ABANDONMENT OF INTRASTATE SEGMENT OF INTERSTATE AIR ROUTE

It has been reported that many airlines are anxious to abandon service to smaller stops to which they were certificated in the flurry of post-war expansion.¹ This tendency toward voluntary applications for abandonment, coupled with the prospect of more frequent use of the Civil Aeronautics Board's powers to alter, amend, modify, and suspend routes,² may eventually result in an answer to the question of just how extensive the Board's powers are in respect to economic regulation of intrastate air operations which affect interstate air transportation.

It is reasonable to assume that in many cases in which the decision of the Board may alter an intrastate service which is incidental to the interstate service primarily under consideration, the State regulatory commission and other state and local interests will enter the picture, not always in a mood of humble submission to the will of the federal agency. This possibility was anticipated by Chicago and Southern Air Lines in its recent application to the Board to abandon the Illinois cities of Bloomington, Peoria, and Springfield, to which the airline was certificated under its Chicago-New Orleans route.³ Chicago and Southern also held a certificate from the Illinois Commerce Commission covering this intrastate segment of the route. In recognition of this dual regulation, Chicago and Southern pointedly asked the Board that the requested abandonment order be made effective as of the date that an abandonment order from the Illinois Commerce Commission should become effective, or be worded in such manner as to eliminate the possibility of the airline being required by the state agency to continue a service which has been ordered abandoned by the Board. Does the Board, under the Civil Aeronautics Act, have sufficient authority to prevail over the intrastate interests?

The Board's opinion in the Chicago and Southern case, while based upon a consideration of intrastate and local interests as well as upon the interstate aspects of the service,⁴ expressed no doubt concerning the Board's authority to prevail over these interests, and did not discuss the possibility of conflict.

¹ American Aviation, April 15, 1949, p. 6, "There's hardly a trunk airline in the industry that doesn't want to get out of serving some of the small stops to which they have been certificated within the past three years. Airlines asked for small stops as protection against feeder expansion, but most such stops have been costly to serve. Even secondary carriers want to abandon the smaller cities. There will be increasing action by airlines toward suspension requests, and in some areas feeder airlines will take over the service."

² O'Connell, Legal Problems in Revising the Air Route Pattern, 15 J. Air L. & C. 404 (1948). "I believe that you can look forward to an increasingly frequent use of the Board's powers under Section 401(h) of the Act ... Certainly the Board has not yet exercised its authority under this section sufficiently to be able to say that we have inadequate legal powers in this field."

³ CAB Docket No. 3571. Application granted as to Peoria and Springfield; deferred as to Bloomington, Chicago and Southern Air Lines, Inc. Abandonment of Service to Peoria, Springfield and Bloomington, 10 CAB..., (Serial E-3488, Oct. 27, 1949).

⁴ Chicago and Southern Air Lines, Inc. Abandonment of Service to Peoria, Springfield and Bloomington, 10 CAB..., (Serial E-3488, Oct. 27, 1949), Appendix A (Report of Examiner).
with any action taken by the Illinois Commerce Commission. Instead, the Board adopted the following language of the examiner's report: "Although these cities clearly should have adequate air service such service should be economical, efficient and void of useless and destructive competition . . . Clearly, the maintenance of such luxury competitive service cannot be considered as being in the public interest, and its continuance is not necessary for the purpose of assuring the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the National Defense." 5

It is well established that the Congress has power to regulate intrastate commerce to the extent that such regulation is incidental to the effective regulation of interstate commerce. 6 The extremes to which this concept can be extended have been demonstrated in recent years by cases arising in fields other than transportation. 7 Granting the power of Congress to regulate the economic aspects of aviation just as broadly as it has these other fields of commerce, has Congress actually done so in the Civil Aeronautics Act?

The words used by Congress in the economic regulations of the Act do not clearly indicate that the regulations were intended to cover such intrastate commerce. That more express language might have been used is illustrated by comparison with the words used to define the Board's jurisdiction in safety matters and with the language of the Interstate Commerce Act in the railroad field.

