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THE REGULATION OF IRREGULAR AIR CARRIERS: A HISTORY

By Victor S. Netterville


INTRODUCTION

Shortly after the Civil Aeronautics Act of 1938 was adopted, it became apparent that it would be both impractical and inequitable to require all carriers, regardless of size or scope of operation, to comply with the time-consuming and expensive processes of obtaining a Certificate of Public Convenience and Necessity. Congress, when it passed the Act, specifically foresaw the problem, and gave the Civil Aeronautics Board the authority to classify carriers and to make certain exemptions from the rigid requirements of the certificate provisions of the Act. Accordingly, the Board promulgated and adopted in 1938 Economic Regulation 292.1, classifying and exempting from the certificate requirements of the Act the so-called "non-scheduled" air carriers.

From 1938 until 1944 the number and significance of those carriers operating pursuant to 292.1 was little in comparison with the over-all transportation system that was developing. Limited attention was attracted to the field of non-scheduled operations, both by reason of the comparative infancy of the entire aviation industry and by reason of the intervening war. However, conditions near and at the close of World War II gave to air transportation a shot in the arm that sent the entire industry, certificated and non-certificated, swelling into a post-war bubble that was to burst sooner than anyone realized at the time. Predictions of unparalleled traffic figures flowed freely. Thousands of men skillfully trained in every segment of the aviation industry returned home. Similarly, thousands of planes were placed on the open market through war surplus.

The surge in air transportation was on, and the surest and most practical way into this new business was by way of the Irregular Air Carrier exemption embodied in Economic Regulation 292.1. The Board issued Letters of Registration freely, and apparently without any

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2 Section 401(a) of the Act states in part: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."
3 Section 416(a), 416(b).
4 For a brief review of the development and significance of Irregular Carriers under the regulation see, The Development, Operation, and Regulation of the Non-Scheduled Air Carrier, Department of Commerce Publication, May 26, 1947.
5 Investigation of Nonscheduled Air Services, 6 CAB 1049 (1946).
very definite system of control. The result: one of the greatest legal and economic dilemmas the Civil Aeronautics Board has ever faced. Since 1944 the Board has been confronted with this two-horned dilemma, both in the promulgation of amendments to 292.1 and in its enforcement. On the one hand, there are strong economic factors to be considered, both from the standpoint of the travelling public which utilizes this service and from the Board's attempt to foster and develop a self-sustaining air transportation system. On the other hand, there are legal difficulties and technicalities which constantly check, advance, or run counter to the economic considerations.6

Balancing these two, again keeping in mind the public interest and the interest of both certificated and non-certificated carriers, has been no small task. So long as the Board is able to find that the public interest requires irregular air transportation, the problem of determining the scope of such operations will plague it. The accompanying problem of air coach transportation which has largely grown out of this segment of the industry will, of course, be settled in certificate proceedings now under consideration.7 But the future of the irregular air carrier appears secure as such, insofar as the public interest requires that service; the question being, rather, one of defining limitations and authorizations within which irregular operations that are economically, as well as legally, feasible may be pursued.8

I. History of 292.1

In order to understand fully the legal peculiarities incident to a consideration of the Irregular Air Carrier problem, one must refer to the basic Act. In the first instance, the Civil Aeronautics Act, by Section 401 (a), forbids any "air carrier" 9 to engage in air transportation unless there is in force and effect a Certificate of Public Convenience and Necessity, issued by the Board. This is the basic law of the land with regard to interstate and foreign air transportation. Under Section 416 of the Act, however, the Board is given authority to classify a carrier, or group of carriers, and to adopt such reasonable rules and regulations pursuant to such classifications as it finds necessary in the public inter-


7 In the matter of Transcontinental Coach Type Service Case, Docket No. 3397 et al.

8 For a general discussion of the problems incident to the regulation of Irregular Carriers see, Hearings before the Committee on Interstate and Foreign Commerce United States Senate, entitled Air-Line Industry Investigation, April and May, 1949. No attempt has been made by the author to include a discussion or analysis of the regulations by the Board pertaining to safety requirements for the Irregular Air Carriers. That subject, being of a technical nature requiring expert analysis of operations, equipment, and facilities, appears beyond the scope of this work.

9 Section 1 (2) of the Act defines an "air carrier" as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Sec. 1 (21) defines "interstate air transportation" to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire."
Furthermore, under Section 416 (b) the Board is given the power, to the extent necessary, to exempt any carrier, or group of carriers, from the requirements of Title IV of the Act if it finds that the enforcement of the Title would be an undue burden on the carrier or group by reason of the limited extent of, or unusual circumstances affecting, the operations of such carrier or group, and finds further that it would not be in the public interest to require strict compliance with that Title.

Pursuant to this authority, the Board in 1938 adopted a classification of "non-scheduled" air carriers, and established for them an exemption from, inter alia, the certificate requirements of the Act.

The authority of the Board to establish a classification of "non-scheduled" carriers and exempt them from the certificate requirements of the Act has long been the subject of conjecture. The Board, when it first established such a classification and exemption in 1938, could not, of course, have foreseen the tremendous development that was to take place under the exemption. That fact, however, does not alter the authority of the Board to exempt a class of carriers when it finds that the requirements of Section 416 are met and that the public interest requires the service so classified and exempted. From the legal point of view, the action by the Board in establishing such an exemption for irregular carriers appears beyond reproach. The Motor Carrier Commission of the I.C.C., acting pursuant to authority not too dissimilar from that conferred upon the Board by the Civil Aeronautics Act, as early as 1937 established a classification of commodity carriers designated as "Irregular Route Carriers," and disclaimed jurisdiction over them for the application of certain requirements of the Interstate Commerce Act applying to Regular Route Carriers. In reviewing this classification order, the court upheld it saying that substantially the same classification of passenger carriers was accomplished in

... the Crescent Express Lines case by imposing conditions in the certificate granted that carrier... There can be no serious doubt that Congress granted the Commission the authority to classify common carriers... and a fortiori the right to establish the classification of irregular route carriers... if, of course, there be a reasonable factual basis therefor...

Thus the classification, in and of itself, established by the Board was not novel in the transportation field generally, and would undoubtedly...
receive judicial approval. The further indication by the courts that classifications and exemptions do not necessarily turn on purely theoretical or scientific factual bases, but often on matters of practical convenience and the novel and experimental nature of the services classified, is equally significant in weighing the propriety of the Board's classification and exemption for the Irregular Carriers.\textsuperscript{16}

The further action by the Board in exempting the all-cargo carriers from the certificate provisions of the Act encountered similar criticism, but such criticism seems largely negatived by the language of the Act, as well as the court history of exemption powers in general.\textsuperscript{17} Certainly the factual basis, as well as the practical convenience and the novelty and experimental nature of the service to be performed would be compelling to a court of review in either the cargo exemption in 292.5 or the passenger exemption in 292.1.\textsuperscript{18}

Retrospectively, it is difficult to know precisely what the nature of the authority granted was when the Board adopted 292.1. Some evidence indicates that the regulation was meant primarily for fixed-base operators conducting what amounted to air-taxi service. Other sources indicate that it intended to establish an independent, but supplementary system of transportation to fill the gaps left either by the failure of the then certificated carriers to provide all the service that was needed at particular times and places, or to serve those non-route points to and between which no air transportation existed, and between which none was required in sufficient amount to warrant service by a certificated carrier.\textsuperscript{19} Whatever the original intent, a large group of irregular air carriers has been established, providing various service, in diverse sections of the country.

It was not until 1944, however, that the Board took any serious note of this new segment in the industry. After some five years of comparatively passive regulation, it instituted in July of 1944 a comprehensive investigation into all matters relating to the so-called "non-scheduled" air services.\textsuperscript{20} It may be noted from the outset that under the 1938 regulation no specific authority, \textit{i.e.}, authority in the form of a license, Letter of Registration, etc., was required in order to operate as a


\textsuperscript{17}Economic Regulation 292.5, Regulation Serial No. 389, adopted by the Board May 5, 1947. Four cargo carriers previously operating pursuant to 292.5 were certificated by the Board for all-cargo service in the \textit{Air Freight Case}, supra note 11.


\textsuperscript{19}See Board's opinion in \textit{Investigation of Non-Scheduled Air Service}, cit. supra note 5. \textit{See also} Letter from Chairman O'Connell to Senator Edwin C. Johnson, dated March 24, 1949, in reference to proposed revision of Section 292.1, included in \textit{Airline Industry Investigation}, supra note 8, at p. 494.

