intrastate operations. On the 
other hand, it is recognized by many that the development of air 
transportation, particularly at the local and state level, will be acceler-
ated if it encounters only a minimum of economic regulation. In 
short, economic regulation where necessary at the state level should 
follow rather than precede the development of intrastate air transpor-
tation.

It should be the goal of the states in the regulation of intrastate 
operations to supplement federal regulations of interstate air trans-
portation and in so doing improve federal regulation. Where a state 
regards economic regulation of intrastate operations essential within 
its borders, it should undertake such regulation with the idea of 
supplementing, rather than competing with, federal regulation of 
interstate air transportation. At the present time, some states have 
economic regulatory laws which do little more than duplicate the 
economic regulations of the CAB and which require interstate air 
carriers to meet the regulations of the state in addition to those of 
the CAB. There seems to be little to be gained in state economic 
regulation of this kind and such state laws should be modified or 
repealed.

Economic Regulation Does Not Need To Be Uniform

There has been a tendency on the part of most proponents of 
complete federal economic regulation of air transportation to hold 
that economic regulation and safety regulation have to go hand in 
hand. At the same time, the proponents of complete federal economic 
regulation have suggested that safety regulation, because of the physi-
ical size of total safety regulation, should be delegated wholly or in 
part to the various states. This view, which recurs time and again 
in the press, is not only inconsistent, but it is also contrary to the 
facts demonstrated by experience.

Inasmuch as this study is concerned with economic regulation and 
does not make any critical analysis of safety regulation at either the 
state or national level, no exhaustive examination will be made of 
the relative merits or shortcomings of safety regulation under state 
control rather than federal control. It is sufficient to note in passing 
that economic and safety regulation as a whole do not necessarily 
go hand in hand. It is true, of course, that there are economic limits 
to safety, and safety may often be affected by economic conditions 
and even economic regulation; they do not, however, have to stem 
from the same source. The experience of the Federal Government 
with the Air Safety Board before the reorganization orders of 1940, 
and the experience since that date, indicates the folly of maintaining 
that both economic and safety regulation must be under the direct 
control of a single agency.

On the whole, safety regulation in the air is little different in
character from safety regulation on land. The hazards of air transportation, due to high speeds, the inability of the fixed wing type plane to sustain itself in flight below certain speeds, and the high probability of loss of life and property damage accompanying aircraft accidents, have made safety standards higher, and traffic regulations more rigid in the air than on land, but the principles of regulation have remained much the same.

It is desirable that some parts of our safety regulation in the air be uniform throughout the country. The necessity of uniformity in regulation has long been one test applied by the Supreme Court in determining whether some kinds of regulation should be by the Federal Government or left to the states. Safety regulation as applied in the air may be summarized under four heads: Competence of operators; airworthiness of aircraft; safe operation of aircraft, and the promulgation and enforcement of rules designed to promote safety. Competence of operators, and airworthiness of aircraft should not be influenced by geographic factors and consequently should be uniform throughout the nation. To a large degree the safe operation of aircraft, and the promulgation and enforcement of rules designed to promote safety should vary but little because of geographic or traffic factors for aircraft of the same type or engaged in the same type of service. There may be some merit in the decentralization of the enforcement of safety, but there is little to be said in favor of varying standards of safety because of decentralization. Thus safety regulation as a whole should be uniform, and in the interest of uniformity much of it must be at the federal level. On the other hand, there is no compelling reason why economic regulation should be uniform throughout the nation, consequently, no reason why it should be wholly under the control of the Federal Government.

**State Regulation Will Not Displace Federal Regulation**

Too many proponents of complete federal economic regulation of air transportation have taken the position that either federal or state regulation must be exclusive and that any economic regulation at the state level would be incompatible with a sound federal regulatory program. This is a position which seems unwarranted, since there is no reason why state regulation may not supplement federal regulation. The air transportation industry is rapidly approaching the status of the motor transportation industry, since within limits airlines are free to choose their routes; operators may engage in unscheduled and irregular operations; may furnish either contract or common carrier services; and some even engaged in performing local services. At the end of 1947, there were, for example, nearly 2000 non-scheduled operators certificated by the CAB. These operators owned nearly 4500 aircraft, and employed nearly 8500 pilots. There were also at the end of the year nearly 200 firms engaged in industrial flying, as distinguished from non-scheduled air carrier operation. Also,
at the end of 1947 there were about 90,000 personal planes registered as compared to less than 15,000 in 1939.