The safety provisions of the Civil Aeronautics Act and the economic regulations differ in their express coverage by virtue of the Act's definitions of "air commerce" and "air transportation." "Air commerce," which sets forth the scope of the Board's jurisdiction in safety matters, 8 is defined in such a way as to subject practically all operations to federal safety regulation. 9 In contrast, "air transportation," which term describes the Board's jurisdiction

5 Id. at 23.
6 This was best said by Chief Justice Taft in Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy RR Co., 257 U.S. 563 (1922) (Wisconsin Rate Case; federal increase of discriminatory intrastate rail rates to correspond with interstate rate increases upheld.), "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority." Also Southern Railway Co. v. U.S., 222 U.S. 20 (1911) (federal regulation of railroad vehicles used only in intrastate traffic upheld as valid exercise of commerce power because of "real or substantial relation or connection" with interstate commerce); Houston, East and West Texas Railway Co. v. U.S., 234 U.S. 342 (1914) (Shreveport Rate Case; federal regulation of intrastate rail rates which discriminated against interstate traffic upheld).
7 Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946) (Employees of corporation which washed windows under contracts with customers engaged in production for interstate commerce, held to be engaged in same and subject to Fair Labor Standards Act); U.S. v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (Federal control of milk produced and distributed solely within Illinois upheld due to effect on interstate milk regulations); Wickard v. Filburn, 317 U.S. 111 (1942) (wheat grown for individual's private use subject to federal quota system due to effect on interstate commerce).
8 52 Stat. 1007 (1938), 49 USCA §551 (a) (Supp. 1948).
9 52 Stat. 977 (1938), 49 USCA §401 (3) (Supp. 1948). "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." In effect, this leaves only intrastate aviation which operates outside civil airways and far enough removed therefrom so as not to affect or endanger interstate air operations.
in the field of economic regulation,\textsuperscript{10} is by definition restricted to carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail, in interstate, overseas, or foreign commerce.\textsuperscript{11} By so expressing the Board’s jurisdiction in economic matters, the Congress certainly did not write into the economic sections of the Act the specific ideas of broad jurisdiction which are included in the safety sections.\textsuperscript{12}

That the language which sets forth the economic jurisdiction of the Board may not be as broad as it could be is also demonstrated by a consideration of the jurisdiction granted the Interstate Commerce Commission in the railroad field by the Interstate Commerce Act. That Act subjects to regulation all common carriers engaged in railroad transportation,\textsuperscript{13} but exempts transportation which is wholly intrastate.\textsuperscript{14} The abandonment provisions are made applicable to all carriers subject to that Act and apply to “all or any portion of a line of railroad,”\textsuperscript{15} which read literally, appears to cover wholly intrastate abandonments. However, the courts have in effect limited the abandonment provisions to transportation subject to the Act, by refusing to include a purely intrastate line which had no connection with or effect on interstate commerce.\textsuperscript{16} The more express language of the Interstate Commerce Act setting forth the Commission’s jurisdiction has been sufficient to handle the railroad counterpart of the Chicago and Southern case—in Colorado v. United States, a federal order to abandon an economically burdensome intrastate branch was held to be valid because of the economic effect on the interstate activities of the carrier.\textsuperscript{17}

Of course, these comparisons of the language used in the statutes are of limited value, since the courts are not confined to a strict, literal interpretation of a statute, especially when the purposes and policies behind a statute appear to license broader interpretation and application. This has proven to be particularly true in cases involving interstate commerce.\textsuperscript{18} However, in the transportation field, leading cases upholding federal regulation of intrastate commerce as incidental to the effective control of interstate commerce have been based upon statutes which go far in expressing the intent of Congress to regulate such intrastate activities.\textsuperscript{19} For example, in the Shreveport Rate Case,\textsuperscript{20} the Supreme Court upheld federal regulation of intrastate rail rates which discriminated against interstate traffic, but in doing so, the Court relied upon a statute which clearly outlawed the dis-