\textsuperscript{20}Supra, note 5.
"non-scheduled" air carrier. One of the express purposes of the 1944 investigation was to inquire into the general problem concerning the desirability of revising or terminating the general exemption order for non-scheduled air services under which such services could be rendered without specific authority from the Board.\textsuperscript{21}

Final decision in the \textit{Investigation} case was handed down in May, 1946. Section 292.1 as amended then established a requirement that a carrier undertaking to engage in non-scheduled operations must file with the Board a statement setting forth its identity and certain additional information outlining the services then being, or to be, offered. In May and June, 1946, the Board issued and circulated throughout the industry a new proposed revision of 292.1. In January, 1947, the Board heard oral argument on the proposed regulation, and after considering that along with voluminous written comments submitted by the industry, it adopted a new 292.1 in February of 1947. On May 5, 1947, the Board amended 292.1, classifying irregular air carriers into Large and Small, depending upon the size of the aircraft used.\textsuperscript{22} In addition, this amendment established for the \textit{first time} the requirement for a Letter of Registration in order to obtain the benefits of the 292.1 exemption.\textsuperscript{23} The exact significance of such a Letter is the subject of much controversy today, and will be subsequently discussed.

Section 292.1 as a general exemption applying to all who met its requirements came to an abrupt end in the spring of 1949 when the Board amended the regulation so drastically as to bring cries of "death sentence" from many of the irregular operators.\textsuperscript{24} In effect, the Board revoked, in the exercise of its rule-making powers, the blanket exemption authority under which the irregulars had operated, and substituted for it a plan of individual exemptions for irregular air service. The legal problem which the Board and the carriers face was not, however, immediately affected by this new regulation, inasmuch as any carrier who filed for an individual exemption on or before June 20, 1949, retained its status as an irregular carrier under much the same regulation

\textsuperscript{21} Ibid.

\textsuperscript{22} Regulation Serial No. 388, adopted May 5, 1947. An Irregular Air Carrier is classified as a Large Irregular Carrier if the allowable gross weight of the aircraft units utilized in the transportation services of the carrier exceeds 10,000 pounds for any one unit or 25,000 pounds for the total of such units (disregarding units of 6,000 or less.

\textsuperscript{23} 292.1 (d) (1) stated: "Letter of Registration Required. From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board." Applications for Letters of Registration must contain (1) date; (2) name of carrier; (3) mailing address; (4) location of principal operating base; (5) if a corporation the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the U. S. or of its possessions; (6) if an individual or partnership, the name and citizenship of owners or partners; (7) the types and numbers of each type of aircraft utilized in air transportation.

\textsuperscript{24} Classification and Exemptions, Irregular Air Carriers, Economic Regulations Revision of 292.1, adopted April 13, 1949, effective May 20, 1949. Regulation Serial No. ER-142.
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that existed prior to the revision. It is only after consideration of the individual exemption application and action by the Board thereon that the carrier's status may be affected. The problems incidental to economic control of the irregular carriers by the Board, however, are present under either the blanket or individual form of exemption.

II. THE MEANING OF "IRREGULAR"

By far the most perplexing problem arising out of the Board's exemption for the non-scheduled carriers has been the definition of "irregular." Its meaning is the very essence of the regulation, for it must define the scope and frequency of operations permissible under 292.1. Moreover, it is essential to the Board's broad economic policies to know with some precision the authority conferred by the regulation, so that the plan may be properly fitted into the general pattern for the development of an adequate air transportation system. But the task of definition in this particular case has been indeed complex, and the term "irregular" remains today a somewhat elusive and shifting concept.

There are two schools of thought with regard to the definition of the term "irregular." On the one hand, it is said that by its very nature the term is generic, and any precise definition based upon a mechanistic formula would defeat the purpose of the regulation, which was intended to allow flexibility in operations to fill the need for supplemental air transportation where and when it arose. On the other hand, it is maintained that a greater degree of certainty is required for the protection of the practical-minded irregular operator, which may best be had by a mathematical definition of "irregular" permitting perhaps a maximum number of flights in a given period. Until very recently the former theory prevailed, and the definition of "irregular" was pronounced somewhat on a case-to-case basis in rather general terms. A review of this definitive development is of aid in any study of the general nature of irregular air carrier regulation.

In the original 1938 regulation, the Board defined "non-scheduled" service in this manner:

"Within the meaning of this regulation, any operation shall be deemed to be non-scheduled if the air carrier does not hold out to the public, by advertisement or otherwise, that it will operate one
or more airplanes between any designated points regularly, or with a reasonable degree of regularity, upon which airplane . . . it will accept for transportation . . . such members of the public as may apply therefor . . . " 30

In 1946, when the Board amended 292.1, the essential part of the regulation establishing a classification of irregular carriers defines the class as:

"[A carrier] which does not hold out to the public, expressly or by course of conduct, that it operates . . . regularly or with a reasonable degree of regularity 31 . . . ."  

In addition to the regulation itself, however, the Board in 1946 issued an opinion in Investigation of Non-Scheduled Air Services which set forth in comparative but generalized detail the scope and nature of operations permissible under 292.1. The more significant portions of that opinion stated:

"To fall outside the meaning of 'regularity,' a service must be so characterized by variation as to be free from the suggestion of a normal, customary, and common course of conduct. Recurring operations which assume the nature of a pattern of course are regular, even though the practice of staggering such operations has been adopted. But the non-scheduled-exemptions order also contains the phrase 'reasonable degree of regularity,' and this imposes an even more stringent requirement as to the isolation from such operations of characteristics which would identify them with a pattern of consistency or uniformity. It would not be enough to show merely that there is not a consistent course of conduct, for there must not even be a moderately consistent course of conduct . . .  

"The irregularity contemplated for exemption is that which neither directly nor indirectly leads the public to believe that between given points a reasonably certain number of flights per day or per week, or flights at approximately certain times . . . , may be anticipated with a reasonable degree of assurance." 32

In two opinions issued at the same time, the Board further attempted to clarify the meaning of the regulation. In Page Airways, Inc., Investigation 33 and in Trans-Marine Airlines Investigation, 34 the Board found that the services being conducted by the carriers were not irregular, and appropriate cease and desist orders were issued containing definitions of irregularity similar to that quoted above.

In 1947, another case arose in which the Board was called upon to define the scope of the cargo exemption 292.5, which in its nature and terminology closely followed 292.1. In Trans-Caribbean Air Cargo Lines, 35 the Board issues a cease and desist order against the carrier, defining regularity as follows:

30 Economic Regulation 292.1, Classification and Exemption of Nonscheduled Air Carriers, adopted by the Board Dec. 7, 1938.  
31 Revision to 292.1, adopted May, 1946.  
32 Supra note 5, at pp. 1054, 1055.  
33 6 CAB 1061 (1946).  
34 6 CAB 1071 (1946); See also, Willis Air Service, Inc., Order to Cease and Desist, Order Ser. No. E-466, adopted Apr. 22, 1947.  
“(b) regularly, or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same to points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two or three or more such flights, between any same two points each week in succeeding weeks, without intervene other weeks, or approximately similar periods, at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service; it being intended by this sub-paragraph to require irregularity in service... but not to preclude the operation of more than one or two... flights in any given week, nor to prescribe any specific maximum limitations upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in number of flights and intervals between flights and through frequent and extended definite breaks in service...” 36

This, then, was the skeleton upon which the irregular carriers were to graft the meat of a lawful operation under 292.1. For, whatever theoretical significance these decisions and interpretations had for keeping "irregularity" within its generic meaning, they appeared to be of little aid in the realm of the practical, and the irregular operator in the field was to experience great difficulty in so gauging his operation as to remain within the confines of 292.1.

This difficulty was made even more apparent when, in December of 1948, the Board found it advisable to issue its own interpretation of 292.1 for the guidance of the irregular operator.37 Interpretation No. 1 to 292.1 evidenced an attempted union of hearts between the school of generic definition and the mathematical formula believers. The Interpretation, consisting of a series of calendar analyses of operations for a hypothetical carrier, demonstrated graphically the definitions which the Board had given rhetorically in previous cases and opinions. Its import, however, was largely negative—a prescription for what may not be done and the affirmative value of the Interpretation lie only in its worth as an aid to analysis.38

Since the adoption of Interpretation No. 1, the Board's attempt to clarify 292.1 has not advanced measurably. There has, nevertheless, been some indication of Board thinking on the matter of irregular operations. For example, there exists along with 292.1 another exemp-

36 Supra note 35. See also: Trans-Luxury Air Lines, Docket No. 2589, decided Apr. 22, 1947, and Willis Air Service, supra note 34.

37 Economic Regulations, Interpretation No. 1 to Sec. 292.1, adopted Dec. 10, 1948, Regulations Ser. No. ER-136, promulgated pursuant to section 205(a) of the Civil Aeronautics Act and section 3(a) of the Administrative Procedure Act.

