The Meaning of Incidental to Transportation by Aircraft as Used in Section 203 (b) (7a) of the Interstate Commerce Act

Russell S. Bernhard
THE MEANING OF "INCIDENTAL TO TRANSPORTATION BY AIRCRAFT" AS USED IN SECTION 203 (b) (7a) OF THE INTERSTATE COMMERCE ACT

By RUSSELL S. BERNHARD

Assistant to General Counsel, Air Transport Association; Assistant Secretary and Counsel, Air Cargo, Inc.; and Lecturer on Transportation at American University; B.S. 1936, M.A. 1938, Northwestern University; LL.B. 1941, Harvard Law School. Formerly, associated with Lord, Bissell and Kadyk, attorneys at law, Chicago, 1941-1942; Attorney, Office of Price Administration, 1942; Analyst, Board of Economic Warfare, 1943; Attorney, Civil Aeronautics Board, 1943-1946; Assistant Director, Route Development Division, Trans-World Airlines, 1946-1947. Member Illinois, Court of Appeals D.C., and U.S. Supreme Court Bars.

WHEN the Civil Aeronautics Act was enacted in 1938, numerous other statutes related to air transportation were repealed or amended by Section 1107 of that Act. Among such amendments was subsection (j):

"Section 203(b) of the Motor Carrier Act, 1935, is amended by inserting after the words "(7) Motor vehicles used exclusively in the distribution of newspapers" a semicolon and the following: 'or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.'"

The significance of this amendment is not apparent without reference to Section 203(b) of the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act). Section 203(b) is the "exemption" section which relieves the several types of motor carriers therein specified from all provisions of the Interstate Commerce Act except those relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment. Thus, a motor carrier falling within the exemption of Section 203(b) is not subject to economic regulation by the Commission, that is to say, such a motor carrier is not required to procure a certificate of public convenience and necessity or an operating permit from the Commission and its rates are not subject to control by the Commission. The effect of Section 1107(j) of the Civil Aeronautics Act was thus to place in this exempt category "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

The phrase "when incidental to transportation by aircraft" is not defined, or otherwise qualified or explained, either in the Civil Aeronautics Act.
nautics Act or the Interstate Commerce Act, nor has diligent research by numerous persons revealed any legislative history which might throw light upon the Congressional intent with respect to the scope of this phrase. Moreover, at the time Section 1107(j) of the Civil Aeronautics Act was enacted, there was no comparable provision either in that Act or in the Interstate Commerce Act from which the meaning of that phrase could be construed by analogy. Thus, Congress in effect employed a novel statutory expression without offering any clues as to its precise meaning, notwithstanding the fact that an important exemption was thereby created for a class of motor carriers of rapidly increasing significance.

The purpose of Section 203(b)(7a) is, of course, obvious. Air transportation, unlike other forms of transportation, is seldom, if ever, complete in and of itself. Other forms of transportation generally have their terminals in the heart of the city or town served; but most airline terminals, i.e., airports, are located at considerable distances from the centers of the cities and towns which they are designed to serve. This occurs not only because airports, particularly those accommodating the larger commercial aircraft, require extensive tracts of land which can only be procured at reasonable prices in rural or suburban areas, but also because the inherent nature of commercial air transportation precludes frequent short interval stops by the airplanes, with the result that airports are often so located as to serve with reasonable convenience several separate communities. Inevitable gaps are thus created between the actual origin and destination points of air travelers and air shipments and the places where the airplanes are available; and motor carriers, operating either under contract with the airlines or independently, are the usual means of filling these unavoidable gaps in a complete air transportation service. Under Title IV of the Civil Aeronautics Act, Congress gave to the Civil Aeronautics Board complete jurisdiction over all economic phases of common carrier air transportation; but under Part II of the Interstate Commerce Act, in the absence of the aforementioned amendment to Section 203(b)(7a), the Commission retained jurisdiction over these "incidental" motor carrier services so essential to a commercial air transportation system. Congress apparently recognized the undesirability of this duality of regulation and acted accordingly. Thus, as stated by the Civil Aeronautics Board in a case involving this question: 3

"Section 1107(j) amends the Motor Carrier Act to exclude from the regulatory provisions of that Act motor vehicle operations which are "incidental to transportation by aircraft." It is apparent that it was deemed necessary to avoid conflict of jurisdiction between the Board and the Interstate Commerce Commission."

The general purpose of the exemption created by Section 203(b)(7a) is thus clear enough, but the precise scope to be given that exemption is far less certain. The exemption is, of course, a limitation

---

3 Railway Express Agency Grandfather Certificate, 2 CAB 531 at 538.
on the scope of the Interstate Commerce Act, and as such, the primary responsibility for the interpretation of such exemption rests with the Commission; and such interpretation, if reasonable, will not be disturbed by the Courts except for weighty reasons.\textsuperscript{4}

The applicability of the exemption in Section 203 (b) (7a) has been considered by the Commission in at least eighteen reported cases and several unreported cases. These cases fall into the following three distinct categories, each of which has been treated somewhat differently by the Commission: (1) cases concerned with the air express traffic of the Railway Express Agency, all of which were decided during the period 1940-1942; (2) cases involving the transportation of commercial airline traffic by motor carriers operating under contracts with the airlines, the first decision in this category having been made in 1947; and (3) cases involving the transportation of commercial airline traffic by motor carriers operating independently of the airlines, the initial decision in this category also having been made in 1947.