\begin{itemize}
  \item \textsuperscript{10} 52 Stat. 987 (1938), 49 USCA §481 (a) (Supp. 1948).
  \item \textsuperscript{11} 52 Stat. 977 (1938), 49 USCA §401 (10), (21) (Supp. 1948).
  \item \textsuperscript{12} Rhyne, Federal, State and Local Jurisdiction Over Civil Aviation, 11 Law & Contemp. Prob. 466 (1946).
  \item \textsuperscript{13} 41 Stat. 474 (1920), 49 USCA §1 (1) (1929).
  \item \textsuperscript{14} 41 Stat. 474 (1920), 49 USCA §1 (2) (1929).
  \item \textsuperscript{15} 41 Stat. 477 (1920), 49 USCA §1 (18) (1929).
  \item \textsuperscript{16} Texas v. Eastern Texas Railroad Co., 258 U.S. 204 (1922).
  \item \textsuperscript{17} 271 U.S. 153 (1926).
  \item \textsuperscript{18} Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946); U.S. v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); see note 7 supra.
  \item \textsuperscript{19} Southern Railway Co. v. U.S., 222 U.S. 20 (1911), cited supra note 6; Colorado v. U.S., 271 U.S. 153 (1926) (federal order to abandon economically burdensome intrastate branch upheld because of effect on interstate commerce); Wisconsin Rate Case, 257 U.S. 563 (1922), cited supra note 6. In these cases, if power already existed, there would have been no need for additional legislation; mere fact of additional legislation indicated Congressional intent to go further and give these express powers over intrastate commerce incidental to regulation of interstate commerce.
  \item \textsuperscript{20} Houston, East and West Texas Railway Co. v. U.S., 234 U.S. 342 (1914), cited supra note 6.
\end{itemize}
criminatory practice involved in the case. That the acknowledged power of Congress to regulate this type of intrastate commerce can go unexercised, as has been suggested may be the case in regard to the economic regulations of the Civil Aeronautics Act, was recognized in the \textit{Shreveport} case, the Court saying, "\ldots in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is not ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation \ldots"\22

If, however, the courts consider the general policies of the Civil Aeronautics Act, as they may be expected to do, in determining the economic jurisdiction of the Board, there is reason to believe that the Act will be liberally construed to include economic regulation of intrastate commerce as an incident to the effective regulation of interstate commerce. The declaration of policy of the Act\23 does not once use the term "interstate commerce," but rather "domestic commerce."\24 The latter term is not defined in the Act, but generally it means commerce carried on within the limits of the Nation as distinguished from foreign commerce.\25 The term as used in the Act has never been defined by the courts, but it is reasonable to assume that it covers intrastate commerce within the United States as well as interstate commerce; if the Congress had meant merely interstate commerce, it logically would have used that more exact term.

Applying the maxim that between an unconstitutional interpretation of a statute and an equally reasonable constitutional interpretation, the latter will be favored, it may be assumed that "domestic commerce" as referred to in the declaration of policy of the Act includes only that intrastate commerce which Congress may validly regulate, i.e., intrastate commerce the regulation of which is incidental to the effective regulation of interstate commerce.\26

Another point in the policy statement favors a liberal interpretation of the economic regulations. One of the factors which the Board is directed to consider in carrying out its powers and duties is "sound economic conditions" in the industry.\27 This factor is presumably equally as commanding as the other policy considerations, and appears to cover the case of an intrastate operation which is economically burdensome to an interstate carrier. In view of the foregoing considerations, a broad interpretation of the economic regulations to include many intrastate operations is not an unexpected development.

\begin{footnotes}
\item[21] 24 Stat. 380 (1887), 49 USCA §3 (1) (1929) "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

\item[22] Houston, East and West Texas Railway Co. v. U.S., 234 U.S. 342 (1914), at 358-359.

\item[23] 52 Stat. 980 (1938), 49 USCA §402 (Supp. 1948).

\item[24] For example, para. (a), "The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and \textit{domestic commerce} \ldots"; and para. (d), "Competition to the extent necessary to assure the normal development of an air-transportation system properly adapted to the needs of the foreign and \textit{domestic commerce} \ldots" (emphasis supplied throughout).