38 Supra, note 37, at p. 1 of the mimeographed opinion. Specifically the Board offered some ten illustrations, only one of which portrayed a legitimate operation. That example, with the operation of only four flights in a given month between the same two points, was believed by the industry to be the most rigid interpretation of 292.1 possible. "Operation Doodlegram" became, overnight, the by-word for the interpretation. The language of the Board accompanying the analyses, however, indicated directly that the example was not intended to be exclusive, not to limit other operations, presumably of greater frequency, that could be operated irregularly.
tion for Alaskan carriers. This exemption, 292.2, is comparable in language to 292.1, and the scope of operations permitted thereunder from that language seems analogous although the authority conferred by 292.1 may be broader.89 Therefore, the Board’s recent cease and desist order in the Alaska Airlines case 40 may offer an indicative key to the present trend in interpretation of 292.1 by the CAB enforcement section. In that order, the Board adopted a mathematical formula for attaining irregularity of operations by this Alaskan carrier. Some four major tests by which the operation may be measured were set forth by the Board; operations will be other than irregular where there is

“(1) Operation in excess of a total of eight flights in the same direction, or eight round-trip flights, between any two points during any period of four successive weeks; or

“(2) Operation of a single flight per week between any two points in the same direction on the same day of successive weeks; or

“(3) Operation of a total of three or more flights between any two points in the same direction during any period of two successive weeks, unless such a period is followed by a break of at least one week, during which no flights are operated between such points; or

“(4) Operation so arranged as to result in the observance of breaks required by sub-paragraph three above at regularly recurring intervals . . .” 41

It is well to point out, however, that the Board’s order in the Alaska case, and the Airline Transport Carriers case were all the result of consent orders entered into between the carrier and the Board. Such a consent order is in effect the result of an offer on both sides to compromise, not too dissimilar from routine out of court settlements. It is reasonable to assume that such compromises will not be considered interpretations in the technical sense. Thus the question of whether or not a maximum of eight round-trip flights per month between the same two points is now to be considered the maximum permissible number of flights under 292.1 is posed for other carriers operating under the regulation. Clearly these cease and desist orders which are the result of a compromise between the parties in their interpretations of the regulation are not binding, nor are they recognized as legal precedent. Undoubtedly a carrier operating in excess of eight flights per month between the same two points on an irregular basis will still be within the permissible bounds of 292.1.

One further element in the Alaska case, for example, seems significant. The Board there adopted a policy whereby, should the carrier


41 Supra note 40, at p. 2 of the mimeographed opinion. See also: Cease and desist order issued against Airline Transport Carriers, Inc., Order Ser. No. E-2393, adopted Sept. 20, 1949.
desire to operate at greater frequency because of unusual circumstances of time and place it must obtain permission from the Board to so operate. This policy appears to have merit for general application to the irregular industry. Once the Board sets a maximum number of flights, it may still achieve the flexibility desirable for irregular operations by allowing the carrier to submit such additional operational plans as it may have to the Board for approval or disapproval. The further value of the plan as a method of policing the industry seems equally significant and may well prove of value to the Board in adopting a plan for individual exemptions under the recent revision of 292.1.

In summary, it may be said that despite the abundance of words that have been employed in attempting to define “irregularity,” the exact nature of operations permissible under 292.1 still depends to a large degree on the particular carrier, its area of operations, and the time when such flights are operated. Further, it appears likely that the more suitable definition of “irregularity,” both from the standpoint of the operator and the Board, will employ a flexible combination of the mathematical formula, permitting a certain maximum number of flights in a given period, and the less restrictive generic formula, permitting more or less than the maximum according to the peculiarities of, and fluctuations in, the traffic to be moved at particular times and places. Such a definition would, it seems, at once accomplish the practical needs of the irregular operators and preserve the spirit of irregular operations. In passing upon applications for individual exemptions under the present plan, the Board will again be faced with the difficult task of defining, with some particularity, the scope of permissible operations. To arrive at that end will require the adoption of some plan whereby the Board will not unduly restrict the operation of the irregular carrier, but also be able to police those operations and hold them within the scope contemplated in line with higher Board policy for the over-all development of air transportation.

In addition to the actual flight analysis for the determination of regularity of operations by a particular carrier, there are other means of holding out to the public a regular service which are equally as dangerous, if not so apparent, to the irregular operator as its flight reports. Of primary significance in this respect are three factors: the use of the independent ticket agents for sales, the general advertising plans utilized by the carriers, and the leasing of aircraft between two irregular carriers operating between the same two points. The importance of the first two categories is illustrated in recent Board opinions, and the third is particularly significant because of the frequency with which such leases are utilized.

A. Ticket Agents

Few, if any, of the irregular carriers have in the past maintained their own traffic and sales departments. These functions have been handled through the independent ticket agents who represent one or more of the irregular air carriers on a commission basis. These agencies, strategically placed throughout the country, have been the major source of traffic for the irregulars, and their practices have long been the subject of Board scrutiny. Direct regulation of these agencies by the Board has been impractical, if not illegal. The jurisdictional question presented is indeed perplexing, both by reason of the Board's own statute and the general law pertaining to independent brokers.

Further, the Board's limited staff and resources render additional jurisdiction undesirable from an administrative standpoint, except where such jurisdiction is essential to the proper functioning of the authority vested in the Board for the protection of the public interest. Consequently, there has been no final action by the Board to gain direct jurisdiction over the ticket agents representing the irregular carriers. The Board, however, has given repeated warnings to the carriers themselves of the dangers inherent in a multi-carrier-ticket-agent relationship.

The major difficulty involved in such relationships is readily apparent from an understanding of 292.1. Because the regulation forbids a holding out to the public of a regular service, it has been the opinion of the Board that this is accomplished indirectly when a ticket agent represents a number of irregular air carriers. For example, when a prospective passenger requests from the agent transportation on a particular day, the carrier upon which such transportation is requested may not be operating — that is, it may be observing one of the periodic breaks required under the regulation. Now, if the agent represented only that particular carrier, the passenger could not be accommodated, and there would be no holding out to the public of a regular, or reasonably regular, service. On the other hand, when an agency represents several irregular carriers, a passenger, with his consent, may be routed on a different carrier which does happen to be operating that day. In this way, over a period of time the service offered by the agent tends to become regular, and the holding out to the public of service on a number of irregular carriers.

These agencies, although not directly under Board regulation are indirectly affected by regulations controlling the carriers they serve. See, for example, the Board's opinion in Standard Airlines, Inc., Noncertificated Operations, Order Ser. No. E-2950, decided June 20, 1949. See also, Draft Release E-33, supra note 42. The Board has recently circulated through the industry a new proposed amendment to 292.1 requiring the carriers to report certain carrier-ticket agent transactions.


Supra note 43.

See the general discussion of the ticket agency problem in Draft Release No. 33, supra note 42.
of irregular carriers, each of whom may be individually operating irregularly, accomplishes an over-all regularity of service.

In the absence of any agreement to so accomplish regularity, the Board is faced with some difficulty in maintaining that the individual carrier is violating 292.1, and because of the jurisdictional problem already mentioned, the Board has been reluctant to act affirmatively against the ticket agents. Until early in 1949, there was no specific effort made by the Board to regulate ticket agent agreements; but in the light of experience, the Board circulated for comment throughout the industry a proposed plan of control, whereby, in effect, no ticket agent could represent more than one irregular carrier at a time without prior Board approval. This proposal was, however, rejected ultimately, and there has since been no adoption by the Board of any provision controlling these relationships.

There are, nevertheless, numerous indications of the Board's thinking with regard to the matter of carrier-ticket agent relationships in recent decisions under 292.1. Outstanding among these is the Board's opinion in the Standard case, decided in May of 1949. There the Board made clear its concern over such relationships when their effect was to attain, at least for the particular carrier, a regularity in service. Basically, Standard argued that the representations made to the public by the independent ticket agent could not be attributed to Standard, since many of these representations were made against express instructions. The Board, however, held Standard liable for such representations, saying:

"... the general importance of the question presented warrants an expression of the Board's views concerning responsibility for the action of agents, particularly so-called independent ticket or travel agencies.

"Generally speaking, a principal will be bound by the misrepresentations of his agent if they are made in the exercise of his apparent authority, relate to the matter entrusted to his management or control, and the party dealt with has no knowledge of any misrepresentation. In those cases involving ticket agents, the courts have held that representations concerning the arrival and departure of trains and buses, and other similar information, are within the apparent scope of the authority of the agent intrusted with the duty of selling tickets, and are binding upon the carrier.

(Citing cases) . . ."
"Further, an air carrier properly may be held accountable for the acts of its employees and ticket agents, including those not actually issuing tickets or exchange orders, on the principle that retention of the benefits derived from the unauthorized activities of an agent with knowledge of those activities constitutes a ratification thereof."

