State Agencies of Control and Enforcement of Aeronautical Laws

Reed G. Landis
STATE AGENCIES OF CONTROL AND ENFORCEMENT OF AERONAUTICAL LAWS*

Reed G. Landis†

Several years ago a group of us interested in aviation became convinced that the day of the "gypsy flier" and his associate, the "jenny" type of private owner, had passed. We appreciated fully the fine part they had played in the hard hungry years after the war. We knew the hardships and hazards they had suffered, driven by their enthusiasm and confidence in aviation, into a so-called business that could not secure sufficient public support to pay for proper equipment, airport, maintenance, et cetera. Feeling as we did about those sterling pioneers, it was with great and genuine regret that we concluded they must go from Illinois, and make way for aviation as a business, with modern equipment and methods.

The situation was carefully studied. Reports of coroners' juries were investigated. We were fortunate in having had experienced airmen in contact with the coroners' inquests for some time. Laws were looked up, meetings held, officials interviewed, and the Department of Commerce officials consulted—and it was found that we could get little help from Washington.

Those Chicago air operations of a definite interstate character were being pretty well operated and obeyed the regulations. They did not have accidents, in the Chicago district at least. They were not our problem. Several school, sightseeing, and charter activities were similarly well financed and operated. They obeyed the law too, and their freedom from accidents indicated that they were not the source of our trouble.

The crashes, and headlines, resulted from the operations of those formerly known as "gypsy"—justly called now the shorter and more fitting name, "gyps." They carefully avoided interstate operations. They held themselves carefully clear of federal regulations, sometimes on the advice of barracks lawyers—and on occasions with the advice of real attorneys. Obviously, some other authority than the federal had to be invoked.

---

*Portion of the paper upon this subject read at the Legislative Air Parley of Midwest States, at Milwaukee, Wisconsin, February 24, 1930.
†Chairman, Aeronautical Navigation Committee, State of Illinois; member Board of Directors of the AIR LAW INSTITUTE.
at best is clumsy. No rules have been established to provide for the filing of complaints by third parties.

Because of the short maximum license period there have been virtually no revocation proceedings conducted by the Commission. Disciplinary action has been taken almost exclusively by action on applications for renewal of license. There have been several cases in which the applicant has been placed on "probation" but in each case he has sooner or later been restored into the good graces of the Commission.

General Reallocations. From time to time it has been necessary to make "reallocations" of broadcasting stations. It may be necessary to go through this process again in the future, and to go through analogous processes in portions of the spectrum other than the broadcast band. The most extensive allocation yet made was that effective November 11, 1928, in which the assignments of 94% of the stations were changed.

The procedure adopted by the Commission for such action has been partly described in the discussion of the General Electric Company case in this article. It consisted in setting up a tentative reallocation of which all stations were notified, effective at a later date (the expiration of the license period). Each station dissatisfied with its assignment was given opportunity for hearing if it filed application for modification of its assignment specifying the frequency, power and hours of operation which it desired. Other stations which, under the tentative reallocation, would be adversely affected were then notified and given an opportunity to oppose the application.

If the General Electric Company case were the only case on the subject, it would have to be conceded that it is doubtful whether this procedure met the requirements of the Act. Since the court's decision in that case, however, it has several times, both expressly and by necessary implication, upheld the procedure. All the es-

47. One station WNBA of Forest Park, Ill., was suspended for 30 days for frequency deviation in April, 1928. There have been several instances where a station has been put upon "probation," which consisted of the issuance of 30-day licenses instead of the usual 3 months license. In several cases this was due to the broadcasting of private disputes by warring stations (2nd Ann. Rep., pp. 159-161) and in another case, to the alleged use of obscenity (U. S. Daily, Jan. 7, 10, 11, 18, 23, 1930). In the first cases, the action followed hearings upon applications for renewal; in the latter there was no hearing at all. In each case the station was later restored to good standing.
sential requirements of due process of law would seem to have been met. The hearings should be regarded as really having been held on the applications of the stations affected for renewal of license.

Issuance of Permits and Licenses. Construction permits, licenses and other formal authorizations are signed by the Chairman of the Commission (a burdensome duty which might well be delegated to the Secretary), under the seal of the Commission. They are thereupon usually delivered to the Radio Division of the Department of Commerce which, in turn, delivers them to the grantees and licensees through the radio supervisor in the several districts.