\item[25] \textsc{Black's Law Dictionary} 359 (3d ed. 1933). "Domestic commerce" also means, in reference to a state, commerce wholly within the state as distinguished from interstate commerce; this meaning should not be confused with the use of the term on a national level.

\item[26] Wisconsin Rate Case, 257 U.S. 563 (1922), cited \textit{supra} note 6.

\item[27] 52 Stat. 980 (1938), 49 USCA §402(b) (Supp. 1948).
\end{footnotes}
Thus far, the economic regulations, as applied to physically intrastate operations, have been before the courts only once, in Civil Aeronautics Board v. Canadian Colonial Airways. That case is of dubious value, however, in that it presented primarily a question of whether the airline was engaged in interstate commerce or not, rather than whether an acknowledged intrastate operation was a burden on interstate commerce and subject to the Board's authority on that ground. The route was, geographically, wholly intrastate, being from New York City to Niagara Falls, and was not certified by the Board. Acting to enjoin the operation, the Board asserted its authority on the ground that passengers were using the service as a leg of interstate and foreign journeys. According to the Board, this was sufficient to characterize the service as interstate and therefore amenable to the authority of the Board. Canadian Colonial contended that even if the Board's argument were accepted, the airline could not be held to be engaged in interstate commerce if it was without knowledge of the origin and destination of its passengers. In issuing an order permitting the Board to examine pertinent documents and records of the carrier, the Federal District Court recognized the possibility that a physically intrastate air operation may be subject to the economic jurisdiction of the Board. However, any potentialities of this case as a court test of the Board's authority ended when the airline submitted to a consent decree permanently enjoining the operation. The case is also of limited value in the question at hand in that there was no certificate from the State of New York, and the State took no part in the litigation, according to the reports.

The Chicago and Southern decision is an unequivocal assertion of Board authority over an intrastate service. While it reflects a consideration of state and local interests, it expresses no doubt concerning the Board's jurisdiction over the matter. It does not solve the problem that would be presented if the state and local interests in the case should choose to challenge the asserted authority of the Board. It is probable that through such actions, the present language of the Act will be interpreted to have given the

28 41 F. Supp. 1006 (S.D.N.Y. 1940). The fact that more cases have not been considered by the courts is no indication of lack of Board authority in such matters, but probably reflects a reluctance of the Board to take up such situations without initial action by a carrier.

29 Annual Report CAB 35 (1941).

30 For a time, such challenge was in prospect. On November 4, 1949, Chicago and Southern petitioned the Illinois Commerce Commission for abandonment of the intrastate service and cancellation of its certificate with respect to the three Illinois cities (Proceeding No. 37906); a second petition by C & S on the same date sought suspension of service to Peoria (the only point then being actually served) pending action on the first request (Proceeding No. 37907). At the Examiner's hearing November 28, C & S challenged the jurisdiction of the Commission on the ground that the CAB has sole and exclusive jurisdiction over both interstate and intrastate commercial air transportation by virtue of the Civil Aeronautics Act. The case was then heard on its merits. On December 14, there having been no order on the aforementioned petition, C & S filed a time schedule with the Commission proposing discontinuance of its intrastate service as of December 26, the effective date of the CAB order cited supra note 3. The Commission, on December 21, answered this with an ex parte order suspending the proposed time schedule until April 25, 1950 and setting a hearing on the matter for March 21, 1950 (Proceeding No. 38029). On December 26, C & S suspended service to Peoria, in compliance with the CAB order, but contrary to the Commission's order of December 21. Two days later, C & S filed an action in the U.S. District Court (N. D. Ill., Eastern Division) requesting an order restraining the Commission and other defendants from attempting to compel operation of the intrastate service, and from enforcing any order of the Commission inconsistent with the Civil Aeronautics Act (No. 49-C-1961). A temporary order was granted. On January 19, 1950, the Commission suddenly acted upon the original C & S petition of November 4, 1949 (Proceeding No. 37905), and cancelled and rescinded the C & S certificate for intrastate service, and ordered that no action be taken to enforce penal provisions against C & S for discontinuance of the service prior to this order. However, the
Board broad powers to economically regulate these intrastate operations. However, the need for clarification of the Board's authority in this field is immediate. This has been recently illustrated by the California situation in which low-fare, non-certificated, intrastate carriers have been competing with certificated interstate airlines and clearly affecting the economic conditions of the latter. Intra-