In its regulation of motor carriers the Congress has seen fit to give the states wide latitude in assisting in the program. The debates in the Congress at the time of the passage of the Motor Carrier Act indicated that a majority believed that state participation was vital in order to make the regulatory program flexible and adaptable to local needs and local circumstances. The Congress appreciated that national regulation is prone to be average regulation not fitted to the needs of any particular section of the country.

Title IV of the Civil Aeronautics Act limits the economic regulation by the CAB to air carriers engaged in air transportation, and air transportation is defined in paragraph 10 of Section 1 in Title I as interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. The implication of this definition apparently is that any carrier transporting mail is subject to economic regulation by the CAB. Under paragraph 21 of this Section however, interstate air transportation is defined as the carriage by aircraft of persons or property as a common carrier for compensation or hire, for the carriage of mail by aircraft in commerce between the District of Columbia and the various states or among the various states or between places within the same state over any air space outside of that state. It would appear in reading paragraph 10 and paragraph 21 of Section 1 that it was not the intention of the Congress to define the carriage of mail as interstate commerce but to give the CAB economic control over all common carriers by air engaged in interstate transportation and of all air carriers transporting mail whether such operations were interstate or intrastate.

It is quite evident that the Congress did not intend, and, in fact, did not give the CAB any economic control over air carriers operating wholly in intrastate commerce if they were not engaged in the transportation of mail. Certificates of public convenience and necessity from the CAB were provided by the Congress in order that the Federal Government might exercise control over all common carriers engaged in the transportation of mail. Congress apparently took this precaution on the theory that air mail payments would be used to subsidize air transportation during its developmental stage. Once common carrier air transportation reaches an economic position wherein air mail payments need only to cover the cost of transportation to the air carrier, there would no longer be any valid reason to require air lines transporting mail to have certificates of public convenience and necessity from the CAB if such carriers were not engaged in interstate air transportation.

Only as long as we use air mail payments to subsidize air transportation does there appear to be any reason for economic regulation by the CAB of air mail carriers whose operations are intrastate. Once the air transportation industry becomes self sufficient, there should
be no relationship between the transportation of mail and economic regulation by the CAB. In short, the transportation of mail by air carriers should not influence their regulation by the CAB any more than the transportation of mail by railways affects the economic regulation of rail carriers by the ICC.

While Section 205 (b) of the Civil Aeronautics Act permits cooperation between the federal regulatory agencies and the various state and local agencies, it is significant that this section is permissive only and not mandatory. A similar situation has prevailed in the regulation of railway transportation since 1887, and no real cooperation between the state regulatory agencies and the ICC has ever developed in that field. On the other hand, in the regulation of our motor carriers, it is mandatory that much of the work be delegated to joint boards at the state level, and this has permitted, or at least will permit, the states to have an important voice in the regulation of motor carriers.

**What Should The States Do?**

We now come to the point where we may raise the question: What should the policy of the states be with respect to the regulation of air transportation? We may well break down this general inquiry into several parts for the purpose of analysis. Such questions arise as: What powers do the states have over the regulation of the transportation of persons and property by air? What are the states now doing in the field of economic regulation of air transportation? What should the states be able to do in this field from the standpoint of promoting the maximum use of air transportation by the public? What are some of the ways by which present economic regulation at both the state and national level can be improved?

The states under the Constitution of the United States have always had original jurisdiction in the regulation of intrastate transportation by land, and undoubtedly the same is true with respect to air transportation. Apparently, it was the intent of the Congress to give the states something more than original jurisdiction over intrastate air transportation when it passed the Civil Aeronautics Act of 1938, since the language is specific in confining the jurisdiction of the Federal Government under the act to the regulation of interstate transportation. In the field of land transportation the Supreme Court for nearly twenty-five years from the *Minnesota Rate* cases to the *ICC v. North Carolina* case, has jealously guarded the rights of the states over the commerce wholly within their borders. It may be anticipated that the Court will do no less than this in the regulation of intrastate air transportation.