The language of the opinion seems stronger than the facts warrant and possibly goes beyond what the law actually is with regard to independent ticket brokers. Nevertheless, it is clear that by course of conduct what was originally an independent ticket agent, i.e., not the agent of the carrier in the true legal sense, may become a true agent with the accompanying liability on the part of the principal. Ratification by the carrier of acts done beyond the scope of the authority of an independent broker may render that broker an agent of the carrier, and the carrier thereby becomes liable under general Agency principles.

This is not new law, for under such circumstances one is no longer concerned with an independent contractor, and the Board's opinion, dealing as it does with a situation of true agency, falls into place in the general scheme of that law. Other than that, the Board's opinion appears too broad for general application to one actually enjoying the status of a true independent ticket broker acting only as a middle man between the passenger and the carrier, and not holding out a regular service for one particular carrier.

That the Board itself experienced some doubt as to the propriety of its holding is evidenced by the fact that it further bolstered its stand on the ticket agent problem, saying:

"Actually the responsibility of air carriers for actions of their agents rests upon a broader foundation than an application of the principles of agency applied between private litigants. In those situations involving regulatory statutes, the principal is generally charged with the responsibility for the acts of its agents and employees, even in situations in which there would be no liability for damages in a private law suit."

In other words, the Board takes the position that where a carrier might not normally be liable for certain acts of an independent broker, the public policy aspects of a regulatory statute may alter status of the parties and subject the carrier to liability before the regulatory body enforcing a regulation with strong functional dictates. The primary duty of administering the Act according to the Congressional mandate and the protection of the public interest may make this secondary power of control over the ticket agent an essential to the proper functioning of the regulatory body.

51 Id. at p. 19.
52 Supra note 44. Brokers, enjoying the status of an Independent Contractor are not subject directly to the general law of Agency.
53 Supra note 43 at p. 19.
It is interesting to note, however, that even after this strong declaration of CAB attitude, it found no *ipso facto* responsibility on the part of the carrier for the acts of his ticket agent; rather, the holding rests upon knowledge by the carrier and/or ratification of the unauthorized acts of the ticket agent. Apparently, the language pertaining to the public policy aspects and the functional desirability of extending the principles of agency to an independent broker situation was dicta in the Board's Opinion.

The decision in the *Standard* case is clearly an attempt by the CAB to fix liability for acts already done. It does not, however, go to the crux of the problem, i.e., to prescribing some plan whereby the basic difficulty mentioned before may be remedied, and yet be economically feasible for the carriers and within the permissible bounds of Board authority. The objection to such relationships is a natural result under 292.1 of what may be, under proper circumstances, a perfectly legal and legitimate practice in the absence of conspiratorial agreements among and between the carriers and the ticket agents. This practical enforcement difficulty facing the Board will require economic, as well as legal, consideration if the irregular industry is to weather an additional tightening of controls which may stifle the primary source of its passenger traffic. This is clearly not a case where the end justifies any means the Board happens to think expedient.

On the other hand, action among and by the carriers and agents themselves can do much to alleviate this undesirable situation under the regulation and render drastic steps by the Board unnecessary. Already the example has been set. At least one Large Irregular Carrier, which had long utilized the facilities of the travel agent for the procurement of traffic, has resolved the legal enigma attached to the multi-carrier-ticket agent relationship. Air America, Inc., a Large Irregular Air Carrier, has announced the execution of an exclusive agency agreement with two of the travel agents which had heretofore represented several irregular carriers. Under this agreement, the travel agents will represent only Air America for the sale of transportation to and between points served by that carrier on an irregular basis.\(^{54}\)

Such an indication of willingness, both on the part of the carrier and the agents to bring their practices within the *spirit* of the Board's regulation, is indeed heartening in this oftimes bleak realm of administrative control. Action of this nature on the part of the carriers and the agents may do much toward resolving many of the difficult and perplexing aspects in the enforcement of 292.1.

\(^{54}\) A contract for exclusive agency arrangement was entered into between Air America, Inc., and Airline Reservations, Inc., and Airline Tickets, Inc., on September 15, 1949, and filed with the Board.
B. Advertising

The Board has found a second method whereby there may be a holding out to the public of a regular service. This is the advertising plans utilized by the irregular carriers. Advertising by the non-scheduled carriers generally evolves from the carrier itself or from a ticket agent representing it. Ads placed in telephone directories, newspapers, magazines, etc., in the larger cities are common and are read by thousands of people daily. The effect, of course, is to bring the service to the attention of the public generally, and the holding out that results must not reflect a regularity of service. No one can condemn a business for advertising; it is certainly an essential feature of business as we know it. But the danger to the irregular air carrier through advertising is great, and the Board has found that by its advertising methods the carrier may be holding out to the public a regular service in violation of 292.1.56

It would be impossible within the scope of this article to give in detail the many words, phrases, slogans, etc., that have been condemned, or at least frowned upon, by the Board’s staff in the past as indicating a regular service. From all that can be gathered from the opinions and statements by the Board and its staff, an advertisement to be regarded as proper must show affirmatively and unequivocally that the operation is irregular. In other words, unless the ad indicates precisely to the contrary, the public will assume from it that the service is regular, and there will be consequently an unlawful holding out. The use of the words “Irregular Air Carrier” in fine print, buried away in fanfare of the ad is apparently not sufficient to rebut the presumption that the service is regular. Distinct type, conspicuously placed to catch the more casual glance appears necessary.57

Interestingly enough, the Board said in the Page case58 that the words “by advertisement or otherwise” with reference to the holding out are not restrictive terms, but are descriptive of that holding out to the public. “This does not necessarily imply,” the Board said, “that the advertising must be through newspaper, periodical, pamphlet, or a host of other media used in advertising. Rather, the public may just as effectively become acquainted with the service through the actions of


56 Supra, note 55.

57 Nowhere in the Board’s opinion or explanatory statement does it give any direct indication of the type advertising which it considers proper. However, conferences between the Board’s enforcement section and the representatives of the carriers have produced opinions as indicated above, and show the general attitude of the enforcement staff with regard to advertising.

58 Supra, note 33.
the carrier in operating regularly or with a reasonable degree of regularity." In other words, by holding out a regular service by course of operating conduct, the sin becomes twofold: it violates the basic definition of irregularity contained in the regulation, and makes one guilty of advertising a regular service.

Further indication of what the Board considers improper advertising is evident in the opinion in the Standard case. The use of circular letters not indicating affirmatively an irregular service was thought to amount to a holding out of a regular service. Other pamphlets and brochures were circulated to the carrier's travel agents representing that "new direct service is available to major cities, and it saves time, provides over-night service and fewer stops." Further, the company on certain of its pamphlets depicted an aircraft whose shadow embraced various cities including San Francisco, Los Angeles, Chicago, Cleveland, and New York, thus indicating, the staff thought, that the carrier held out service to those points. There was also received in evidence in the Standard case copies of advertisements appearing in the classified sections of the various telephone directories, along with business cards, signs, etc., all of which the Board found indicated a regular service. It is somewhat doubtful whether any of this advertising standing alone indicates a "regular" or "scheduled" service. When taken as a whole, however, individual ads that might not be faced with this underlying assumption of regularity become such a part of a general pattern in the opinion of the CAB Enforcement Division, regardless of the legal basis therefor, that regularity of service, or at least a reasonable degree of regularity, is indicated, of the regulation is thus violated. The Report of the Examiner in the Standard case expressed this belief when he said:

"In consideration of all of the circumstances surrounding the representations of respondents' service to the public, there is but one conclusion which the public can draw, and that is the existence of a frequent and regular service between specified points. (Italics added.)"

III. Lease Agreements

Until recently, few of the Large Irregular Air Carriers owned enough of their own equipment to conduct any substantial operations. The practice of leasing aircraft, therefore, developed as the primary
means of obtaining necessary equipment. Such lease agreements present great danger to the irregular carrier, particularly those entered into between two such carriers operating substantially between the same two points. Leases with a non-operating company like California Eastern, or with the certificated carriers who have no restriction as to regularity, are not objectionable. But the inter-leasing of aircraft between two irregular carriers may have the over-all effect of creating a regular operation, either for one of the carriers or for the two of them taken together. For example, if carrier X operates on an irregular basis between New York and Miami, and on the days when carrier X does not operate, it leases its aircraft to carrier Y who operates between the same two points, there may be achieved that would appear to be, on an over-all basis, a regular operation. From the technically legal standpoint, however, there does not seem to be any particular objection to leasing as such, provided, of course, that the control of the operation is entirely in the lessee.