Two interesting situations have already arisen involving the question as to when the right to the document vests in the grantee or licensee and as to when the grantee or licensee is justified in considering that he has the authority to construct or to operate. In one case, now involved in a pending appeal,® the Commission's minutes showed a granting of certain applications for construction permits to several different grantees. A dispute thereafter arose between the grantees with the result that the construction permits were never executed or, if executed, were never delivered. The case involves other issues (e.g., as to whether the Commission's action was upon certain conditions which the grantees failed to fulfill) which need not be discussed here. In another case, the Commission, by action recorded in its minutes, granted certain licenses and construction permits; both the licenses and permits were duly executed and it remained only to forward them through the Department of Commerce. Before they were forwarded, however, the Commission was served with a stay order from the Court of Appeals.®

Miscellaneous. Under Section 10 the Commission has power, which it frequently exercises, to require licensees to furnish it with information under oath. This is usually done by sending out questionnaires.

Under Section 11, in the event that for any reason the Commission cannot act because of absence of the Commissioners, etc., the Secretary of Commerce is given temporary licensing authority. There has, as yet, been no occasion for recourse to this provision.®


52. During the interim between March 16, 1928, and March 28, 1928 (the date on which the Act containing the Davis Amendment became law), the Secretary of Commerce was temporarily the licensing authority under
period of time, an application which is substantially the same as one which has been heard and acted upon. No definite time limit has yet been set but manifestly the matter should be covered at an early date by formal regulations.

The Commission also, as a rule, will not consider more than one application from a particular applicant at a time; for example, an applicant is ordinarily not permitted to apply for the use of several different frequencies in the alternative. These are cases: however, where this is unavoidable.

Scope of Decision on a Particular Application. Several unanswered questions arise under this heading. If a station, by application for modification, asks for a better frequency, may the Commission, as a result of a hearing give it a frequency other than that applied for, or one which is inferior to that which it already has? May it otherwise restrict the station's present privileges, such as by reducing its hours of operation or its power? It will avoid an unnecessary duplication of hearings if the Commission is recognized to have such power; on the other hand, injustice may easily result to the applicant who ordinarily does and cannot present his case with such an eventuality in view. It would seem that, before making such a decision, the Commission should give the applicant a further opportunity to be heard.

Suppose Station A and Station B are dividing time on the same frequency, and Station A applies for full time on the frequency. If the Commission, after hearing both Stations A and B, grants the application, may it forthwith assign Station B to another frequency where it will cause interference to stations which did not participate in the hearing? Natural justice requires that such other stations also have an opportunity to be heard; but the Commission has frequently failed to give the opportunity to such stations.

Informal Applications and Hearings. Under one of the early general orders of the Commission provision was made for hearings on complaints of interference. Practically no one has availed himself formally of this provision. Unfortunately such a hearing has no legal status and is not the basis for an appeal.

The law is defective in not providing some method by which, upon proper application to that end, the license of another may be modified. Such an application might be used to raise directly the issue of undue interference caused by a station with too much power on the same frequency, etc. In view of the liberal attitude of the

---

45a. G. O. 15, June 7, 1927. 1st Ann. Rep., p. 16. This order was based on what the writer believes to be an erroneous construction of Sec. 4 (f).
Court of Appeals in construing Section 16, it may be that such an application would be recognized as an application for modification under the Act as it now stands.

Similarly there should be some concrete method, under suitable restrictions, of forcing the Commission, on the application of persons with a legitimate interest, to set applications for renewal for hearing. There are at present no rules providing for such applications, although persons are permitted to file complaints and affidavits which are sometimes taken into consideration by the Commission in determining whether it will designate an application for renewal for hearing.\textsuperscript{45b}

Many informal hearings are held by the Commission, sometimes in support of pending applications and sometimes with reference to other matters. Pending applications are also urged upon individual Commissioners by personal conferences in their offices. The worst offenders, outside of the applicants themselves, are Senators and Congressmen. Such methods of supporting applications are necessarily \textit{ex parte} and have led to a great deal of injustice. On the other hand, there are occasions when it seems proper for Members of Congress or other public officials to appear openly before the Commission, to urge, for example, that their state has not received its due share of broadcasting facilities. Someone has to speak in behalf of the state's rights (which, fortunately or unfortunately, are recognized by the Davis Amendment) and, so long as such delegations avoid emphasizing the claims of a particular station at the expense of other stations not present, there is no very substantial ground for criticism. It is simply unfortunate that state boundaries should have anything to do with radio regulation. The ideal object is good radio service for the entire United States.