Apparently, there are people in high places, who have convinced themselves that there is something peculiar to air transportation which should not make it subject to the same statutes that govern the regulation of land transportation. Some would go even further, and at-
tempt to amend the Constitution by statute, taking away the right of the states to regulate intrastate air transportation within their borders, even though such regulation would not extend into the field of concurrent jurisdiction because of interference with, or being a burden upon interstate commerce. The legislation introduced in the recent session of the Congress which would define commerce in the regulation of air transportation as domestic and foreign, and give the Federal Government control over both, is an example of trying to amend the Constitution by statute.\textsuperscript{22} Obviously such legislation would not only be unfortunate regulatory policy, but would be clearly unconstitutional.\textsuperscript{23}

It is difficult to summarize what the states are doing in the field of economic regulation of air transportation. Some states have set up aeronautic commissions with widely varying powers over the regulation of air transportation within their borders. Other states have turned over the work of regulating air transportation to the same agencies that regulate land transportation, usually public service commissions. Here again, the powers of the public service commission over the regulation of air transportation vary widely among the states. The one outstanding fact which arises from the study of the regulation of air transportation by the various states is the wide difference in the methods used and the powers exercised by the regulatory commissions.

Two things are apparent from a study of the present regulatory laws applying to air transportation which are in effect in the various states: one is the need for a separate agency in each state which can confine its activities entirely to the regulation and promotion of air transportation within the state. Second, is the need of a uniform general overall policy on the part of the states in the regulation of air transportation within their borders.

If it is desirable that federal regulation of air transportation be handled exclusively by an agency divorced from any connection with the regulation of land transportation facilities, and few question the advisability of this arrangement, then it appears most essential that regulation at the state level also be handled by an agency concerned only with air transportation. Whether safety regulation at the state level, insofar as the states may engage in safety regulation, should be handled by the same agency that handles economic regulation, is a matter for each state to determine, but it appears logical that the agency handling economic regulation will also be the best qualified state organization to handle safety regulation.


\textsuperscript{23} H. R. 2337, for example, would give the Federal Government complete control over economic regulation, and would prohibit economic regulation by the states. To the writer's knowledge no member of the CAB has gone on record opposing any of the bills before the Congress which would give the Federal Government complete control over all air commerce, whether interstate or intrastate.
In the regulation of air transportation at the state level, whether such regulation be economic or safety, there is much to be said in favor of a uniform policy on the part of the states in the handling of many matters which arise from day to day. Maximum progress will be made in this direction if such state agencies work thru a single national organization, such as the NASAO, and if the latter needs to work with only a single agency in each state whose sole duties are concerned with the development and regulation of aviation and air transportation within the state.

Each state should have a full time commissioner, board, commission, department, or equivalent organization, whose sole duties should be to foster the development, and to regulate aviation and air transportation within the state. Now, regulation can mean many things, and may go as far as to duplicate at the state level practically everything which is done by the Federal Government at the national level. Obviously, there should be no overlapping of functions of state and national air regulatory agencies; federal regulation should stop where state regulation begins, and vice versa. Economic regulation of motor carriers since the passage of the Motor Carrier Act of 1935 has worked quite satisfactorily from the standpoint of both the regulatory agencies and the regulated carriers. There appears to be no reason why air transportation cannot be regulated with equal facility by the states and the Federal Government.

Doubtless, air transportation will become much more important in the Mountain and Pacific Coast states, and in the Southwest, than in Middle Atlantic and New England States, and a state such as California, may have a much greater interest in the economic regulation of intrastate air transportation than Rhode Island, for example. In order that the newest of the transportation industries may not be retarded by regulatory agencies essentially not airminded, economic regulation should not be under the control of a state agency whose principal duty is the economic regulation of land transportation facilities.

If we assume that the various states become actively engaged in the regulation of aviation and air transportation within their borders, then it should follow that the state regulatory agencies will have considerable traffic with the federal regulatory agencies, such as the CAB, for example. From the standpoint of the work of the CAB and other federal aviation organizations, there is much to be said in favor of a single agency within each state which is solely responsible for the regulation and development of aviation within the state.

Apart from the development and regulation of aviation activities which are wholly local or not more than state-wide in their operation, the principal interest of the states is in seeing that each community has the best air transportation facilities that its economic conditions and geographical location will permit. This means that the states need to have a considerable part in the determination of air routes within their borders whether such routes are intrastate or interstate.
There are some very practical reasons for giving the states some voice in route determination. It was recognized when the Motor Carrier Act of 1935 was passed that the states were in a better position to determine motor carrier routes within their areas than was a single federal commission sitting in Washington. The proper determination of transportation routes requires considerable familiarity with local conditions, and only the states are in a position to be entirely familiar with local conditions. The granting of certificates of public convenience and necessity to air carriers by the CAB within recent months bears out the wisdom of the provisions of the Motor Carrier Act which gives the states some voice in Motor Carrier route determination. Almost a year ago the CAB authorized 34 stops for a three-year feeder line operation when there were not adequate airports at all stops. Today only 16 of the 34 stops authorized at that time have adequate airports.