As to what amount of control or participation on the part of the lessor is required to make the operation that of the lessor, and thus, incidentally, an additional operation which may render his service regular, is certainly an open question. It is common practice in the leasing of aircraft by one carrier to another for the lessor to supply the crews, maintenance facilities, etc., for the operation of the aircraft pursuant to the lease. This seems desirable from the standpoint of safety and economics. Such practices, however, as selling tickets bearing the name of the lessor on a plane for a flight allegedly operated by the lessee would seem to indicate a measure of participation and control beyond that contemplated in the normal lease, and might well, together with other supporting circumstances, render the operation that of the lessor.

It is unfortunate that the Board has not seen fit in its recent opinions, revisions, and interpretations to indicate what it considered to be permissible terms in such leases between irregular carriers. As a result of this failure to state its position on lease agreements, which incidentally must be filed with the Board under the requirements of Section 412 of the Act, and which have therefore been within the Board’s immediate knowledge, the carriers have found themselves without real guidance and free to adopt lease arrangements which best suited the particular need of the moment. While all such leases are subject to Board approval, the Board, insofar as can be ascertained, has failed to so approve or disapprove any of these leases; hence the carriers have no ba-

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63 The importance of such a lease plan to the industry in general is evidenced by the present financial position of California Eastern Airways, particularly, who prior to the inauguration of lease agreements with certain of the non-scheduled carriers was a bankrupt corporation. In the recent past, that carrier has derived sufficient revenue from the leasing of its aircraft to enable it, without other operations, to make substantial payments to all its creditors. See Aviation Week, Sept. 19, 1949, p. 35. The effect of such lease agreements has been to open a new system of profitable transactions for those carriers with idle or excess equipment.

64 See Section 412(a) and 412(b) of the Act.
sis for determining whether or why such leases are proper or improper. These leases were generally made without consideration or suspicion that the leases might render their operations regular in the eyes of the Board.

Even when the control and direction of the flight is wholly in the lessee, the problem of lease agreements is a difficult legal question. Leases such as these, although appearing to be legal, and no doubt actually legal under normal circumstances, when executed between irregular carriers operating between the same two points may bring about or suggest a regularity of the service held out to the public similar to that resulting from the multi-carrier-ticket-agent relationship. Again, the problem is one of practical inadequacy of the regulation, and will in all probability require further regulatory measures, unless the carriers are themselves able to meet the objection by individual conduct consistent with the spirit of the irregular service contemplated under the regulation.

IV. 401(a) Violations

Thus far this analysis has dealt primarily with the scope of operations permitted. The question now arises as to the position or status of a carrier who conducts operations in excess of that contemplated under 292.1, who operates a regular or reasonably regular service. By operating a regular service, does the carrier merely violate the regulation itself and call into play the enforcement machinery set up for such violations, or does the carrier go further and violate Section 401(a) of the Act? If the irregular carrier thus violates the Act itself, the Board's power to act against the carrier is increased. Secondly, the certificated carriers gain a weapon of their own with which to check the regular operations of the erstwhile irregular carrier and protect the rights given those carriers under their certificates. For by virtue of Section 1007(a) of the Act, if any person violates any of the Act's provisions, any party in interest may apply to the court for the enforcement of such provision by injunction. Thus the scope of enforcement tools for alleged violations of 292.1 is enhanced under the interpretation that regular operations place the carrier outside the scope of the exemption of 292.1 and a fortiori in violation of 401(a) requiring a certificate for such operations.

The argument of some of the irregular carriers, that their Letters of Registration amount to authority to operate until such Letters are suspended or revoked, has received attention both from the courts and the CAB. In the Standard case, that carrier argued basically that the issuance to it of a Letter of Registration constituted it an "Irregular Air Carrier" to which the exemption specified in 292.1 applied unconditionally so long as such Letter was outstanding. Otherwise, Standard argued, there could be no real purpose in the various sub-paragraphs of 292.1 covering the issuance of Letters and proceedings for suspension
and revocation thereof. Therefore, it contended, its operations were wholly immune from Section 401 (a) of the Act to which the exemption was expressly applicable. The Board’s answer to this contention was indeed set to meet the issue squarely. It said in part:

“The respondent’s argument wholly misconceives the nature of the exemption regulation. Section 292.1 is a definitive regulation . . . It exempts air carriers’ operations from certain requirements of the . . . Act where such operations are irregular in character. If a carrier holding a Letter of Registration . . . engages in regular operations, that carrier cannot claim the protection of the exemption from the statute, since by its own conduct it has placed itself beyond the scope of the exemption regulation. It necessarily follows that if it then conducts regular operations without holding a certificate of public convenience and necessity, it violates Section 401 of the Act, not having been exempted from the requirements of that section.”

Thus it seems certain that carriers operating in violation of 292.1 must find themselves equally in violation of 401 (a) of the Act.

Actions brought by the certificated carriers under 1007 (a) of the Act have thus far experienced a varied result before the courts. It is the position taken by the Board that a carrier which operates regularly would therefore violate Section 401 (a) of the Act, and provide the proper basis for an injunction. Courts, however, in some cases have evidenced an unwillingness to assume the position of determining in the first instance whether or not a carrier has operated beyond the scope of the exemption embodied in 292.1. In American Airlines v. Standard Airlines, the trial judge refused an injunction requested by the certificated carrier for the alleged violation of 401 (a) on the ground that it was for the Board to determine in the first instance whether the operations of the particular carrier were beyond those contemplated by the exemption. This view of the matter was further adopted by the Ninth Court of Appeals in Trans-Pacific Airlines v. Hawaiian Airlines, which reviewed a lower court decision granting the certificated carrier an injunction prior to a finding by the Board that the operations of the irregular carrier were in violation of 401 (a). Judge Kaufman in the American Airlines case stated his position as follows:

“I conclude that it was not intended that the courts should in the first instance undertake to determine whether or not one who holds a Letter of Registration as an Irregular Air Carrier . . . has forfeited the right to operate as such. I can conceive of serious chaos and conflict with the Board if the courts were to do so.”

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65 See similar contentions in Nats Air Transportation Service, Enforcement Proceeding, Docket No. 3456, decided Feb. 10, 1949, Order Ser. No. E-2457 where the Board denied the carrier’s motion to dismiss the proceeding.
68 Supra, note 67.
69 Supra, note 67.
70 Id. at p. 139.
Some courts, on the other hand, have taken the position that it is within the province of the court, in the first instance, to determine whether or not the operations of an irregular carrier are within the limitations of 292.2. Judge Diamond in *Pacific Northern Airlines v. Alaska Airlines* said:

“A carrier is safe within the area of the exemption so long as he remains within the external boundary limits of his exemption, as within the walls of a protecting fortress; but without those walls, 401(a) still rules, and its mandate must be obeyed.”

In *Civil Aeronautics Board v. Modern Air Transport*, the CAB itself, prior to the completion of administrative proceedings against the carrier, obtained an injunction in the district court against the alleged violations by that carrier of Section 401(a). In such cases where a court action is obtained prior to a finding by the Board that the irregular carrier has operated in violation of 401(a), the CAB is placed in a position similar to that of the certificated carriers seeking relief under 1007(a).

This split in the courts on the question of the propriety of judicial determination, in the first instance, of the scope of operations permitted under 292.1 emphasizes again the hesitation on the part of the courts to assume the duties which Congress intended for the administrative body. It seems evident that any consideration of the scope of this exemption would require a detailed examination of the economic situation of the carrier and of the public policy involved. As Judge Fee said in the Trans-Pacific case:

“The rules or economic regulations of the Board are not static. Common observation will suggest that the economic situation of an air carrier, or class of air carriers, will be mutable. It is for the Board to adjust these relations under the complicated formula of the statute. Experience in cases arising under the rules for exemptions will clarify the needs. The practices developed by the economic dynamics will guide the administrative body in the promulgation of regulations. Thus the day-by-day happenings will mold the statute under administrative guidance into an efficient instrument. This very enactment gives ample opportunity for judicial review of the actions of the Board if it proceed arbitrarily or capriciously. In the nature of things, the jurisdiction of the Board to make such determinations must be exclusive.”