\textit{Revocation of License.} The grounds for revocation of license, and the procedure which must be followed, are covered by Section 14. No provision is made for revocation of construction permits, or for suspension or other discipline less than complete revocation. The writer believes, however, that the word "license" is to be construed to cover construction permits, and that the power of suspension is to be inferred from the power to revoke. Whether the Commission has power to discipline by modifying the license so as to cover less favorable privileges is uncertain. The procedure

also several of the essential features of the eventual license, such as frequency, power, hours of operation, etc. This seems thoroughly logical.

No peculiar problem (other than those already discussed) is involved in determining whether Commission action in a particular case is to be considered as a granting or a denial of an application for modification. Nor is there any such problem with reference to applications for the Commission’s consent or approval to the assignment of a permit or license. The issues on such applications are necessarily very much the same as are raised by new applicants as to their fitness and qualifications to operate a station.

Who Are Interested Parties? Whatever be the character of the application, the principles determining who should be notified and given an opportunity to be heard are substantially the same. Engineering facts and principles prescribe, with reasonable definiteness, what licensees of existing stations, what grantees of permits to construct new stations, and what applicants requesting authority to establish new stations, will be adversely affected by granting the application. When the application seeks to construct a station to operate on a specified frequency, or to modify a license so as to authorize the use of a specified frequency, all stations using that frequency (with perhaps certain geographical limitations in the case of regional or local channels), or closely adjacent frequencies in the same region, should be, and usually are, notified. Similarly stations that would be affected by a requested increase of power or of hours of operation should be notified.

There has been complaint in some quarters against the Commission’s requirement that an application specify the frequency desired, on the ground that this throws the applicant into a controversy with persons with whom he has no quarrel. In the writer’s opinion this complaint is not sound. Since the broadcast band, for example, is already overcrowded, it is not unfair to require the applicant to select the assignment which he regards as best suited for his station, either from the point of view of interference or from the point of view of the qualifications (or lack thereof) of licensees now using the frequency. In other words, the Commission simply requires the applicant to select what he regards as the weakest and most vulnerable spot in the spectrum for his assault, and declines to take that burden upon itself. The only alternative would be for the Commission to notify and pass on the merits of all stations of a given class before acting upon any application proposing a new
station of that class, as well as perhaps many other stations who
would be interfered with if any of a number of channels were
finally assigned to the applicant.

Where there are several applications involving the same fre-
quency, the Commission endeavors to set the same hearing date for
all of them.

There is an increasing tendency to recognize interests of an
economic character. For example, in a town which is able to sup-
port only two stations with advertising or sponsored programs, each
of the two existing stations is considered to have a legitimate in-
terest in opposing the establishment of a new station.43b

A most difficult situation arises out of defects in Section 16,
which accords the right of appeal to defeated applicants but does not
recognize any right of appeal in interested respondents who may be
adversely affected by the granting of applications. The situation
is being partly met by regarding a hearing as being also a hearing
upon a respondent's application for renewal if he has one pending.
This device will obviously fail to reach many cases and will not be
helpful when the three-year license period is restored.

The defects of Sections 11 and 16 as to the rights of respondents
are among the most serious in the Act and call urgently for amend-
ment by Congress.44

The Act gives no status to States or other political subdivi-
sions,45 or to Governmental Departments, or to the representatives
of foreign nations or stations, with respect to applications and hear-
ings before the Commission, although all of them will from time to
time be vitally interested. The Commission has, however, pursued
a very liberal policy in this regard and permits intervention in its
hearings of virtually anyone having a legitimate interest (and, oc-
casionally, of persons who have not).

Repetition or Multiplicity of Applications. The Commission is
observing an unwritten rule against considering within a reasonable

43b. This was the principal basis for the opposition to the establish-
ment of a new station by the Richmond Development Corporation at Roanoke,
Virginia, which resulted in a refusal by a divided Commission to grant a
third extension of date of completion under a construction permit. This
decision was reversed by the Court of Appeals. Richmond Development
It is interesting to contrast the position taken by the Commission in this case
with the position taken in a case involving Buffalo stations, in which an
application to establish a new station in Buffalo was allowed largely because
all the existing stations in that city were controlled by one concern. U. S.
Daily, Nov. 1, 2, 4, Dec. 23, 30, 1929.