How completely the needs of a state for adequate trunk line and feeder line air service may be disregarded by the Civil Aeronautics Board is illustrated by the experience of the State of Minnesota in the North Central case. Given permission, upon request, to intervene in the North Central case, the State of Minnesota requested: (1) An adequate feeder line service for some 39 communities in the state other than the Twin Cities and Duluth; and (2) direct single carrier service between the Twin Cities and the principal eastern seaboard cities, Florida points, the Gulf cities, and Pacific Coast points. At the time of filing the brief, the Twin Cities had single carrier service to New York, New Orleans, and Portland-Seattle. The decision of the CAB in the North Central case did not provide any additional single carrier service to Atlantic Coast, Florida, Gulf Coast, or Pacific Coast cities, thus leaving the twelfth largest metropolitan area in the United States with single carrier service to only New York, New Orleans, and Seattle-Portland. Aside from New York City, the cities of New Orleans, and Seattle-Portland, from a traffic standpoint must be of much less importance to the Twin Cities than a majority to which single carrier service was requested in the brief filed by the State of Minnesota.

In relation to the feeder line service requested, the decision of the CAB in the North Central case was even less satisfactory to the State of Minnesota than the decision with respect to trunk line services. Three feeder line services, Iowa Airplane, Parks Air Transport, and Wisconsin Central Airlines, operating extensive route mileages in other states were given appendages to their existing routes extending slightly into the State of Minnesota.

Apart from the metropolitan areas of Duluth and Rochester, which were given stops on trunk lines, only 14 cities in the group of 39 having metropolitan area populations from 10,000 to 50,000 were awarded feeder line services. The 14 cities were grouped along the eastern bor-

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24 7 CAB 639 (1946).
der of the state, leaving the central area and the northern, western and southern borders without feeder line service, either among themselves or with other metropolitan areas in adjoining states. Wisconsin Central Airlines was given six stops on the extension of its line from Duluth to the Twin Cities. Parks Air Transport was given two cities not having trunk line service on its extension from Chicago to the Twin Cities. Iowa Airplane was given three non-trunk line stops on its extension into the Twin Cities from Omaha.\textsuperscript{25}

Apparently the State of Minnesota presented its case completely and adequately in the beginning, and subsequently followed its original presentation as far as it legally could do so. A more than fifty page brief with exhibits was presented to the examiners at the Des Moines hearings. Exceptions were taken to the examiner's recommendations, and a brief was filed to support the exceptions. Finally, a petition was filed by the Department of Aeronautics of the State of Minnesota for rehearing, reargument, and consideration.\textsuperscript{25a}

In the original decision the majority of the Board pointed out that nothing could be gained from a discussion of all the feeder services proposed in the North Central case. Said the Board:

"We are obligated by the Act to develop an air transportation system properly adapted to the needs of the commerce of the United States and the Postal Service, and accordingly it is incumbent upon us to determine what additional air services are needed in this area rather than the necessity for each of the proposed routes."\textsuperscript{26}

Feeder line service was also denied in some cases, because in the opinion of the Board, land transportation facilities were adequate. Note that the Board found facilities and not necessarily services adequate. One of the controlling reasons why the Congress placed the control of air transportation in the hands of a board not engaged in the regulation of land transportation facilities was to avoid the stifling of the industry by legally adequate land transportation facilities.

The appeal of the State of Minnesota for a rehearing was handled by the Board in its Supplemental Opinion on July 22, 1947, in these words:

"In considering new route applications, the Board welcomes the advice and assistance of states, municipalities and communities located in the area under consideration. Such groups can furnish relevant factual information and can counsel the Board as to the types of service they believe would provide the greatest public benefits. In deciding such cases the Board gives great weight to the representations so made.

"However, air transportation is essentially interstate in scope, and consequently to promote the public interest the establishment

\textsuperscript{25} Several feeder line stops serve more than one city.

\textsuperscript{25a} The original brief was filed June 15, 1945, the brief to support the exceptions to the examiners' report was filed on April 26, 1946, and the petition for rehearing on February 19, 1947. The original opinion by the CAB was handed down by the Board on December 19, 1946, and a supplementary opinion denying the petition for a rehearing was given by the Board on July 22, 1947.

