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SOME DISCRIMINATION PROBLEMS IN AIR-FREIGHT SERVICE

THEODORE E. WOLCOTT AND WILLIAM M. WHERRY

On September 14, 1944, for the first time since the enactment of the Civil Aeronautics Act of 1938,¹ a tariff for the carriage of freight or cargo by a commercial airline was filed with the Civil Aeronautics Board.² Until then, carriage of cargo had been limited to the medium of the Railway Express Agency, Inc. or *R.E.A. as it is known in the industry.³ R.E.A. is an indirect carrier, or overlying carrier, using the facilities of the airlines, or the underlying carriers, pursuant to a uniform contract filed with the Civil Aeronautics Board. Under this arrangement, R.E.A. has provided, and continues to provide, air express service between the various points on the airlines. As the carrier vis-a-vis the public, R.E.A. files the tariff containing the rates and conditions of this air express service.

Now that carriage of freight is being directly undertaken by an air carrier,⁴ it becomes of interest to examine the nature and extent of the obligation to transport freight of a common carrier by air. How far is it obligated to serve the cities named on its certificated routes; what variations may it make in services and rates to various localities; and when do such differences become unlawfully discriminatory? May an airline limit its service and gear it in direct ratio to the gradually expanding over-all economic feasibility of such service and the nature and extent of its current physical equipment? Must it provide the same type of freight service to every airline system point regardless of substantial differentials in costs, the actual need of the locality, and its effect upon the efficiency of the airline system as a whole?

The search for answers to the above involves consideration of the primary rights and obligations of the carrier to transport cargo under the terms of its certificate of public convenience and necessity, the applicable statutes and certain of the common law concepts that are adaptable to the peculiar nature of air transportation.

¹52 STAT. 977 (1938), 49 U. S. C. A. c. 9 (Supp. 1944).

²The tariff was filed by American Airlines, Inc. Another air freight tariff was subsequently filed by Transcontinental and Western Air, Inc., on June 1, 1945.

³Reference is made to the period following the enactment of the Civil Aeronautics Act of 1938. *This abbreviation R.E.A. should not be confused with the same abbreviation commonly used for the Federal Rural Electrification Administration.

⁴The kind of air carrier discussed here is a common carrier by air engaged in regularly scheduled transportation over a designated route, pursuant to a Certificate of Public Convenience and Necessity issued by the C.A.B. For all practical purposes this would apply to the entire domestic airlines system.

To give our inquiry proper focus, brief mention may at once be made of the controlling features of the certificate and of the governing statute. The usual form of Certificate of Public Convenience and Necessity under which the various federally certificated airlines have been operating authorizes the airline "to engage in air transportation with respect to persons, property and mail as follows: The holder shall render service to and from each of the points named herein. Between the terminal point—(name of city), the intermediate points—(names of intermediate cities or towns) and the terminal point—(name of city) to be known as Route—(here route number is inserted)." The Civil Aeronautics Act also appears to impose upon the air carrier the obligation of cargo transportation and it gives to the Civil Aeronautics Board discretionary powers to cancel the certificate to the extent that the service authorized is not inaugurated.⁵ Does this necessarily mean that an airline is bound to carry any and all types of property tendered to it for carriage to all on-line points whether or not commercial air transportation has sufficiently developed to provide such service economically—apart from whether or not the carrier has held itself out to the public as ready, willing and able to carry such property? To put it another way, if air cargo service is being offered, may it be limited for the time being to long-haul points on the ground of economic feasibility, or would this constitute the unjust discrimination by an air carrier as between localities forbidden in Section 404 (b) of the Civil Aeronautics Act?⁶

DEVELOPMENT OF PUBLIC REGULATION OF DISCRIMINATION IN TRANSPORTATION

It is hardly necessary to trace the evolution of the original description of an enterprise as "affected with a public interest," from its use three centuries

⁵Civil Aeronautics Act § 404 (a) of 1938 provides in part: "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefore. . . ." 52 STAT. 993 (1938), 49 U. S. C. A. § 484 (a) (Supp. 1944).

§ 401 (g) declares: "*Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service." 52 STAT. 989 (1938), 49 U. S. C. A. § 481 (g) (Supp. 1944).

⁶"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 52 STAT. 993 (1938), 49 U. S. C. A. § 484 (b) (Supp. 1944).

ago, to modern times when it is applied to the public utility, to establish that those presently engaged in rendering a service to the public owe definite obligations to that public.

The fundamental demands of a nascent democratic society required that there be no discrimination—that there be equality in the public services rendered. The logic of mass production also required uniformity of service and of price. If there were to be a constant supply of services to all comers by a public service enterprise or by a common carrier then this meant that such services had to be uniform. Only by this means could mass consumption be encouraged. Operation as a common carrier thus meant standardized service to all comers, both in respect of product and of price.