44. See 1929 Report of Standing Committee on Radio Law, pp. 461-469.
45. States and political subdivisions were recognized in those portions
of Sec. 5 of the Act which have never gone into effect.
renewal of license in reducing the station's power from 500 watts to 100 watts was to be considered a denial of the application. In three cases appealed in November, 1929, the Commission had, without hearing and in acting upon applications for renewal, granted renewal licenses differing substantially in desirability of channel (from 1310 kc. to 1500 kc.) and slightly in hours of operation; these appeals were later voluntarily dismissed, however, because of later Commission action restoring the stations to a more desirable channel and increasing their hours of operation. In *Westinghouse Elec. & Mfg. Co. v. Commission*, now pending before the Court of Appeals, complaint is made of Commission action on an application for renewal of license, consisting of the insertion of a condition in the renewal license not contained in the previous license; the condition was to the effect that if a proper applicant applied for the channel for use in the Second Zone, appellant's license would not be again renewed. In *The Journal Company v. Commission*, now pending before the Court of Appeals, complaint is made of Commission action in reducing (without hearing) the service area of a broadcasting station at the end of a license period by assigning new stations to the channel and by increasing the power of a station already assigned to the channel, with the result that the renewal license actually permitted appellant's station to serve only a much smaller area than the previous license.

The only possible qualification which suggests itself to the rule laid down in the *General Electric Company* case is where the change is not substantial. For example, a renewal license may give a station exactly the same grade and character of channel which it had before, or even a better one, with no change in its power, hours of operation or other privileges. Even in such a case, however, the safe course would seem to be to regard an opportunity for hearing as necessary so as to avoid any abuses. One channel may appear equivalent to another to the Commission and yet in practice may prove to be inferior for the purposes of the station. It is obvious that, as a practical matter, where the new channel is equivalent or superior in character, the station will neither avail itself of the opportunity for hearing nor appeal.

When must Applications for License be Designated for Hearing. As has already been pointed out, applications for license fall...
under two general categories. When the application for license is
with respect to a station for which a construction permit is not a
prerequisite, the principles should be exactly the same as those gov-
erning applications for renewal of license. The same features are
to be regarded as essential.

Where, however, the application for license follows a construc-
tion permit, the situation is materially different. Upon what the
writer believes to be the correct construction of Section 21, the Com-
mission is legally obligated to grant the license upon the terms and
conditions, and with the privileges, specified in the construction per-
mit unless the grantee of the permit has in some respect failed to
meet “all the terms, conditions, and obligations set forth in the ap-
lication and permit” and unless some “cause or circumstance arising
or first coming to the knowledge of the licensing authority since
the granting of the permit would, in the judgment of the licens-
ing authority, make the operation of such station against public
interest.” The section also requires that “said license shall conform
generally to the terms of said permit,” which would seem to con-
template that the permit should cover frequency, power, hours of
operation and other features of the eventual license to be issued
when the station is completed. There is, therefore, no occasion for
designating the application for license for hearing or for doing other
than granting it, except for a violation of the terms of the permit or
for some new cause or circumstance; in case of either exception,
there must be a hearing before the application for license may be
denied or granted on terms other than those covered by the permit.
In such a hearing, the burden should be upon the Commission.

If, however, the application for license asks for terms differ-
ing from those specified in, or covered by, the permit, the applica-
tion should pro tanto be treated exactly the same as an application
for modification of license.

When must Applications for Construction Permit be Designated
for Hearing. Curiously, Section 11 does not mention construction
permits and consequently there is no specific requirement in the
Act that a hearing be held before an application for construction
permit be denied. This is clearly the result of oversight. Since,
however, under Section 21 the Commission is guided by the same
standard as that in which it is guided in acting on other kinds of
applications, namely, that of public interest, convenience or necessity,
and since Section 16 covering appeals manifestly contemplates that
there shall have been a hearing prior to a decision denying an ap-
application for a construction permit, it may be taken for granted that Congress intended that applicants for construction permits should be accorded the same opportunity for hearing as other applicants. The Commission is following this construction of the Act.