As a practical matter, if the courts were to follow the ruling of the Court of Appeals, the expedited handling of an enforcement proceeding by resort to the courts rather than to the oft-time lengthy and burdensome procedure of the Board would be at an end. Whether or not it was the intention of the other courts to substitute their interpretation of 292.1 for that of the CAB, even with tacit Board approval, is questionable; but that result seems to follow their decisions. Under such circumstances, the Board and the certificated carriers would be free to

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71 Id. at p. 608.
73 Supra, note 67, at p. 65.
resort openly to the courts for judicial determination of permissible operations under 292.1. Considering the problems involved which require expert knowledge of a detailed and specialized nature, and which call for uniformity of interpretation and constancy in application with a view toward an over-all policy, there seems little doubt that these ends would not be achieved by the diversity incident to judicial interpretation in the first instance. More properly the statute should be considered as one committing not only primary but likewise exclusive jurisdiction to the administrative agency making the exhaustion of the administrative remedy mandatory.\textsuperscript{74}

\section{The Applicability of Section 401 (1)}

Although the Irregular Air Carriers have been operating pursuant to exemption authority since 1938, little or no attention has been directed to their responsibilities under Section 401 (1). The Civil Aeronautics Act has within it a proviso limiting the exemption power of the Board with regard to the hours and pay for pilots. Section 416 (b) (2) states that the Board shall not exempt any carrier from any provision of Subsection (l) of Section 401 of the Act, with certain exceptions. Section 401 (l), on the other hand, states that every air carrier shall maintain rates of compensation, maximum hours, and other work conditions and relations of all of its pilots and co-pilots who are engaged in interstate air transportation within the continental United States so as to conform with decision number 83 made by the National Labor Board on May 10, 1944, notwithstanding any limitation contained therein as to the period of that decision's effectiveness.

By virtue of Section 416 (b) (2), exemptions from the provisions of 401 (l) may only be given to an air carrier not engaged in scheduled air transportation and secondly to the extent that the operations of the carrier are conducted during daylight hours.

It is clear from a review of the history of 292.1 that the Board has never exempted the irregular air carriers from the requirements of Section 401 (l). Neither the blanket exemption, which was given without hearing, nor the exemptions granted on an individual basis are to be found among the Board's orders, revisions, and interpretations exempting the irregulars from 401 (l). It must follow then that the irregular carriers are required to maintain pilot wage and hour standards consistent with the requirements of decision 83.\textsuperscript{75} Failure by a

\textsuperscript{74} \textit{Ibid.}

\textsuperscript{75} Such an exemption, however, may only be given after notice and hearing and must be based upon the limited extent of, or unusual circumstances affecting the operations of the air carrier upon which the enforcement of such paragraphs would be an undue burden, and which would obstruct its development or prevent it from beginning or continuing operations, and further that such an exemption would not adversely affect the public interest.
carrier to comply with the requirements of decision 83 constitutes a violation of the Act from which these carriers have not been exempted.\(^7\)

Few, if any, of the irregular carriers have negotiated contracts with either the Airline Pilots Association or any other group representing the pilots. In the absence of such a collective bargaining agreement it appears that decision 83, although now largely superseded in the certificated air carrier group by such collective bargaining contracts, must control the hours and wages of pilots serving the non-certificated carriers. Although no formal action has been taken by the Board, and none is contemplated at the present time, the dangers to the irregular air carriers from complaints instituted by the pilots are great since no exemption from the requirements of decision 83 has been given by the Board to these carriers, and individual employment contracts with the pilots must conform to the requirements of decision 83 as originally adopted by the National Labor Board.

VI. Tariff Provisions

For some time now the irregular air carriers have been required to comply with the tariff provisions of the Act, specifically Section 403;

\(^7\) Decision 83 fixed a maximum of 85 hours per month for air pilots. This maximum limitation of 85 hours flight time per month has been adhered to in the collective agreements between the Airline Pilots Association and the airline companies, and no statutory change has been made lowering the maximum hours. Decision 83 made no limitation on monthly mileages, but on the contrary stated that experience has not crystallized sufficient to put a maximum on the monthly mileage of air pilots. Further, decision 83 set the rate of base pay at $1,600 a year with an increase of $200 for each year of service up to a maximum of $3,000. Airline pilots must be paid the base rate plus an hourly rate of $4.00, $4.20, $4.40, $4.60, $4.80, and $5.00 for day flying and $6.00, $6.30, $6.60, $6.90, $7.20, and $7.50 for night flying at hourly speeds of under 125 miles, 130 miles, 140 miles, 150 miles, 175 miles, and 200 miles, or more miles respectively. In addition the monthly mileage of 10,000 to 11,999 miles, and 12,000 miles, and more respectively, the pilot must be paid 2 cents, 1 ½ cents, and 1 cent a mile for all miles per hour flown at the hourly speed of more than 100 miles.

The history of interpretation of decision 83 has largely been restricted to negotiations between the pilots, their representatives on the one hand and the airline companies on the other, in collective bargaining contracts. Some aid to interpretation may, however, be obtained from the "Report to the President by the Emergency Board" created May 7, 1946, pursuant to Section 10 of the Railway Labor Act to investigate unadjusted disputes concerning rates of pay and working rules between Transcontinental and Western Air, Inc., and others, and the Airline Pilots Association, issued at Washington July 8, 1946. According to that report:

The base pay for an 8-hour man at present is $250 per month. The pilot receives that much whether he flies or not; it is a guaranteed minimum. When he flies a pilot receives hourly pay ranging from $4.00 per hour for day flying at speeds less than 125 miles per hour, up to $5.00 per hour for speeds at 200 miles or over per hour. Night flying is compensated at a rate 50 per cent higher in each classification. Mileage pay is allowed at 2, 1 ½, and 1 cent per mile for that part of monthly mileages flown at more than 100 miles per hour. (One cent per mile when the monthly mileage is 12,000 or more; 1 ½ cents when the monthly mileage is between 10,000 and 12,000 miles; and 2 cents when it is less than 10,000 miles.)

Example: If a total mileage flown in 85 hours at 160 miles per hour is 13,600 miles, then that portion flown at more than 100 miles per hour (13,600 minus 5,800) would be 5,800 miles, which at one cent per mile would be $58 for the month.

See also: Report to the President by the Emergency Board, created May 7, 1946, pursuant to Section 10 of the Railway Labor Act, issued at Washington, D. C., July 8, 1946, at p. 16.
and further with Section 404 (a) in so far as that section would require the carriers to provide safe service, equipment, and facilities in connection with interstate and overseas air transportation, and to establish, observe, and enforce just and reasonable individual rates, fares, and charges, and just and reasonable classifications, rules, and regulations, and practices relating to such air transportation. These requirements have been the basis of repeated violations by the carriers generally.\footnote{See particularly, Standard Airlines, Inc., Nonscheduled Operations, supra, note 43; Virgin Islands Air Service, Inc., supra, note 41; many such violations have been brought to the carrier's attention by letters from the enforcement section, and have been rectified without a formal proceeding.} Some of the irregular carriers failed to file any tariffs at all before commencing operations. Numerous instances have been presented where transportation was sold at a greater or lesser fare than that stated in the established tariff, thus violating Section 403 of the Act.\footnote{Supra, note 77.}

Other major difficulties have been encountered by the irregular operator in the operating of so-called “charter” flights.\footnote{Ibid. Report of Examiners in Investigation of Seaboard and Western and Western Airlines, Inc., Docket No. 3346 and Transocean Air Lines, Enforcement Proceeding, Docket No. 3244.} The concept of “charter” flights, of course, is an ever-narrowing one in the general field of transportation. The law is yet unsettled on the subject, but it clearly contemplates an operation conducted pursuant to an arrangement whereby exclusive occupancy of the entire vehicle is granted to a single individual or group, and, further, that such services must not be held out to the general public or a sufficient segment thereof. Unless these tests are met, the operation is that of a common carrier within the general meaning of the term.\footnote{See e.g., Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916); Fordham Bus Corp. v. United States, 41 F. Supp. 712 (S. D. N. Y. 1941); Alaska Air Transport v. Alaska Airplane Charter Co., 72 F. Supp. 609 (Alaska, 1947); Cushing v. White, 172 P. 229 (Wash. 1918).} Through active solicitation of “charter” flights by advertising material distributed to the general public, by circular letters to travel agencies or to groups holding conventions or to other similar groups, or by personal solicitation of various firms, institutions, etc., the so-called “charter” services may become common carrier operations requiring established tariffs.\footnote{See e. g., Tanner Motor Livery, Common Carrier Application, 32 M. C. C. 387 (1942); Lieduback, Common Carrier Application, 41 M. C. C. 595 (1942); U-Drive-It Co. of Pa., Common Carrier Application, 23 M. C. C. 799 (1940); Peters, Common Carrier Application, 23 M. C. C. 611 (1940); Joseph Newman, Common Carrier Application, 17 M. C. C. 101 (1939); Barrows, Common Carrier Application, 19 M. C. C. 179 (1939); Blue & Grey Sight Seeing Tours, Common Carrier Application, 8 M. C. C. 124 (1938).} It is a well-known rule that a carrier transporting under its own direct control and responsibility traffic which is solicited from the general public by travel agents, freight forwarders, etc., is thereby engaged in common carriage and cannot be classified under a so-called “charter” operation.