state-interstate problems will become increasingly common with the extension of commercial air service to smaller communities within a single state which by virtue of such service find themselves within the stream of interstate commerce. To meet this growing problem and to clearly equip the Board with power to carry out the policies of the Act, the Congress should enact recently proposed legislation which would amend the Act to expressly give the Board economic jurisdiction over intrastate operations of interstate carriers and over the operations of intrastate carriers insofar as they compete with interstate carriers.

BERNARD R. BALCH*

JUDICIAL REVIEW OF ROUTE ORDERS OF CIVIL AERONAUTICS BOARD

STATE Airlines Inc. and Piedmont Aviations Inc. sought local or "feeder" air transportation certificates for an area in southeastern United States. The Board granted a certificate of public convenience and necessity to Piedmont and denied State's application. On petition for rehearing State urged that the Board's award to Piedmont was unlawful since Piedmont had not applied for the route which had been granted to it, and that by such a grant, the Board had acted beyond its jurisdiction. Furthermore, State argued that the finding that Piedmont was fit, willing, and able was not supported by substantial evidence. The Board found, however, that Piedmont was an applicant for the route awarded to it, since it had included in its application a clause which requested not only the route detailed within the petition, but any modification of that route which the Commission claimed jurisdiction of the matter, contrary to C & S's contention before the Examiner that the CAB has sole and exclusive jurisdiction. Finally, on January 25, the District Court entered an order dismissing the C & S action for a permanent restraining order, regarding the case as mooted by the January 19 action of the Commission.


S. 2759, 81st Cong., 1st Sess., by Sen. Johnson (D.-Colo.) extends jurisdiction under the Act to include all but local carriers, and defines local carrier as a person in intrastate commerce whose operations do not compete with registered carriers under the Act.

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A local or "feeder" air route is one made up largely of stops in small communities. These communities are tied in with larger communities by short haul operations. Thus, communities with a community of interest are joined regardless of size.

The Civil Aeronautics Board consolidated for hearing in a single proceeding known as the Southeastern States Case, 7 C.A.B. 863 (1947), some 45 applications by 25 companies proposing new and additional air transportation services. The area included the states, or a portion of the states of Florida, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, Missouri, Ohio, Indiana, West Virginia, District of Columbia, and Maryland.

The Board ignored the recommendations of the special Examiners who on June 4, 1946 issued their report recommending that the area be split into four separate "feeder" routes, one of which was to go to State, the others to Piedmont.

For purposes of review of an order of the Board, there is no final order until a rehearing has been denied by the Board. Braniff Airways v. C.A.B., 147 F.(2d) 162 (C.A.D.C. 1945).
Board thought necessary. The Board ruled also that there was substantial evidence upon which it had based its findings that Piedmont was fit, willing, and able.

On petition for review the Court of Appeals for the District of Columbia in *State Airlines v. C.A.B.*, overruled the Board's decision. The Court found that the route awarded was something more than mere modification of the route applied for; that section 401(d)(1) of the Civil Aeronautics Act required an application for the route before an award could be made; and further that the award was arbitrary, capricious, and not supported by substantial evidence.

The case is of some consequence since it presents for the first time the question of the definitive limits of the Board's broad discretion. There is no doubt that essentially the selection of a certain air line for a new air route is a task for administrative judgment. It has been felt that administrative agencies are peculiarly equipped to find the facts and should be the final arbiters of public interest concerning those facts. The question now presented is whether the Board has gone too far in exercising its discretion. From its inception the Courts have given the C. A. B. a fairly free rein over their administrative domain. The fulfillment of the substantial evidence test, always a necessary prerequisite, has not been a difficult task for the Board, and as in the case of administrative determinations, generally, administrative findings constantly tend to replace court adjudications. The Court here would not seem to be signalling a trend away from this munificent treatment; it merely appears to be pointing out to the Board the limits of its discretion.