In the opinion of the writer an application for construction permit is to be viewed as a preliminary application for license and, so far as other interested parties may be concerned, all issues as to whether a license should ultimately be granted to the applicant should be determined at the time the application for construction permit is acted upon. Not only should the Commission decide the bare issue as to whether or not it will permit an apparatus of a certain type to be constructed and the date by which it must be constructed; it should also decide all the other essential features of the eventual license, such as frequency, power, hours of operation, etc. Justice requires this with respect to the applicant so that he may know what privileges he is to enjoy before making the investment; it also requires it with respect to other interested parties so that they may have a chance to be heard on their objections before the applicant has made the investment and acquired a certain legal status. If this be the correct construction of the Act, then virtually all the essential features of an application for license as above set forth are also essential features of an application for construction permit and the situation is substantially the same as to when a hearing must be accorded, as is the case on applications for renewal of license. This view is supported by the fact that Section 21 in setting forth what should be contained in an application for construction permit follows almost verbatim the language of Section 10, which sets forth what must be contained in an application for license.

The Commission has adopted rather inconsistent positions on the construction of Section 21. In actual practice, on an application for construction permit which is set for hearing, it views the application as being for a license and notifies all parties who would be adversely affected by granting the license, specifying the frequency, power, hours of operation, etc., specified in the application for construction permit. On the other hand, it has in many instances taken the position that upon completion of the station it is not obligated to issue to the grantee of a construction permit a license specifying the frequency, power, or hours of operation specified in the permit. It has taken this position in a statement recently filed with the Court of Appeals on an appeal from one of its decisions. The form of permit actually used by the Commission

purports to relieve the Commission from issuing a license conforming to the terms of the permit and specifies these terms only in tentative fashion. The writer is inclined to believe that the Commission will not be upheld in this position.

An unusual type of hearing was held by the Commission in November, 1929, when the state of New Jersey, through its attorney general, appeared to oppose the construction of a 50 KW station (WABC) in northern New Jersey, the studio of the station being in New York City. The Commission had already granted the construction permit, so that the proceeding was an anomalous one. The claim made was that the establishment of the station would blanket local listeners so that they would not be able to receive New Jersey stations within a certain frequency range. The station owners finally surrendered the permit and sought to substitute a location on Long Island. This location was opposed by civic and radio trade groups in the neighborhood. These incidents serve to illustrate some of the interests which may be affected by the construction of a new station and illustrate the necessity of publication by the Commission of all such applications a reasonable time prior to action upon them.43a

When must Applications for Modification of License be Designated for Hearing. Whatever may have been the original intention of Congress, applications for modification of license are recognized by the Commission as the proper manner in which to seek a change in frequency, power, hours of operation or other essential feature of a license. When, however, the modification of license requested involves a substantial alteration or rebuilding of apparatus, or a change in the location of the transmitter, an application for construction permit must be filed—an unnecessarily cumbersome process. Thus an increase of power may involve two applications. When an application for modification is granted, the Commission does not usually put it into effect until the beginning of the next license period, and the modification is covered by the renewal license. This, of course, is all right as long as the present maximum license period for broadcasting stations is three months, but difficulties will arise when a return is had to the three-year period originally provided by the Act.

The Commission has also devised a form of application known as an application for modification of construction permit which covers not only requests for extension of time for completion but

by the United States in building aeroplanes and training flyers during the war. Patent difficulties were largely overcome by cross license agreements.¹ When the war ended a large part of the accumulated aeronautical material was placed on the market but was very largely acquired by gypsy flyers to thrill crowds and satisfy the curious by a circular flight at five or ten dollars per person. Happily all these old "jennies" are now practically junk. Since the government did not subsidize the industry the United States for some years lagged behind the development in Europe. The country of Langley and the Wrights was for some years trailing Europe in its support of this new means of locomotion.

However this apathy was not to extend far beyond the deflation period. The inventors, though the war support had ceased, were not to be denied. Capitalists were beginning to see the importance of the new development. The factories which had turned out aeroplanes during the war were still in existence and could readily be devoted to the same purpose. Reports which tourists brought back from Europe as to the wonderful air transportation in existence there could not but exercise a certain influence. The technical development of the aeroplane therefore continued until the Spirit of St. Louis in charge of a single pilot crossed the Atlantic and reached its destination with fuel to spare. Other less successful flights across the same moat of water undertaken by companies of two or three followed. If the Atlantic could be spanned by a single hop no reason existed why communication between New York and San Francisco or St. Paul and New Orleans should not be similarly established. Air lines therefore today exist between San Francisco and Los Angeles, between Chicago and St. Paul and between numerous other more or less connected points. No such extensive network as exists in Europe exists here it is true. That is for the future and probably for the very near future.