A further source of violation may result from the operation of “contract” flights which are carried over established routes without imposing any obligation upon the other party to tender any specified number
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of passengers. Such operations have been found to constitute common carriage and to be subject to the Board's jurisdiction. Accordingly the carrier is required to file tariffs with the Board for such operations. Whether a further filing of a charter tariff, as such, is required under the Act remains undecided officially, although the Board has so indicated in an unofficial manner, and is presently contemplating the promulgation of rules governing charter flights. The Board has indicated that such a tariff, at least on a mileage basis, must be filed by the certificated carriers. If this be true with respect to the irregulars then these tariffs, along with the regular-fare passenger tariffs required to be filed, must constitute for the carrier the absolute price basis for ticket sales. Discounts and reductions amounting to rebates or increases affecting and altering the amount of the tariff established and filed with the Board constitute a violation of the Act, for which fines are leviable. Even the proffer of a discount unaccompanied by the actual granting thereof may constitute a deceptive practice, according to one enforcement attorney, in air transportation within the meaning of Section 411 of the Act.

It is scarcely within the scope of this article to enumerate in detail the technical tariff violations which may be involved in interline ticketing by a group of irregular carriers having on file with the Board individual tariffs with varying fares to and between the same points. It may be said generally, however, that each carrier, in the absence of filing with the CAB their interline ticket agreement, is required to adhere strictly to its own established tariffs on file with the Board. Where such interline agreements for apportioning traffic and fares do exist, those agreements must be filed with the CAB under Section 412 of the Act.

VII. THE NATURE OF A LETTER OF REGISTRATION

No little comment is heard with regard to the legal status of the Letter of Registration issued by the Board pursuant to 292.1 to the Irregular Carrier. Such Letters have been the subject of legal controversy, both in Board procedure in enforcing 292.1 and in amending and revis-

82 Ibid.
83 Section 902(d) of the Civil Aeronautics Act reads: Any air carrier or foreign air carrier, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this Act, or who, by any device or means, shall knowingly and willfully, assist, or shall willingly suffer or permit any person to obtain transportation or services subject to this Act at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000.
ing the exemption.\textsuperscript{55} Whether such a Letter is a license, a permit, a privilege, or some other vague form of operating authority, or whether it is in no sense an authority \textit{per se}, presents a legal question of some import to the holder thereof, and to the Board.

There seems little doubt that the Board takes the narrowest possible view of the status of such a Letter; whether that view is believed to be legally sound or more a matter of administrative convenience is open to question. Basically the CAB has said that a Letter of Registration amounts to nothing more than "evidence of registration under 292.1" and is not, in and of itself, an operating authority conferring anything in the nature of a vested right to continued existence.\textsuperscript{86} The courts have, however, evidenced a belief that a Letter of Registration amounts to more than mere "evidence of registration," and that it confers upon its holder certain rights and privileges found incident to licenses generally. For example, in the \textit{Standard} appeal, the court held that the Board could not suspend a Letter of Registration without at least giving the holder thereof opportunity to present oral argument before the Board.\textsuperscript{87} This holding alone, apparently based as much upon constitutional as upon statutory grounds, gives far greater weight to the Letter of Registration than that given it previously by the Board.

Moreover, relying upon principles of general license, such a Letter of Registration would certainly appear to qualify as operating authority amounting to a license.\textsuperscript{88} Section 2 (e) of the Administrative Procedure Act defines "License" as "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission."\textsuperscript{89} This alone would appear to settle the basic question and bring the Letter of Registration within the ambit of the ordinary license. What procedures are thereby necessitated in dealing with carriers operating under that license raise procedural and Constitutional questions beyond the scope of this work. Nevertheless, it does seem fair to say that in suspending, revoking, or revising the authority held pursuant to 292.1 and the Letter of Registration, the Board will be required to adhere to those procedural and Constitutional safeguards usually found necessary in license cases, and failure to so adhere may well bring reversals from the courts of review.\textsuperscript{90}

\textsuperscript{55} The Board has variously referred to such a Letter of Registration as "a form of operating authority," "a mere evidence of registration," "a privilege," etc. See e.g., \textit{Investigation of Nonscheduled Air Services}, supra, note 5; Economic Regulations, Revision to 292.1 adopted April 13, 1949, effective May 20, 1949; Regulation Ser. No. E-142; \textit{Nats Air Transportation Service, Enforcement Proceeding}, supra, note 65; \textit{Standard Airlines, Inc., Noncertificated Operations}, supra, note 43.

VIII. SUSPENSION AND REVOCATION

Subsection (d) (4) of 292.1 states that the Board shall have the power to suspend Letters of Registration whenever such action is required in the public interest. The test of the Board's power under this subsection came in the case of Standard Airlines whose Letter of Registration the Board suspended without hearing or oral argument. This suspension action was appealed by Standard, with the Board's order stayed and later reversed and remanded by the Circuit Court of Appeals for the District of Columbia. As pointed out above, procedural and Constitutional requirements were held to require the Board to give Standard some opportunity to defend its cause by oral argument at least, and the Board's summary suspension power was thus eliminated by the court. That decision, now under reconsideration by the court, if allowed to stand, will require the Board to read into Subsection (d) (4) the right of the carrier to present its case orally to the Board before suspension, and the real teeth will be gone from this suspension provision. Until a decision is reached in the reconsideration of the Standard appeal, the summary suspension power is held in abeyance.

The power to revoke a Letter of Registration set up in Subsection (d) (5) of 292.1 seems more in line with the general provisions of the Civil Aeronautics Act in that it provides for notice and hearing and for revocation only when the violations alleged are proved to have been actually committed, knowingly and willfully. This section was invoked by the Board for the first time in the Standard case, and the CAB there set forth clearly what it regarded as "knowing" and "wilfull" violation. These words, which are often the key to statutory interpretation, have been repeatedly defined by the courts in an ever-broadening scope of definition. More recently the Supreme Court has held that "knowingly" means with "knowledge of the facts," and "wilfully" may describe that "attitude of a person who, having a free will of choice, either intentionally disregards the statute or is plainly indifferent to its requirements."
In the Standard case, the Board found that in view of having received all the Board's regulations, interpretations, explanatory statements, etc., and yet having conducted operations wholly beyond the scope of the regulation, it had thereby rendered its conduct knowing and wilfull. Standard, on the other hand, claimed that the Board had knowledge of its operations before it issued Standard's Letter of Registration, and that the Board had thereby approved such operations. The Board, of course, rejected this claim, and held that it was clear that Standard's Letter was neither an adjudication, a finding, nor an admission that the holder's operations were within the scope of 292.1.

It is evident from the foregoing that the conception of "knowing" and "wilfull" violations of the Act is a flexible measure, far less rigid than any test of criminal intent or blissful ignorance. This broadening of terms is, of course, not peculiar with the Board, for the courts have strongly evidenced their agreement with such a holding under statutes employing the same general terminology. The recent Hughes case, among others, shows some indication that the burden is on the carrier to ascertain his rights and duties under the law, and failure to do so, if possible, may render its acts knowing and wilfull.

While such a view is probably consistent with the law as it stands today, the "knowing" and "wilfull" tests set forth in the statute and defined by the cases ought not be applied indifferently and recklessly in a field of administrative regulation in which the bounds of legality are loosely defined and in which the twilight zone of permissible conduct contracts and expands with experience and providence. The regulation of irregular carriers, while carried on pursuant to rules adopted and promulgated by the Board, has nevertheless advanced in a large measure upon a lex non scripta basis, which may or may not have been within the realm of the "knowable" with respect to a particular carrier. The practical rectitude of the decision in a particular case may seem appropriate enough on the factual surface, but the more subtle test of propriety in revocation may come in determining whether the charge levied against the carriers was a "knowable" offence at the time of the allegedly unlawful conduct. Certainly the Standard case cannot be taken as the model; the character of the violations therein were such as to remove any serious doubt as to the good faith of the carrier. In less flagrant cases, the Board will do well to weigh carefully the nature of its position on particular matters that have not heretofore been clarified either by decision or by interpretation, and which have been evidenced at most by an attitude, sometimes knowable, sometimes not, on the part of the CAB and its staff.

97 Hughes v. SEC, 174 F. 2(d) 969 (C. A. D. C., 1949).
One further element of importance insofar as the enforcement proceedings incident to 292.1 are concerned is that of the carrier's ability to enter into a consent decree, and thus avoid suspension and/or revocation. This very equitable procedure has long been in use in some administrative circles and has more recently become a part of the positive law framework within which the administrative process must operate. By virtue of Section 9 (b) of the Administrative Procedure Act, a license may not be revoked except upon notice to the licensee and opportunity given for him to comply with the lawful requirements of the Agency. Moreover, Section 5 (b) of that Act requires that the Agency shall afford all interested parties opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit. In the Standard case, the carrier maintained that the CAB could not properly revoke its Letter of Registration in view of the fact that circumstances which would warrant revocation were not called to Standard's attention in writing prior to the institution of the proceeding as required by Section 9 (b) of the Administrative Procedure Act.