I. THE RAILWAY EXPRESS CASES

This discussion commences with the R.E.A. cases, not because they are first in significance, but because they are first in time and have thereby created an unnecessary amount of confused thinking. The R.E.A. cases are, in fact, utterly without value as precedent for the airline traffic cases, and in all probability may be regarded as over-ruled by the Commission even with respect to R.E.A. traffic.

"Air Express" is an expedited service of the R.E.A. Air express traffic moves on R.E.A. bills of lading and is accepted from shippers and delivered to consignees only by the R.E.A. The commercial airlines are utilized by the R.E.A. under contract to move such traffic between airports, but the R.E.A. is the carrier insofar as the public is concerned. Air express traffic moves at substantially higher rates than "air freight" and is given a priority in handling by the airlines. When air express moves by aircraft, it necessarily must be transported to or from the airport by motor carrier. At some points such motor carrier service is provided by the R.E.A. itself, while at other points the service is provided by motor carriers under contract with the R.E.A.

In the first case involving Section 203 (b) (7a)\textsuperscript{5} a motor carrier, under contract with the R.E.A. to transport air express between Columbus and the airport serving Columbus (Port Columbus), applied to the Commission for a contract carrier permit covering such operation. The Commission, without analyzing Section 203 (b) (7a), held such service to be within the exemption and dismissed the application.

During the years 1941 and 1942 the Commission decided four cases in which the R.E.A. applied for authority to transport express by its

\textsuperscript{4} Brewster v. Gage, 280 US 335 at 336.

\textsuperscript{5} Port Columbus Cab Co.—Contract Carrier Application, 24 MCC 237.
motor vehicles between points formerly served by railroads. In each of these cases the Commission found that the public convenience and necessity required the proposed service, limited however, to shipments moving on a through bill of lading and having an immediately prior or subsequent movement by rail, and directed that a certificate in such form be issued to R.E.A. As an apparent afterthought, R.E.A. requested that the words “or air” be added to the certificate following the words “by rail,” to cover the occasional movement of an air express shipment, and the Commission complied. In each of these cases the Commission adverted to the exemption in Section 203 (b) (7a) but held that it was not applicable, even though in the West Warwick Case a distance of only twelve miles was involved. In none of these cases, however, did the Commission make any effort to define the phrase “incidental to transportation by aircraft” or to explain why it regarded the proposed R.E.A. service for air express as a “line-haul” movement. Commissioner Lee dissented on this point in the West Warwick Case and in the Bristol Case, contending in both that the service proposed, insofar as air express shipments were involved, was within the exemption of Section 203 (b) (7a), but he likewise gave no reasons for his position. Since only a trivial amount of air express traffic was involved in these cases, and the Commission had already decided that a certificate should be issued to the R.E.A. for the proposed service covering rail express, the slight modification of the certificate to include air express, as requested by the R.E.A., must have appeared to the majority of the Commission as a harmless accommodation to R.E.A., particularly in the absence of opposition by any party.

The foregoing considerations would appear to accord these R.E.A. cases little, if any, precedent value with respect to the meaning and scope of the exemption in Section 203 (b) (7a). In any event, the Commission in its subsequent decisions has utterly disregarded them. In the first case decided by the Commission involving Section 203 (b) (7a) subsequent to the R.E.A. cases,\(^7\) the Commission adverted to the West Warwick Case, but dismissed it with the statement that “the circumstances which persuaded such a finding at that time are not present here.” A slight effort was made in that case to distinguish the West Warwick Case on its facts; but in the fourteen or more cases subsequently decided by the Commission, involving Section 203 (b) (7a), the R.E.A. cases were not even mentioned. Thus, the R.E.A. cases should properly be disregarded as precedent reflecting on the scope of Section 203 (b) (7a).


II. Cases Involving Commercial Airline Traffic Transported by Motor Carriers Under Contract with the Airlines

Three types of commercial airline traffic are presently being transported by motor carriers under contract with the airlines: (1) at virtually every airport in the United States served by the commercial airlines under their "air freight" tariffs, motor transportation service for air freight is offered by the airlines between such airport and points within the designated "terminal area" of that airport; (2) under emergency circumstances all commercial airlines provide a substitute motor carrier service for air service for all types of their traffic; and (3) at five airports in the United States the commercial airlines under their tariffs provide ground transportation for passengers between such airports and one or more points within the "terminal areas" of those airports. No cases have ever arisen before the Commission involving the type of service described in (3), but in several cases the Commission has considered the applicability of the exemption in Section 203 (b) (7a) to the types of service described in (1) and (2).