However the foundations for a network exist. There is probably no city of importance which does not today have one or more privately or publicly owned air ports. Some of these were aviation training grounds during the war. Others have been donated to the cities by private individuals or have been acquired by purchase or through condemnation. Vast sums of money have already been expended on this new development. Vaster sums will presently be expended. Chief Justice Cardozo of the New York Court of Ap-

¹ The United States Attorney General in 1917 held that such an agreement is not in contravention of the Sherman Anti-Trust Act, 31 Opinions of Attorney General 166.
peals therefore say: "Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness." Both courts and legislatures have been quite active in the matter. Practically all the state legislatures have passed enabling acts. The index of the 1929 Aviation Reports devotes ten full pages to an analysis of the airport legislation enacted in 1929. Some ten cases have already reached appellate courts. Without a single exception the power of the various cities to acquire and maintain airports has been sustained by these decisions.\footnote{2. Hesse v. Rath 249 N. Y. 436, 164 N. E. 342 affirming 224 App. Div. 344, 230 N. Y. S. 676.
ing Field of City of Utica in Town of Marcy 134 Misc. Rep. 60, 234 N. Y. 668.
4. Illinois p. 590 sec. 1; Iowa Ch. 133; Michigan No. 193 sec. 1; Missouri p. 345 sec. 2; Wisconsin Ch. 201 sec. 1.}

The airmail service maintained by the United States government has been an important factor in this development. It has resulted not only in the development of a limited number of airports but in the development of airways as well. These airways correspond to ocean lanes just as air ports correspond to seaports. They are naturally useful not only to the postal planes but to others as well. They connect the most important cities and minimize some of the inherent dangers of flight.

Nor are our large transcontinental railroads unaware of the competition which the new development offers to them. Instead of opposing what cannot be opposed they are accommodating themselves to the new situation. A trip from New York to San Francisco in forty eight hours without hardship and on a regularly established basis is today possible, and consists partly of travel by railroad, partly by plane. The legislatures of at least five states have in 1929 authorized the railways to engage in aviation.\footnote{4. Illinois p. 590 sec. 1; Iowa Ch. 133; Michigan No. 193 sec. 1; Missouri p. 345 sec. 2; Wisconsin Ch. 201 sec. 1.}
new difficulties as well. If the service is maintained between cities of different states the first question naturally is whether the United States or the individual states shall do the regulating. That such a service is interstate commerce would not seem to be subject to doubt. In 1928 the Colorado Public Utilities commission had before it the application of a Delaware corporation for a certificate of public convenience and necessity authorizing the applicant to operate lines of aeroplanes for the carrying of passengers and express for hire between Denver, Colorado and Kansas City, Missouri. No competing line existed. The applicant proposed to purchase four Fokker Super-Universal monoplanes each carrying six passengers and one pilot. The commission adopted as its standard of equipment and qualification of pilots the standard prescribed by the Federal Government and the Colorado Commission of Aeronautics, required the applicant to file proof that it had or would comply therewith, stated that this being an interstate operation only the question of public convenience and necessity did not arise and found that the Constitution of the United States and the laws of the state of Colorado required that a certificate of public convenience and necessity be issued to the applicant as prayed for.5

The regulation of intrastate as distinguished from interstate flying has been a burning question before the legislatures of the various states in 1929. According to the report of the standing committee on aeronautical law of the American Bar Association made to the 1929 meeting of that body, 19 states now require a federal license for all aircraft and airmen; seven other states require such a license for aircraft and airmen engaged in commercial flying; seven others require either a state or federal license, while six require a state license and the remaining nine have no regulation at all.6 Such provisions of course will affect airplanes engaged in common carrier business inside of a state. The question still remains whether such business shall be allowed to develop under competitive conditions or whether it is better to eliminate competition. The Nevada Public Service Commission in 1928 had before it three applications for certificates of convenience and necessity for conducting aircraft carrier service between points in that sparsely settled state. While the plans of the applicants somewhat overlapped, they were able at the hearing to arrive at a satisfactory arrangement by which separate "home ports" were assigned to the applicants and each was given a preference of two hours at such home port over any oper-

6. Pages 116 and 117 of such report.
ator away from his home port. This meant that none of the applicants were at liberty to proceed with passengers from the home port of any of the other applicants until after a period of two hours had elapsed from the time the request for transportation was received unless the home port applicant had waived the rule. The commission put the stamp of its approval on this arrangement.7