5 The clause stated that Piedmont applied for authorization to engage in air transportation "on routes detailed herein or such modification as the Board may find public convenience and necessity to require."


7 "The authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the authority hereunder and such transportation is required by the public convenience and necessity: otherwise, the application shall be denied." 52 Stat. 987 (1938) 49, U.S.C.A. §481(d) (1948 Supp.). The Court held that it was without power to order a certificate to State, and therefore remanded the case for further proceedings not inconsistent with the opinion. Piedmont has taken the case to the U.S. Supreme Court.


10 For an example of this gentle treatment, see, *W. B. Grace & Co. v. C.A.B.*, 154 F.(2d) 251 (C.C.A. 2d 1946). "The review of orders of the Civil Aeronautics Board by the courts is not mere private litigation, but the public interest looms large and hence, there is no place on such review for overly-nice scrutiny of the pleadings and undue stress of alleged estoppel." See also: *U.S. Lines Co. v. C.A.B.*, 165 F.(2d) 849. (C.A.D.C. 1948).


12 *DIMOCK, ESSAYS ON LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION, 288 (1935). This tendency or movement has at times been halted. As in the days of *Crowell v. B.C. & St.*, 285 U.S. 22 (1932), but with the exception of a few isolated cases such as *Pittsburgh Steamship Co. v. Brown*, 171 F.(2d) 175 (C.C.A. 7th 1948); *Daffin v. Pape*, 170 F.(2d) 622 (C.C.A. 5th 1948); and see note (1949) 44 Ill. L. Rev. 537; the trend in past years has been toward a less stringent judicial supervision over the administrative fact-finder. This lenient or "liberal" approach is seen in cases like: *South Chicago Coal & Dock Co. v. Bassett*, 10 F.(2d) 529 (C.C.A. 7th 1939), aff'd, 309 U.S. 251 (1940); *Gudmundson v. Cardillo*, 126 F.(2d) 521 (C. A. D. C. 1942); *Shields v. Utah Idaho Central Ry.*, 305 U.S. 177 (1938); *City of Yonkers v. U.S.*, 320 U.S. 685 (1943); *Davis v. Dept. of Labor*, 317 U.S. 249 (1942); *Railroad Commission v. Brown & Nichols Oil Co.*, 310 U.S. 573 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1936); *L'Hote v. Crowell*, 286 U.S. 628 (1932).
Judicial review of the Board's decision is provided for in Section 1006(a) of the Act,\textsuperscript{13} and Section 1006(e) states that findings of fact by the Authority, if supported by substantial evidence, shall be conclusive.\textsuperscript{14} The Court, though it believes that the questions of fitness, willingness, and ability are for expert judgment in aviation matters, feels that the Board has completely ignored the standards which Congress has set for it. It then appears that the case presents two questions; first, whether Piedmont's application was broad enough under the Act to support the Board's grant; and second, whether there was, in fact, evidence with which to support the Board's finding that Piedmont was fit, willing, and able to adequately perform such transportation.

The catch-all phrase in Piedmont's application contained the word "modification." Around the definition of this word centers the court's finding that the Board's action went beyond its jurisdiction in granting to Piedmont a route for which it had not applied. Modification has been judicially defined as a change, an alteration which introduces new elements of detail, but leaves the general subject matter or substance unchanged.\textsuperscript{15} The Court held that the route awarded to Piedmont was more than a mere modification of detail, but was in fact a material alteration of the substance. Whereas a modification leaves the route substantially unchanged, the Board's action constituted a material deviation from the actual routes. The Board found support for their holding from cases coming from other Administrative agencies which found a variation from the issues specifically presented by the moving papers in the proceedings before them.\textsuperscript{16} Upon examination, these cases do not appear to be authority for the proposition asserted. These cases do not give the Board sanction to completely ignore the moving papers or section 401 of the Act nor to make their findings without reference to the petitions before them. The cases merely allow the Board some leeway from the specific issues presented to them by the petitioners. The Court exercised the power to overrule the Board's findings since there was such a disparity between the route applied for and the route granted as to be arbitrary, capricious, and completely unreasonable. Since Piedmont applied for a specific route or any modification of that route the Court was not confronted directly with the question of whether or not the Act allows for any modification. The opinion of the Court merely stands for the proposition that the Board will be allowed a small degree of variance; if that variance has been applied for. Where, as here, the route awarded is a complete change from the route applied for, a catch-all clause petitioning for a modification of the route applied for may not be used by the Board to meet the necessity of an application for the route awarded.\textsuperscript{17}