Motor Carrier Transportation as Regular Part of Airline Air Freight Operations

All of the permanently certificated domestic airlines of the United States are presently engaged in the transportation of "air freight." Although airlines have long been transporting property by air in conjunction with Railway Express Agency's air express service, the direct entry of airlines into the freight transportation field is essentially a postwar development, the first airline tariff offering to the public a common carrier air freight service having been published on October 1, 1944.

In conjunction with the establishment of their air freight service, the airlines recognized that adequate and efficient ground transportation service, coordinated with the air service, was essential if air freight service was to be an effective instrumentality of commerce; and the following statement by the Commission indicates that it is in complete accord with the airlines on this point:

"The sale of air-line service depends to a considerable extent upon the speed with which the lines are able to effect deliveries. Any delay necessitated by the assembly or distribution of traffic by ground transportation will naturally affect the time element involved in the over-all service. In some instances, the time consumed in the movement of traffic by ground transportation will closely approach, if not exceed, the time consumed in the line-haul air movement. It is necessary, therefore, that the airlines have available an expeditious motor-carrier service which will be available at all times to meet arriving or departing planes, so that a minimum of time may be lost between the original pickup or ultimate delivery."

8 Peoples Express Co., Extension of Operation, No. MC-1756 (Sub. No. 1), 48 MCC 393 at 395.
Accordingly, each airline engaging in air freight activities has undertaken to provide ground transportation service between the airports served and designated points within the “terminal areas” of those airports, through contracts with local motor carrier operators. The air freight shipment moves from the door of the consignor to the door of the consignee under the airline’s airbill (bill of lading). The trucker accepts and delivers such shipments solely as the agent of the airline; and the airline is responsible to the shipper for any loss or damage.9

In the *Sky Freight Delivery Service Case*10 the Commission faced, for the first time, the question of the extent to which a motor carrier, transporting air freight under contract with an airline, was operating within the exemption provision of Section 203 (b) (7a). The Commission summarily dismissed the Railway Express Agency cases as possible precedents, and quite properly approached the *Sky Freight Case* as one of first impression.

The applicant in the *Sky Freight Case* requested a certificate of public convenience and necessity to transport shipments moving on commercial airline or air express bills of lading between the airports in the New York-Newark area, on the one hand, and points in New York and northern New Jersey, on the other hand. The opinion of the Commission contained the following findings of fact. The service was being provided exclusively for American Airlines under a contract with that airline. The motor carrier acted solely as agent for the airline and performed in the name of the airline. The shipments at all times moved under the airbill (bill of lading) of the airline. The service was provided between La Guardia and Newark airports, on the one hand, and all points within the “air freight terminal area” of the airline as set forth in its tariffs, on the other hand. Five points in New York and twenty-three points in New Jersey were included within such “air freight terminal area,” the most distant point in New York being twenty-three miles from La Guardia Airport and the most distant point in New Jersey being eight miles from Newark Airport. The contract also provided for an expansion by the airline of such “terminal area” to include points within forty-five miles of La Guardia Airport and twenty-seven miles of Newark Airport.

The Commission first considered the meaning of the phrase “incidental to transportation by aircraft” as used in Section 203 (b) (7a). Although general consideration had been given to that section by the Commission in the R.E.A. cases, it had never previously undertaken to define that particular phrase. Legislative history unfortunately could offer no assistance, since Congress had not disclosed its intent or pur-

---

9 In May 1947, the airlines delegated to their wholly owned subsidiary, Air Cargo, Inc., complete authority to act as their agent in arranging for, and supervising the operation of, such ground transportation service.

10 Supra note 7.
pose in adding Section 203 (b) (7a) to the Act. Consequently, the Commission elected to follow the dictionary definition of "incidental" and concluded that, to be "incidental," the motor carrier transportation must be a "result of," and "adjunct of," and "subordinate to" the movement by air. In support of this conclusion, the Commission referred to Sections 202 (c) (1) and (2),\(^\text{10a}\) which were added to the Act two years after Section 203 (b) (7a). In those sections Congress again used the phrase "incidental," when referring to motor carrier service rendered in conjunction with transportation by other forms of carriers, but was more specific, in that the term "incidental" was limited expressly to pickup, delivery, and transfer service within the terminal areas of the line-haul carriers. The Commission, in the Sky Freight Case, indicated that the language in Section 202 (c) could probably be regarded as a more artistic expression by Congress of the same general concept it intended to convey in Section 203 (b) (7a). From the dictionary definition of "incidental" and the analogous, although later, use of that term in Section 202 (c), the Commission drew the following conclusion:

"... transportation in the performance of collection, delivery, or interline transfer of air freight within what appears to be a reasonable terminal area for the line-haul air carrier is 'incidental' to the transportation by air."