The question whether the operation of air line intrastate common carriers shall be on a competitive basis has been directly presented to the Pennsylvania public service commission. In 1927 that commission approved the application of the Gettysburg Flying Service, Inc., for a certificate of convenience and necessity the company having provided itself with suitable landing fields and planes. Its purpose was to establish a taxi service from Gettysburg to points and places in Pennsylvania and to conduct sightseeing trips over the Gettysburg battlefield.8 A year later the "Battlefield Airways, Inc." made a similar request. The commission in denying the application said:

"The question presented for determination is, Shall the non-competitive principle control under the facts in this case?"

"We are convinced from consideration of all of the facts and arguments that the applicant has failed to meet the legislative requirement to establish that the proposed service is necessary or proper for the service, accommodation, convenience, and safety of the public and so find and determine.

"The Commission recognizes that the policy of the nation and state is to foster and encourage aviation. The facts in this case, however, are in the opinion of the Commission convincing that in a community such as Gettysburg the creation of unnecessary and destructive competition could not and would not be a contributing factor in the development of commercial flying service in Pennsylvania, but would be a decided hindrance to its development. Common carrier transportation by aircraft must be developed for some time at least by and through private enterprise which should not be required to struggle for an existence in the competitive field under conditions as existing in this case."9

On the other hand the opposite conclusion seems to have been arrived at in California where the commission is operating under a constitutional provision which is very similar to that of Pennsylvania. Says W. Jefferson Davis, himself a resident of California:

"The suggestion has been frequently made that aircraft carriers be
required to apply to the Railroad Commission of California for cer-
tificates of public convenience and necessity authorizing them to engage
in public service. The Common Carrier Sub-Committee of the Cali-
fornia Aircraft Conference Committee reported unanimously against
requiring certificates of public convenience and necessity and this re-
port was later adopted by the General Aircraft Conference Committee
of the Railroad Commission and concurred in by the Statewide Aviation
Committee of the California Development Association. As a result of
these recommendations the Legislature in 1929 took no action in regard
to certificates of public convenience and necessity.

"It was generally felt that there was no justification in the position
taken by those who favor certificates of public convenience and neces-
sity as a prerequisite to operating air lines within the state.

"Any such regulatory legislation is moreover very premature. There
are only a few regularly established passenger air services in operation
in California at this time. Air transport companies should be permitted
to charge what the traffic will bear, and there should be no restrictions
for many years to come. There may be some destructive competition
and duplication of the services such as already exists between Los
Angeles and San Francisco, and Chicago and St. Paul, and on the
Chicago-St. Paul Minneapolis route. It is entirely too early in the
development of air transport to create monopolies in favor of the line
which happens to commence operations first, and thus preclude com-
panies which might provide the public with better service."1

Thus there is another conflict of opinion which will probably be
extended to other states as the question becomes a burning one. Of
course the situation as between two such large cities as San Francisco
and Los Angeles on the one hand and a taxi service out of the small
city of Gettysburg on the other is quite dissimilar and this fact may
be used to reconcile the two situations. It would seem, however, that
the real difficulty is a radical difference between radically different
theories whose existence is undeniable in our thought on the entire
matter of regulation of all utilities. Only the future can tell which
of the two will prevail in the struggle for existence which is sure
to come.

The only occasion which has been afforded to American courts
to discuss the question of common carriers has arisen out of a ten
minutes circular pleasure trip undertaken by a former lieutenant of
the naval service in a hydroplane in the course of which the plane
fell and two passengers were killed. Both held insurance policies
(either life or accident) which provided for certain increases if the
accident occurred while riding as a passenger in a "public conveyance
provided by a common carrier for passenger service." The pilot

10. State Regulation of Aircraft Common Carriers, 1 Air Law Re-
view 55.
would not go up with less than three passengers, carried only white people, operated only on such days, at such hours and under such conditions as pleased him, did not pretend to maintain regular schedules and did not advertise his business except so far as the mere presence of the plane was an advertisement. Both the Circuit Court of Appeals of the United States for the Fifth Circuit and the Alabama Supreme Court were presented with the question. Both held that the hydroplane was not a common carrier, at least not on this particular occasion within the meaning of the policy.\[11\]

It is obvious that most if not all the facts which militated in these two cases against the contention that this particular hydroplane was a public conveyance provided by a common carrier for passenger service are absent in the air service which now exists between a great many cities of this country. We can readily agree with the conclusions arrived at in these insurance cases and in the same breath hold that a service through the air which runs on schedule, for which tickets can be bought by a proper person who has the price and the inclination and which gets the occupants from one place to another is as much to be classed as a common carrier as is the passenger service maintained by railroads, street cars, boats and motorbuses.