The Board in the Standard case, however, held that the provisions of Section 9 (b) of the Administrative Procedure Act, requiring written notice and opportunity to achieve compliance prior to the institution of revocation and suspension proceedings by their expressed terms, are inapplicable to a case where the violations are wilful. It is interesting to note that the Board in its opinion chose to rest its denial of Standard's motion for dismissal on the ground that under the Administrative Procedure Act the agency is not required to accept a consent settlement when it believes that such action does not insure compliance with the law. The enforcement attorney in his proposed findings and conclusions to the Examiners had insisted that Section 9 (b) of the Administrative Procedure Act had no application to temporary permits or temporary licenses. He further contended that a Letter of Registration issued pursuant to 292.1 amounted to a temporary license or evidence of registration with the Board authorizing the carrier to engage in air transportation to a limited extent. Had this position been adopted by the Board in its opinion in the Standard case, Section 9 (b) of the Administrative Procedure Act would have been lost to the irregular carriers in their enforcement proceedings. However, since the Board did not decide against the applicability of Section 9 (b) in cases involving Letters of Registration, because of the alleged temporary nature of the license, that section will continue to aid the

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101 Id. at pp. 40-60.
irregular carriers in allowing them opportunity to comply before pro-
ceedings are begun.\textsuperscript{104}

The Board's final opinion held that this case embraces concurrent
and alternative remedies — that is, the issuance of a cease and desist or-
der and the revocation of a Letter of Registration — in that the selec-
tion of one or the other rests with the CAB's discretion.\textsuperscript{105} Since
Standard did not accompany its offer of settlement with the surrender
of its Letter of Registration, its contention that the case could not pro-
ceed was without merit. If the proceeding had been limited to the sin-
gle issue, \textit{e.g.}, whether a cease and desist order should issue, then
certainly Standard could have contended with some justification that,
having consented to the very action contemplated by the proceeding,
the Board ought to accept its offer and discontinue further proceedings.
In effect, the attitude of the CAB from all the surrounding circum-
cstances was that nothing short of revocation would result in terminating
what it considered a gross violation of the law. This was made appar-
ent when the Board said:

"Respondent by its bold, flagrant, and persistent disregard of
the Civil Aeronautics Authority, is in no position to plead for a les-
sor penalty . . . Failure to revoke its Letter of Registration and to
apply all sanctions available for the prevention of further violations
by it would make a mockery of the law, the enforcement of which
has been entrusted to us by the Congress."\textsuperscript{106}

IX. CONCLUSION

From the foregoing review of the history and development of 292.1
and of the decisions thereunder, it is evident that the legal status of the
irregular air carrier is fast crystalizing in an ever-narrowing scope of
definition and interpretation, at least in the sense that it means less
operationally today than it did five years ago. Until the Spring of 1949,
the process had indeed been slow; but with the adoption of that revi-
sion, it took what appeared to be a new path that would bring the
entire matter to a speedy and effective termination. Moreover, the sig-
nificance of case development of the law seemed virtually at an end, to
be substituted for by a new procedure requiring each carrier to come
before the Board, present its criteria for a true irregular operation, and
be approved or denied on its merits.

Of course, economic factors such as diversion, rate structures, and
the general development of an over-all air transportation system, en-
tered into the Board's decision to terminate the blanket exemption that
had existed for the large irregular carriers. But the results that have
followed since the adoption of that revision have scarcely reached the

\textsuperscript{104} \textit{Supra}, note 84, at pp. 4-10.
\textsuperscript{105} \textit{Cf. Phelps Dodge Corp. v. NLRB}, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed.
1271 (1941); \textit{In re Standard Gas & Electric Co.}, 151 F. 2(d) 326 (C.C.A. 3, 1945)
\textsuperscript{106} \textit{Standard Airlines, Inc. Nonscheduled Operations, supra}, note 44, at p. 37
of the mimeographed opinion.
adverse proportions that the more ardent supporters of the irregular carrier concept had feared. The cries of "death sentence" have substantially subsided, and the process of molding an exemption properly adapted to the needs of the time is now under way.

That the public interest, as evidenced by need and desirability, requires the service authorized under 292.1 appears settled. As the Board said in the adoption of the recent revision of 292.1:

"The desirability of terminating the blanket exemption authority does not mean that there is not some need for the use of large aircraft in irregular air service, or that some of the Large Irregular Carriers had not been meeting such need under the present regulation. We believe, on the contrary, that definite need exists for the use of such aircraft under the proper circumstances." 107

Precisely what those "proper circumstances" were the Board failed to spell out; but it may be assumed that the Board had in mind, for example, the use of large aircraft by irregular carriers to supplement the existing service of the certificated carriers, where and under such circumstances as the existing services of those carriers are not adequate to meet the public need, provided, of course, such supplementary service remains irregular. This situation may very likely be found on a north-south, New York-Miami operation during the peak winter months, or during the peak traffic periods in an east-west, New York-California operation. This is by no means exhaustive: the need for the operation of large aircraft on an irregular basis is largely a matter of circumstance with a view to time, place, transportation facilities, and transportation demands.

It may be re-emphasized, moreover, that the Board did not revoke summarily the operating authority enjoyed by the large irregular carriers under the prior 292.1 regulation. The temporary extension of authority given by the CAB under the recent revision of 292.1 terminated at midnight on June 20, 1949, unless the carrier had before that time filed with the Board an application for individual exemption from Title IV of the Act extending to all or part of the air transportation which such carrier was authorized to perform as of June 19, 1949, pursuant to 292.1. Substantially all the large irregular air carriers so applied and continue to operate under much the same regulation that existed prior to that date. Thus they may continue to operate until the Board has acted on their applications for individual exemption.

The significance of the legal problems discussed herein remains practical under the new 292.1, and will continue to be so for some time. Unless the CAB defines with greater particularity the conditions and limitations incident to the irregular operating authority to be conferred under individual exemption, the legal status of the irregular carrier will continue to be propounded on a case-to-case basis, using as precedent the decisions and interpretations of 292.1 as it existed prior to May 20, 1949.

107 Supra, note 24.
The yardsticks to be used by the Board in the consideration of applications for individual exemption were set down in the recent revision of 292.1. It is now incumbent upon the individual carrier seeking authority pursuant to 292.1 to demonstrate (a) that a need for irregular air service exists, and (b) to define the scope of the authority sought with particularity. The applications received by the Board as a consequence of these requirements indicated some confusion on the part of the carriers with respect to what type of operations might be properly applied for under the new regulation. Applications ranging from a request for eighteen round trips per month between the same two points to those requesting permission in a general way to operate on an "irregular basis" were received by the Board. To date no action has been taken affecting any of these applications.

The original desirability of prompt and expeditious handling of such applications has been frustrated by the inability of the CAB to solve the dilemma of irregular operating authority. Until the Board does so act and resolve the legal and economic aspects of this dilemma, a substantial number of irregular air carriers continue to operate under the authority vested by the earlier regulation, and the administrative difficulties incident to the proper enforcement of the conditions and limitations thereunder will continue to plague the Board and its staff, and the carriers.

One other solution seems possible, and that is that the CAB will be able to resolve many of the problems of operating under 292.1 by the certification process. The anticipation of a certificate is, of course, the piece de resistance for the ambitious Large Irregular Carrier. If the Board finds that the public convenience and necessity require the establishment of air coach service, at least on a temporary and experimental basis, and certifies one or more of the large irregular carriers for such an operation, some of the pressure and difficulty which has arisen under the regulation of irregular carriers will be eliminated. If, however, the Board finds that the public convenience and necessity does not call for the establishment of air coach service, or finds that the service can best be rendered by the presently certificated carriers, the legal and economic problems present under 292.1, as well as the task of definition, will continue with the large irregular carriers facing the same operational handicaps. These carriers will continue to find it well nigh impossible to maintain an operation which is at once economic and legally feasible.108

108 For an excellent and detailed analysis, pro and con of the entire subject of Irregular Air Carrier Regulation and the related subject of the feasibility of certificated coach operations now being conducted chiefly by non-scheduled operators, see Airline Industry Investigation, Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Congress, 1st Session, April and May 1949, particularly statements by James Fischgrund, pp. 260, 823; James M. Landis, pp. 211, 295; Joseph J. O'Connell, Jr., Chairman, CAB, pp. 249, 494; C. R. Smith, p. 741.