The Commission dismissed the application of Sky Freight upon making the ultimate finding that the service proposed was within the scope of the exemption provided in Section 203 (b) (7a) as thus defined. It should be noted in passing, however, that this definition does not necessarily purport to be all-inclusive. Collection, delivery, and transfer services within the airline's terminal area are held to be "incidental to transportation by aircraft"; but the definition does not indicate that the Commission intended thereby to exclude the possi-

\(^{10a}\) "(c) Notwithstanding any provision of this section or of section 303, the provisions of this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental." 56 Stat. 300, 49 U.S.C. 302.
bility that other types of service may also be "incidental to transportation by aircraft" within the meaning of that phrase as used in Section 203(b)(7a). Thus, for example, cases involving the "emergency" type of service, discussed in the following subsection, were decided subsequent to the Sky Freight Case; and even though such service extended far beyond the terminal area of the airport concerned, it was held by the Commission to be "incidental" within the meaning of the exemption.

In the second case presented to the Commission involving the transportation of air freight by a motor carrier under contract with airlines, again the application was for authority to provide motor transportation for property moving on airline bills of lading between La Guardia and Newark airports, on the one hand, and points in northern New Jersey, within forty miles of the Newark Airport, on the other.\textsuperscript{11} Except for the fact that the contractual arrangements with the airlines were oral, rather than written, the facts of the Golembiewski Case were virtually identical to those in the Sky Freight Case, and the Commission so stated:

"The application before us is almost identical to that filed by Sky Freight, supra. The maximum hauls involved in the Sky Freight Case were approximately the same as those here proposed. In that case, as here, shipments transported move in door-to-door service at rates fixed by the airlines and under contracts between applicants and the airlines. We find nothing in applicant's present proposal to compel us to a different conclusion than was reached in the Sky Freight Case."\textsuperscript{12}

The Commission qualified its decision, however, by saying:

"Such consideration as door-to-door rates and air-carrier billing and responsibility are not necessarily controlling and would not require a finding of an exempt operation should it appear that the motor-carrier service involved was so extensive as to constitute, in fact, a line-haul part of a through interline service, rather than a bona fide collection or delivery service incidental to air carrier service."\textsuperscript{13}

This admonition in the Golembiewski opinion soon found practical application in the next case of this type to be decided by the Commission, Peoples Express Co., Extension of Operation.\textsuperscript{14} The nature of the service proposed in the Peoples Express Case was found to be substantially the same as that proposed in the two preceding cases: the application was limited to shipments moving on commercial airline or air express bills of lading, the service was to be rendered for airlines under contract, door-to-door airline rates would apply to the shipments, and they would be covered throughout their movement by the airline

\textsuperscript{11} Sigmund J. Golembiewski, Common Carrier Application, No. MC-106850, 48 MCC 1 (1948).
\textsuperscript{12} 48 MCC 1 at 4.
\textsuperscript{13} 48 MCC 1 at 5.
\textsuperscript{14} Supra note 8.
shipping document. The only distinguishing feature between the *Peoples Express Case* and the two preceding cases was that the proposed service was to be provided between the airports in or adjacent to New York and Newark, on the one hand, and *all* points in the entire State of New Jersey, on the other hand.

On the issue of the applicability of Section 203 (b) (7a) to this proposed service, the Commission concluded that service within such portion of the area involved as duplicated the *Sky Freight* proposal would be within the exemption; but it went on to point out that certain of the points to be served were more than one hundred miles distant from the Newark Airport and actually were in the immediate vicinity of the Philadelphia Airport at which the same type of air service was available. Based on such findings the Commission reached the following important conclusion:

"Motor operations conducted as those proposed which extend so far as to reach into the territory adjacent to, and served primarily by, another airport clearly take on the character of inter-terminal line-haul service in substitution for, rather than incidental to, air transportation." (Emphasis added.)

The Commission found that the public convenience and necessity required the service proposed in the *Peoples Express* application; and rather than attempting to draw a line between that portion which was exempt under Section 203 (b) (7a) and that which was not, the Commission decided to issue a certificate for the entire operation.

The *Peoples Express Case* decision thus provides a significant corollary to the definition of "incidental to transportation by aircraft" in the *Sky Freight Case*, by establishing an important category of service which will *not* be regarded as service within "a reasonable terminal area for the line-haul air carrier" and hence exempt under Section 203 (b) (7a), namely, motor carrier service which extends into the terminal area of another airport at which like air service is available.

The other two cases of this type decided by the Commission are the *Harry Lillien Case* and the *Hazel Kenny Case*. The former is an unreported case involving a motor carrier providing transportation of property in the New York and nearby Connecticut area for the Belgian airline, Sabena, under contract with that airline. The service was held to be within the exemption in Section 203 (b) (7a) on the authority of the *Sky Freight Case*. The latter case involved an application for a certificate of public convenience and necessity by a motor carrier providing pickup and delivery service for air freight in the Pittsburgh area under contract with Capital Airlines. The application requested authority to provide such service to all points within a fifty-mile radius of the airports in Allegheny County (Pittsburgh), although at that

15 48 MCC 393 at 396.
16 *Harry Lillien, Common Carrier Application*, No. MC-108665, unreported.
time (and at present) Capital Airlines and the other airlines serving Pittsburgh were (and are) providing pickup and delivery service under their tariffs only within Pittsburgh and its immediately adjacent suburbs. In analyzing the area within the fifty-mile radius contemplated for service by the Kenny application, the Commission stated:

"Within this radius Pittsburgh is the largest point in size and within Pittsburgh and a small area therearound is concentrated the greatest density of population for such radius. The radius also embraces some mountainous territory within which principal air terminals are not likely to be located. Shippers on the perimeter of the radius are desirous of air service. That they seek an expeditious movement of their traffic by air is evident from their practice of not engaging line-haul motor carriers to transport their freight to and from the airports. Because of this the air carriers are handicapped in attracting more freight from these points when they do not have an agent to perform the incidental ground haul. We conclude that points within a 50-mile radius of either of the two above-described airports in Allegheny County are within the terminal areas of air carriers operating to and from such airports, and that bona fide collection, delivery, and transfer operations on behalf of air carriers serving such airports in the transportation of commodities having an immediately prior or subsequent movement by aircraft and moving on commercial air line or air express bills of lading are incidental to transportation by aircraft and are exempt from the certificate and permit requirements of the act."

Based on such findings, the Commission dismissed the application. On its face the Kenny decision would appear to be the broadest interpretation to date by the Commission with respect to the scope of the Section 203 (b) (7a) exemption. Actually, however, such is not the case. It should be noted that the Commission qualified its decision in the Kenny Case by providing that such traffic must be moving on commercial airline or air express bills of lading. Since an airline or air express bill of lading may be issued only in conformance with a tariff published by the airline or the Railway Express Agency and filed with the Civil Aeronautics Board, and no such tariff had been so filed, the Commission was not in fact authorizing Kenny to provide the proposed service within the fifty-mile radius contemplated by the application. In effect, the Commission merely held that if a commercial airline should publish a tariff providing pickup and delivery service to points fifty miles distant from the Pittsburgh airport and should contract with Kenny to perform the actual operation for the airline, such operation by Kenny would then be within the exemption.

The qualification that shipments must be "moving on commercial airline or air express bills of lading" appears in every decision of the Commission in which it has held that ground service provided for air freight by motor carriers under contract with the airlines is within the exemption of Section 203 (b) (7a). The significance of this qualification may not be readily apparent; but what it in effect represents is a

---

18 49 MCC 182 at 185.
reliance by the Commission upon the fact that air freight moving in motor carrier service under airline bills of lading must necessarily be moving under the airline tariffs and under airline contracts with the motor carriers, and such movements cannot take place without the sanction of the Civil Aeronautics Board. Thus, the Commission in these cases is actually saying that if such movement is approved by the Civil Aeronautics Board it will be approved by the Commission.

The Commission, in deciding the foregoing cases, has unquestionably exercised sound administrative judgment and acted in a manner consistent with the apparent intent of Congress by according almost conclusive weight to those very factors which place such motor transportation squarely under the jurisdiction of the Civil Aeronautics Board, namely, that such services are provided pursuant to contracts between the airlines and the motor carriers and the fact that such services are offered to the public as services of the airlines under their tariffs, shipping documents, and responsibility. Although the Commission, of course, has the primary duty of construing the scope of the exemption in Section 203 (b) (7a), the serious repercussions of such interpretations are felt mainly by the air transport industry; since air transportation is utterly reliant upon motor carrier transportation for the local movement of airline traffic to and from the airports. Thus, it is most appropriate that the Commission has afforded the Board the initial opportunity to regulate the nature and extent of such service.

At first blush, the Commission's decision in the Peoples Express Case, supra, in which it refused to extend the exemption of Section 203 (b) (7a) to include motor transportation of air freight moving under airline contracts and shipping documents from Newark Airport to the very limits of Philadelphia, might possibly appear to be a contradiction of, or at least inconsistent with, the principles above indicated. Actually, however, such apparently exceptional action by the Commission was quite proper, and created no conflict with the Civil Aeronautics Board, since the Board had never given its sanction to such operations. The air carriers with whom Peoples Express had its contracts, and for whom it was acting, were not certificated airlines and were operating under a temporary exemption which relieved them from filing tariffs and contracts. Such exemption, a holdover from prewar conditions, has long since been abolished; and now all air freight carriers, as well as the scheduled airlines, are fully subject to

19 The specific sections of the Civil Aeronautics Act under which the Board exercises full regulatory control over such contracts and services are the following: Section 412(a) which requires every air carrier to file with the Board a copy of every contract affecting air transportation between such air carrier and any other carrier for cooperative working arrangements; Section 412(b) which requires the Board to disapprove such contract if it shall find it to be adverse to the public interest, otherwise to approve it; Section 403(a) which requires the air carriers to publish in their tariffs all services which they provide in connection with air transportation; Section 403(b) which prohibits an air carrier from providing a service not so published in its tariff; and Section 1002(g) which authorizes the Board to suspend the publication of any tariff provision pending hearing and decision with respect to its lawfulness.
the aforementioned tariff and contract provisions, Sections 403 and 412 of the Civil Aeronautics Act.