The Transcontinental Air Transport, Inc., requires the signature of all of its passengers to a provision that "as a part of the consideration for the issuance of this ticket and of the acceptance of me for transportation I hereby agree to the rules and conditions printed on the reverse side of this ticket all of which are understood by me, and are made a part of the contract for transportation evidenced by this ticket." Among seven "conditions of passage" is the following: "The user of this ticket agrees that the Company, in the performance of the transportation covered by this ticket, is not a common carrier for hire and/or liable as such, but is a private carrier; and that the Company shall not be liable for injury or death to the person or loss or damage to the property of the said user caused in any manner whatsoever, whether attributable to negligence or not, occurring during and/or arising out of the performance, or failure of performance, of the transportation for which this ticket is issued."\[12\] This provision is not as new as might seem to be the case. The extensive and intensive development in Europe of passenger transportation


\[12\] For a copy of the entire contract see 1 JOURNAL OF AIR LAW. 36 and 37.
through the air at a time now some years past when the dangers inherently connected with such travel were considered to be greater than they are considered today, naturally brought about the insertion into the contracts of transportation of exemption clauses which are essentially identical with that just quoted. In view of this fact the construction which these exemption clauses have received in Europe by the courts is of the utmost interest on this side of the Atlantic.

The first case to arise under such a provision involved a circular flight at a popular bath and was therefore not as strong in its facts as might be desired. The Amtsgericht (trial court) at Emden, Germany, however, did not lay any stress on this fact but decided in a well reasoned opinion that such a clause is void as being against public policy.\(^{13}\) The Kreisgericht (circuit court) at Aurich reversed this decision on the ground that such a clause is not against public policy at least not until aviation has more fully developed.\(^{14}\) In reaching this decision the court did not mention the fact that the flight was a circular one and for this reason might very well be held not to be transportation at all. The decision of the Kreisgericht was followed by other lower courts so that a square conflict of judicial views came into being.

The Reichsgericht in two decisions has avoided the difficulty with which these courts struggles by confining itself to a strict construction of the exemption provision and by holding that such a provision will not be construed to exempt the air line company from liability caused by its own fault.\(^{15}\)

Finally the Zivillandesgericht in Prague has held that such an exemption to be valid must be the deliberate and definite declaration of the parties and that a one sided assertion through the handing over of the ticket to the passenger without expressly calling his attention to the exemption clause which was printed in a language which the passenger did not know is not sufficient.\(^{16}\)

It may be of interest to note that the American Air Transport Association in a draft of a Uniform Passenger Contract which it offers to the air passenger lines of the United States for adoption, inserts among others the following clause: "If I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein

---

13. For the entire case see infra p. 219.
14. For the entire case see infra p. 220.
15. For the entire two cases see infra pp. 220 and 223.
16. For the entire case see infra p. 225.
shall not be responsible save for its or their own neglect of duty." In commenting on this provision it is said: "Your committee deems this clause the most important of the whole contract. If, while the industry is young and the courts and the public are taking kindly to the aviation industry, this clause can be adjudicated and upheld in the appellate tribunals, needless to say, the advantages that will accrue to the carriers are obvious. If it is not upheld, your committee believes that the only alternative will be statutory legislation in the various states which will meet the situation."

A great deal of good would be accomplished if the air line companies were to adopt these sane and sensible suggestions. By being reasonable in their demands they so arrange their affairs that they may possibly obtain what they are asking for. However, a uniform adoption of such a provision is perhaps out of the question at least for the present. Certain air transportation companies though they may be fully aware that a provision by which liability for their own fault is sought to be avoided is not legally binding will nevertheless insist on inserting it in their contracts with a view to obtaining thereby a leverage with which to obtain better settlements with passengers injured than would otherwise be possible. It may therefore be expected that courts will soon be confronted with a construction of such a stringent exemption clause. The European cases hereinbefore referred to may, when this time comes, be of considerable interest to all concerned.