\textsuperscript{13} "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the Circuit Court of Appeals of the U.S. or the U.S. Court of Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order..." 52 Stat. 1024 (1938), 49 U.S.C.A. §646 (Supp. 1948).

\textsuperscript{14} 52 Stat. 1024 (1938), 49 U.S.C.A. §646(e) (Supp. 1948).


\textsuperscript{16} Supra.

\textsuperscript{17} It seems clear that the courts will allow the Board some variance in view of the cases cited above (Supra. 16) in the name of public convenience and necessity.
The significance of the Court's finding should not be underestimated. The issue of how much change the courts can allow is not mere rhetoric. To allow the Board to grant routes vastly different from those applied for makes judicial discovery of an arbitrary grant impossible, since the evidence before the Court as to a petitioning air line's fitness and ability would be entirely irrelevant. The possibility of favoritism would be ever present with the relinquishment of this essential judicial check rein.

The Court's decision that there was no substantial evidence to support the Board's finding as to Piedmont's qualifications cannot be entirely divorced from its conclusion that Piedmont was not an applicant for the route awarded. It is obvious that Piedmont could not have evidenced its qualifications for a route for which it did not apply. This shortcoming is especially apparent in the present case since the two routes are over dissimilar terrain and would no doubt require the utilization of essentially different equipment and services.

The Board in the case of Braniff Airways v. C.A.B. developed the presently followed tests for fitness and willingness. These are the ones which courts look to in order to determine whether or not there was evidence to support the Board's finding. The necessary prerequisites are: a proper organizational basis for the conduct of air transportation; a plan for the conduct of the service made by competent personnel; and an adequate financial resource. The Court found the record barren of any substantial evidence, showing that Piedmont had met these tests with respect to the operation granted. In fact, there was evidence to the contrary. The Board has failed to meet its own tests and it appears that the Court was correct in finding that the Board had acted in an arbitrary and capricious manner.

In so finding the Court has decided: that an air line must be an applicant for the route granted, that in order to be an applicant the application must be substantially directed toward the route awarded; and finally that the record before the court must show that the applicant was fit, willing, and able to perform the route awarded to it. This decision appears to be sound judicial treatment of an administrative determination. Unless the Supreme Court, which is now hearing oral argument on the case, decides that no application is necessary for the particular route granted and by so doing gives the broadest possible interpretation of Section 401(d) (1) of the Civil Aeronautics Act, the opinion of the court should be affirmed.

ROBERT F. HANLEY*

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19 147 F. (2d) 152 (C.A.D.C. 1945).
20 The route ultimately awarded to Piedmont was west of the Appalachians over mountainous terrain. Counsel for Piedmont in oral argument before the Board made statements with regard to the non-mountainous character of its application emphasizing its non-mountainous terrain. He also based all of his evidence and exhibits on the performance of a Noordvyn Norseman v. a single-engine plane, whereas State proposed to use twin engine planes.
21 It is of interest to note that §10 of the Administrative Procedure Act states that reviewing courts are empowered to set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, and also those unsupported by substantial evidence. Unless the Supreme Court redefines the words in this section, it would appear that the Court's decision was correct.
22 After this note had gone to press the Supreme Court, on February 6, 1950, delivered its opinion. It reversed the holding of the Court of Appeals for the District of Columbia discussed above. The majority held that it was not the Congressional purpose to bar the Board from granting any certificates in which the routes awarded deviate more than slightly from the precise routes defined in the application.

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