Motor Carrier Service Provided Under Contract With Airlines as Emergency Substitute for Air Service

Airlines provide service to points which they are authorized to serve through airports approved by the Civil Aeronautics Board. Such approval includes not only the airport regularly used for such services, but also airports to be used under emergency conditions when the airport regularly used is unavailable. Unfavorable weather conditions are, of course, the usual reason for utilization of an alternate airport. In the Graff and Blue Bird cases,\(^2\) the motor carrier operators, who were regularly engaged in transporting airline passengers between the Baltimore Municipal Airport and Baltimore, and between the Chicago Municipal Airport and Chicago, respectively, applied to the Commission for appropriate authority to transport such passengers between each of those cities and the alternate airport used when the Baltimore and Chicago municipal airports were unavailable. In the Graff Case the usual alternate was the airport at Washington, D.C., and in the Blue Bird Case the usual alternate was the airport at Milwaukee.

The Commission decided in both cases that such emergency service, although clearly rendered beyond what could conceivably be regarded as the "terminal areas" of the Chicago and Baltimore airports and unquestionably "line-haul" motor carrier operation in character, was nevertheless "incidental to transportation by aircraft" within the meaning of the exemption in Section 203 (b) (7a). The Commission specifically stated that cases previously decided by it involving regular, as distinguished from emergency, service were not precedents for deciding these two cases, and spelled out the following principles for cases of this type:

"Connecting-carrier line-haul motor operations are complementary to air transportation services with which they connect and are conducted regularly as a part of through interline service. In contrast the operations here involved, though line-haul, are sporadic and irregular in point of time and emergency in character. They are furnished at the airline's expense and serve as a substitute for impossible or impracticable air transportation and not as a complement to regular air service. They are clearly subordinate to the regular air service; a necessary result or adjunct of it, without which, or its equivalent in some form, maintenance of regular air service would be more hazardous if not wholly impracticable on many occasions."\(^2\)

The logic and soundness of this decision is indisputable, and extended discussion could add nothing.


\(^{21}\) 49 MCC 310 at 315-316.
III. Cases Involving Commercial Airline Traffic Transported by Motor Carriers Operating Independently of the Airlines

The third category of cases before the Commission involving Section 203 (b) (7a) concerns airline traffic transported to and from airports by motor carriers who do not operate under contract with the airlines and do not carry passengers or property for the airlines or under airline tickets or shipping documents.

General Considerations Affecting the Commission’s Treatment of Cases in This Category

The exemption in Section 203 (b) (7a), in contradistinction to the exemption in Section 202 (c) (2), is not limited to incidental transportation performed by a person acting “as agent or under a contractual arrangement” with the line-haul carrier. The exemption in Section 203 (b) (7a) requires only that the motor carrier transportation be “incidental to transportation by aircraft.” It is therefore evident that motor carrier operators may, within certain limits, engage in providing “incidental” ground transportation for airline traffic independently of the airlines; and the Commission has so recognized in the cases to be discussed in this section.

For economic or other reasons, the airlines do not, except in a very few instances, provide motor carrier transportation for airline passengers locally to and from the airports, nor do they provide air freight pickup and delivery service for all points which may regularly receive air service through a particular airport. Independent motor carrier operators have entered the field to fill these gaps; and also to compete at certain points with the motor carrier service actually provided by the airlines.

Since such service is provided by independent motor carrier operators and not by the airlines, the Commission, in determining whether that service is within the exemption of Section 203 (b) (7a), cannot rely on the factors regarded as so significant in the preceding category of cases, namely, airline contracts and tariffs and the concurrent jurisdiction of the Civil Aeronautics Board.

Since these services are not subject to the jurisdiction of the Board, and a finding by the Commission that such service is within the exemption of Section 203 (b) (7a) would free such motor carrier operations from all Federal regulatory authority, it would appear appropriate for the Commission to adopt a more conservative and critical approach in considering these cases than in considering cases involving service under airline contracts and tariffs which are also subject to the concurrent jurisdiction of the Board; and the Commission has, in fact, taken just such an attitude in several of these cases.
Analysis of Commission Decisions in Cases Involving Independent Motor Carrier Operators

The first case under Section 203 (b) (7a) involving this type of service was the Seattle Transfer Company Case. An application was filed for a certificate authorizing the transportation of property between the City of Seattle and the Seattle-Tacoma Airport, through which United Air Lines served Seattle. The case was submitted to a joint board, and the recommendation of the joint board became the decision of the Commission by operation of statute. The opinion does not indicate that the service was one provided under contract with the airline or that the shipments moved in ground transportation under airline shipping documents. On the authority of the Port Columbus Case, supra, it was held that such motor carrier transportation for property which has had or will have a prior or subsequent movement by aircraft was within the exemption of Section 203 (b) (7a).