\textsuperscript{26} See note 24 supra.
of local routes must be done on an interstate basis.”

In short, local feeder service is of no concern to the states in which it is located. Again “Before arriving at our original decision, we gave thorough consideration to the representations of the State of Minnesota with respect to the needs of that State for additional air service. We decided that additional air service for Minnesota should be established in the manner set forth in our original opinion for the reasons therein stated. The present petition of the State of Minnesota contains no allegation of error, new facts, or changed conditions which would justify reconsideration of our opinion and order of December 19, 1946.”

The experience of the State of Minnesota in the North Central case may not be typical of that of all states, but it does indicate, whether or not typical, that the states have virtually no voice in the determination of the kind of air transportation services which they are allotted by the CAB.

Under Section 2 of Title I of the Civil Aeronautics Act of 1938, the CAB is charged with the duty of “The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense; . . .” Feeder lines in general are unrelated to the foreign commerce of the United States, and only indirectly related to our national defense. They are, however, related directly to the domestic commerce of the United States, and especially to the intrastate commerce of the states within which they operate. For this reason, the states concerned, individually or jointly, should have the principal voice in the location of feeder line services. Thus, air transportation may be “essentially interstate in scope” if taken as a whole, but feeder lines such as requested by Minnesota are not “essentially interstate in scope” and do not have to be established on interstate basis “to promote the public interest.” To properly adapt air transportation to the present and future needs of the domestic commerce of the United States, feeder lines and some trunk lines, must be located to meet the needs of the communities in the states which they serve. To do this, the CAB must give more than the lip service to the states provided in Section 205 (b) of the Civil Aeronautics Act of 1938.

The Civil Aeronautics Act should be amended to require the Board to give due consideration to route locations and airway patterns within each state as recommended by the recognized air transportation regulatory authority of the state.

Air Transport Service

The states also should be given more control over the kind of air transportation facilities and services which they need. At the present time, the states have virtually no control over the kind of air transporta-

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28 Ibid.
tion services which the lines crossing their borders may offer within each state. Under the procedures set up by the CAB, states may only take part in proceedings as complainants under Section 1002. A state may not intervene in a case involving the certification of routes or the establishment or modification of services by the air carriers if the CAB objects to such intervention. The Civil Aeronautics Act should be amended to permit a state intervening in any proceedings before the Board with rights and privileges equal to those of any other party to the proceedings. Such intervention should not lie within the discretion of the CAB, and the acquisition of such a right on the part of the states should not be contingent upon the surrender of their original jurisdiction over purely intrastate air transportation.

Adequacy of feeder or local services should be another matter about which the CAB should be required to give due consideration to the recommendations of the aviation regulatory agency of each state affected by the services.

Rates and Charges on Intrastate Air Transportation

The states should continue to have the right, as apparently they now have, to fix such rates and charges as appear just on intrastate passenger and cargo transportation. It is recognized that so long as mail payments are available to be used to supplement the earnings of any carrier that are unsatisfactory, intrastate rates and charges established by any state will always have to be high enough not to be a burden on interstate commerce.

Separate State Aviation Agencies

It is highly important that the various states not only set up separate organizations for the economic regulation of air transportation within their borders but that the states as a group through a recognized national organization such as the NASAO agree on a general overall policy with respect to state economic regulation of air transportation. It is recognized that the amount of economic regulation at the state level should be held to a minimum and that the states through their national organization prevent the kind of state economic regulation in the air transportation field which grew up in the land transportation field prior to the Transportation Act of 1920 and the Motor Carrier Act of 1935. Once air transportation approaches maturity, there may be need for more detailed economic regulation at the state level, but that time has not yet arrived and the need should exist before the regulation is effected.