The Commission itself first considered this type of operation in the Air Freight Delivery Service Co. Case, which was decided in conjunction with the Sky Freight Case. The application of Air Freight was for a certificate authorizing the transportation by motor carrier of air freight between the Newark Airport and points in the commercial zone of New York City, which does not include Newark. The findings of fact indicated that Air Freight was rendering such service for the account of seventy shippers and in addition served several airlines; but the airline service apparently was not under contract, although the Commission indicated that such contracts were contemplated. In its discussion and in drawing its conclusions, the Commission treated both the Sky Freight and the Air Freight applications together, and found them both to be within the exemption. The Air Freight application appears actually to have presented the Commission with a considerably narrower and simpler issue than that raised by the Sky Freight application. This latter application involved both the Newark and La Guardia airports and all points named in American Airlines' terminal area tariff, which covered numerous points in both New York and New Jersey in the areas surrounding those airports; whereas, the Air Freight application was limited solely to service between the Newark Airport and points in the New York City commercial zone. The holding that the Air Freight application involved exempt service therefore appears to have been governed solely by the fact that the Newark Airport is one of the airports regularly used by the airlines in providing service to and from the New York City area.

In the Teterboro Motor Transportation Case, the Teterboro Company applied for authority to transport airline passengers between

---

Bendix Airport at Teterboro, New Jersey and New York City and between that airport and points in New Jersey within twenty-five miles of the airport. This operation was to be conducted independently of the airlines. The Commission held that the proposal, insofar as New Jersey points were concerned, met the requirement established in the Sky Freight Case that the traffic carried "must as a prerequisite have an immediately prior or subsequent movement by aircraft" and further held that the Newark Airport could reasonably be considered as the airport intended to serve points in New Jersey within a twenty-five mile radius thereof. On the basis of these findings the proposed service to the New Jersey points was held exempt; but because the operation to New York City would include other than airline passengers, a certificate was issued for such operation.

In the Peter Picknelly Case, an application was filed by Picknelly for authority to transport airline traffic between Springfield, Massachusetts and Bradley Field, at Windsor Locks, Connecticut, a distance of thirteen miles, including such service at the intermediate points en route, Agawam, Massachusetts, and Suffield, Connecticut. Both United and Eastern Air Lines testified that they proposed in the immediate future to use Bradley Field in providing service for Springfield, but Picknelly's service was not to be under contract with the airlines. The Commission found Picknelly's proposed service to be within the exemption of Section 203 (b) (7a). The significant findings supporting this conclusion are the following:

"It accordingly becomes necessary merely to determine whether the transportation to be performed will constitute a line-haul movement. We do not believe that it will. Springfield is but thirteen miles from the airport in question, not an undue distance for an out-of-town airport, and the intervening area is sparsely settled. It is apparent that the operations here considered are in fact delivery service from and to the airport and Springfield, and are designed for the use of passengers of airlines whose services are essentially services to and from the Springfield area." (Emphasis added.)

A situation similar to the Peter Picknelly Case was presented in the Atterholt Case. A certificate was requested authorizing independent motor carrier service for airline traffic between the Youngstown Airport and Youngstown, Warren, Sharon, and other points in Mercer County, Pennsylvania. The Commission found such service to be within Section 203 (b) (7a), holding:

"Youngstown, Warren, and Sharon form the three corners of an equilateral triangle. Vienna, adjacent to which is the airport, is located between Sharon and Warren on the side of the triangle opposite Youngstown, so that it appears to be about as close, possibly closer, to Sharon than it is to Youngstown. Obviously it serves the area. Although the proposed hauls are somewhat longer than

26 47 MCC 401 at 405.
might be expected in this area we are convinced that the record shows a proposal to engage in operations which are incidental to transportation by aircraft and within the exemption provided by Section 203(b) (7a)."28 (Emphasis added.)

Likewise, in the Hudgins Case,29 an application for authority to transport air freight between the airports within fifteen miles of Dallas and Fort Worth, on the one hand, and both Dallas and Fort Worth on the other hand, was filed with the Commission by an independent motor carrier. In holding that such service was within the exemption, although hauls up to forty-five miles may be involved, the Commission stated that it so found, among other reasons, "because the airports involved are designed for service to and from both Dallas and Fort Worth, including the metropolitan areas of each."

But not all cases decided by the Commission under this category involved findings that the proposed service was within the exemption of Section 203(b) (7a). Just as in the Peoples Express Case,30 the Commission placed a limit on the scope of such service when rendered under airline contract, so, in the Bruce Koch Case,31 the Commission placed a limit on service rendered by independent motor carriers. In the Bruce Koch Case, an application was filed by an independent motor carrier for authority to transport air freight for shippers and consignees between the Vandalia airport, on the one hand, and Dayton (ten miles south), Springfield (twenty-four miles east), Sidney (thirty-two miles north), and Richmond (forty miles west). In holding that the service within the exemption of Section 203(b) (7a) was limited to that in the vicinity of Vandalia and Dayton and points within the commercial zone of Dayton, the Commission stated:

"The mere fact that the proposal involved is restricted to traffic having an immediately prior or subsequent movement by air is not enough, standing alone, to require the conclusion that the proposed motor service is subject to the partial exemption. Some of it, the portion confined to the immediate vicinity of Vandalia no doubt is exempt. Also the operations to and from Dayton and points in the Dayton commercial zone appear to be exempt, the Vandalia airport being known, as above indicated, as the Dayton Municipal Airport. Beyond this we cannot go. Available maps indicate a number of airports as close or closer than the Vandalia airport to Springfield, Sidney, and Richmond. There is no showing that the Vandalia airport is the airport normally or regularly used in supplying air service to and from these three points or any of them."32

In the Air Terminal Facilities of California Case,33 on the other hand, an independent motor carrier filed an application to provide

---

30 Supra note 8.
31 Bruce C. Koch, Common Carrier Application, No. MC-108663, 49 MCC 555 (1949).
32 49 MCC 555 at 557.
33 Air Terminal Facilities of California, Common Carrier Application, No. MC-109626 (1949), unreported.
motor carrier transportation for air freight to points within a fifty-mile radius surrounding the Los Angeles Municipal Airport and to points within a seventy-five mile radius of the San Francisco and Oakland airports, although evidence at the hearing indicated that the bulk of such service was currently being performed within thirty miles of such airports. The Commission found, on the basis of the facts of the record, that the San Francisco Municipal Airport, the Oakland Municipal Airport, and the Los Angeles Airport were "... the only airports in these areas which can be, and are used by the regular commercial airlines. They are obviously the airports designed for service to and from the points in the respective areas..." On the basis of such finding it held that the proposed service was within the exemption of Section 203 (b) (7a).

Conclusions With Respect to Independent Motor Carrier Service for Airline Traffic

In applying the exemption in Section 203 (b) (7a) to ground transportation of air traffic provided by motor carriers operating independently of the airlines, the Commission has very properly approached such cases cautiously and critically, since a finding that such service is exempt would leave such service free from any Federal regulatory authority. In none of these cases, of course, does the Commission impose the limitation that the shipments must be moving on commercial airline or air express bills of lading, for it is obvious that such shipments could not be so moving when the motor carrier is operating independently of the airlines. The only restriction which the Commission does place in its decisions, which find such service to be within the exemption, is that the shipment or person carried must have an immediately prior or subsequent movement by aircraft. The only relevant facts upon which the Commission may rely in making its decision, when such service is not offered by the airline itself, are thus limited to the nature of the actual movement of airline traffic and the geographical relationship between the particular points involved. The criteria which have emerged from these decisions is that the airport concerned must not only be used regularly by the airlines for receiving and delivering traffic originating at or destined to the cities and towns included within the motor carrier service pattern, but such airport must also be clearly designed to provide such service. These considerations obviously present a more difficult problem to the Commission than when the service is provided under an airline tariff and pursuant to an airline contract, both of which are subject to Civil Aeronautics Board authority; and in the last analysis the question comes down almost entirely to a matter of the exercise of reasonable judgment and discretion by the Commission.
Summary and Conclusion

When Congress, by Section 1107 (j) of the Civil Aeronatics Act of 1938, amended Section 203 (b) of the Interstate Commerce Act to create an exemption for motor carrier transportation incidental to transportation by aircraft, it offered no clue as to the meaning of the term "incidental" as so used. Since the exemption is, in effect, a limitation on the authority of the Interstate Commerce Commission over such operations, the Commission had the primary duty of construing the scope of such exemption. The cases which have arisen before the Commission involving this exemption fall into two distinct categories, prewar cases and postwar cases. The prewar cases were concerned solely with the air express traffic of the Railway Express Agency; and the Commission, without endeavoring to analyze or define the exemption, held that local motor transportation of such traffic for the Express Agency should be certificated along with the Express Agency's rail express rights. These cases have been distinguished, and probably may be regarded as over-ruled, by the postwar cases; and in any event they have been totally disregarded by the Commission in its many postwar decisions involving this question.

The postwar cases before the Commission involving Section 203 (b) (7a) have been concerned with motor carrier ground transportation of both air passengers and air freight. The Commission has held, with only one readily distinguishable exception, that when such services are provided under the airline tariffs by motor carriers under contract with the airlines, and are thus under Civil Aeronautics Board control, they fall within the exemption. On the other hand, when such services are rendered by motor carriers operating independently of the airlines, with the result that the Civil Aeronautics Board has no control over such operations, the Commission critically examines the area of proposed services; and only if the airport concerned is regularly used by the airlines and such airport is clearly intended to serve the town to which the motor carrier proposes service, will such operation be held to be within the exemption.

The principles thus developed and applied by the Commission in the numerous cases which have been presented to it involving an interpretation of Section 203 (b) (7a) appear to be consistent with Congressional intent and with sound administrative practice. The airlines have taken no issue with the Commission with respect to these decisions, and have developed their pattern of ground transportation for airline traffic within the framework of the principles thus enunciated; and although the line-haul motor carriers apparently are somewhat fearful that such exempt motor carrier transportation might someday invade their certificate rights, to date no line-haul motor carrier has been able to demonstrate to the Commission that its construction and application of the exemption in Section 203 (b) (7a) has produced any harmful effects on the motor carrier industry.