As indicated earlier, at the present stage of air transportation development, the states are interested in seeing that it develops properly and naturally within each state and that airways and commercial airline routes are set up to fit local conditions within each state. These things can be accomplished by relatively minor changes in the Civil Aeronautics Act.
It has been suggested in some quarters that joint boards be set up for the regulation of air transportation much like those now functioning under the Motor Carrier Act. There appears to be a valid legal objection to this procedure. Since joint boards working in cooperation with a federal agency become a part of that agency in the determination of economic matters appearing before it, they may not question the validity of the agency's decisions in court. It would, of course, follow that the decision of the joint board could be overruled by the federal agency such as the CAB for example. If a joint board were overruled by the federal agency, and frequently this would happen, the states involved in the joint board decision would be unable to appeal the decision of the federal agency to the court. For these reasons, it appears desirable that the states' position be strengthened by giving them full rights as interveners, and consequently the right of court appeal. Furthermore, the establishment of a single full time exclusive aviation agency within each state will permit cooperation of such agencies in the prosecution before the Board of matters of interest to more than one state, such as feeder line services, local services, etc. So long as such cooperation is not made a part of the legal machinery of the Civil Aeronautics Act, cooperative action before the Board will not waive the legal right of the states to appeal a decision of the Board to the courts.

It is evident, from the rather long and complete history of state and federal regulation of land transportation, that the rights of the Federal Government and the various states have been clearly determined by the Supreme Court in interpreting the many state and federal statutes which have been enacted for the regulation of land transportation. There is little reason to believe that even such matters as national defense and mail subsidies will greatly change the pattern of regulation in the field of air transportation from that of land transportation.

The modification of the Civil Aeronautics Act as indicated along with the establishment in each state of a separate aeronautical agency, and the agreement among these agencies on a uniform regulatory policy at the state level, should give the states all the authority which they need in the regulation of air transportation, and at the same time protect state rights and avoid unnecessary duplication of regulation. A policy of this kind should have the wholehearted support of the air transport industry.

CONCLUSIONS

1. In the area of concurrent jurisdiction the Congress has not given the Federal Government the same authority over each form of land transportation.

2. In the regulation of air transportation the Congress has not followed the policy set forth in the regulation of either railways or motor carriers.
3. A careful study of Congressional action and court decisions does not show that the trend of regulation in the field of transportation has been characterized by a steady expansion of federal authority and a contraction of state authority.

4. The United States Supreme Court has carefully guarded the right of the states to regulate transportation within their borders, even when such statewide regulation may have resulted in discrimination between intrastate and interstate commerce along state lines.

5. The states have original jurisdiction over intrastate commerce, whether on land or in the air.

6. There is nothing in the Civil Aeronautics Act of 1938 which gives the CAB any indirect control over intrastate air transportation other than through the control of air mail carriers.

7. Because of the expansion of local passenger and cargo services and the extension of feeder lines, intrastate air transportation is becoming an increasingly important part of total air transportation.

8. Due to the growth of feeder lines, serving one or several adjacent states, local considerations rather than national airway patterns should determine feeder line routes and services.

9. Each state should have a single full time agency whose sole responsibility should be the development and regulation of aviation and air transportation within the state.

10. Intrastate air rates, charges and services should be under the exclusive control of the single state agency.

11. Beyond the determination of financial competency for intrastate operation, regulation of financial and corporate matters pertaining to air carriers should not be undertaken by the states.

12. State laws providing economic regulation overlapping economic regulation by the Federal Government should be repealed.

13. The Civil Aeronautics Act of 1938 should be amended to require the CAB to give due consideration to the recommendations of the recognized aviation regulatory agency of a state in the establishment of airline routes or segments of routes within the state, and in the determination of adequate air transportation services for the communities of the state.

14. The Civil Aeronautics Act should be amended to permit state intervention in any proceedings before the Board with rights and privileges equal to those of any other party to the proceeding. Such intervention should not be within the discretion of the CAB, nor should the right to intervene in any way impair the control of intrastate air commerce by the state.

15. Maximum progress will be made in the efficient control of air transportation at the state level as this activity of the state agen-
cies is coordinated through a single national organization such as the NASAO.

16. Any modification of the Civil Aeronautics Act of 1938 enacted for the purpose of giving the states a voice in the development of an adequate system of domestic air transportation in the United States, should not provide for the establishment of joint boards as is provided in the Motor Carrier Act of 1935.

17. States should cooperate in protecting their rights before the CAB, but such cooperation should not become by statute a part of the legal machinery of the CAB.

18. Economic regulation at the state level should follow rather than precede the development of intrastate air transportation. In most states, economic regulation is probably not justified at the present time. The immediate concern of the states should not be with the economic regulation of intrastate air transportation, but with some modification of the Civil Aeronautics Act so as to give the states a voice in air route pattern determination and the kind of air transportation which their communities shall have in the future, and prevent the complete domination of all air transportation in the 48 states by a federal agency.