Naturally, these economic concepts were not at once evident in Lord Hale's classic statement. Its true implications became more readily apparent as the industrial revolution of the 19th century really got under way. The technique of mass production in terms of broad public benefit lent itself more effectively to control in cases of enterprises judicially held to be affected with the public interest and more particularly in the case of common carriers. At the same time the development of the public service enterprise as such usually carried with it certain monopolistic privileges which in turn provided further reason for public regulation.

The imposition of standards on the commodity or service offered to the public meant that for the first time in the relationship between buyer and seller, the buyer could know in advance that there was promised a uniformity of quality, quantity and price and, in transportation service, of time, place and speed. This elimination of the element of bargaining over a particular transaction meant the speeding up of the service both from the production end and the consumption end. Under this arrangement the public service entrepreneur had to assume the obligation of uniformity which meant the obligation not to discriminate. Thus in the early history of regulation of public service companies, the problem was mainly one of seeing that no undue or unjust discrimination was effected.

As the industrialization of the early 19th century progressed, it became a matter of public concern to referee the controversy between the producer and the consumer with respect to problems of discrimination. To cope with this problem the early railroad commissions were set up in the transportation field. As the railroads, then the strongest form of public service corporation, grew more powerful, the public demand for effective control in turn developed. By the middle of the century, a period which marked the beginning of large scale railroading, the popular feeling was not only against unreason-

able railroad practices, but against large combinations, bringing in its wake, among other things, the Sherman and Clayton Acts. In the period after the Civil War the Granger Movement influenced the passage by many states of laws prohibiting unreasonable railroad rates, discriminations and practices.⁷

Clyde B. Aitchinson, Member of the I.C.C., in his article "Evolutions in Transportation Economics" has a lively review of this transitional period:

Then followed a riotous period of railway development, the Civil War, the opening of the West, liberal public aid to rail construction, and alliances between the railways and the developing monopolies. The Granger movement, and state and federal regulation of the railways were successive stages in a popular effort to curb the fast growing monopolies, and many provisions of our present law are the outgrowth of particular phases of these conditions of the 70's and 80's.

Development of mass production methods in industry profoundly changed the whole economic situation. . . .⁸

The same underlying causes led to the passage of the Interstate Commerce Act in 1887. As in the case of the various state railroad commissions, the essential purpose of the Interstate Commerce Act was to prevent discrimination. This purpose is embodied in Section 3 of the Interstate Commerce Act which provision became the prototype of Section 404 (b) of the Civil Aeronautics Act.

Section 3 set up the Interstate Commerce Commission to act as a referee balancing the conflict of interests among the carriers, the producers, the shippers, and the consumers. As was said by the United States Supreme Court in *Louisville & Nashville R. Co. v. United States*:

The legislative history of the Interstate Commerce Act shows that the evil of discrimination was the principal thing aimed at. . . . This court has said that the language of the act "is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."⁹

The Supreme Court recognized that the purpose of the section was to balance the needs of the public with the interests and resources of the railroad in light of the general welfare.

In another outstanding case, the Supreme Court briefly reviewed the origin of the Act and stated that the causes which induced its enactment grew out of the use of the railroad as a dominant modern instrumentality of com-

⁷JOHNSON, HUEBNER AND WILSON, *TRANSPORTATION* (1940) 206.

⁸Aitchinson, *Evolution in Transportation Economics* (1940) 7 I. C. C. PRACTITIONERS' JOURNAL 315.

⁹282 U. S. 749, 749, 51 Sup. Ct. 297, 301 (1931).

merce. It recognized that while rail shippers of merchandise "are under no legal necessity to use railroads, practically they are."¹⁰

The mere fact that the statute prohibited discrimination did not necessarily mean that there was to be strict uniformity. Differentials in rates and services were recognized as necessary, conditioned on the one hand by the physical and financial ability of the railroad to render the service, and on the other hand by the variable demands of various classes of the public for the service. The mere circumstance that there was, in a given case, a preference or an advantage did not of itself establish such preference or advantage as undue or unreasonable.¹¹ The essential problem of administering the anti-discrimination provisions of the Interstate Commerce Act was to supply the counterpoise to avoid inequitable treatment of the various groups involved. But at no time has there been imposed a rigid rule of uniformity.

WHAT CONSTITUTES DISCRIMINATION AS TO TRANSPORTATION SERVICES

In attempting to determine the nature and extent of the service that the public is entitled to demand from a common carrier, the early common law test was to ascertain the nature of the holding-out on the part of the common carrier. This test is consistent with the contract philosophy. What the carrier, whether private or public, offers in the way of service would determine his obligations towards those who accepted the offer. The acceptance of a franchise clearly defined his obligation as one to serve the public. Although this forms still a major part of the test, nevertheless, courts are presently no longer solely concerned with whether the property or the business has been dedicated to a public use.¹² The extent of the state's control of a business may be said to turn now upon the question of the public interest involved and not principally on the fact of its having dedicated its property to a public use. Concomitantly, a statute regulating any business is likely to be upheld if it is found to be reasonably necessary and appropriate for public protection.

The earlier tests were logically concerned in the main with dedication to

¹⁰Texas & Pacific Ry. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666 (1896).

¹¹*Ibid.*

¹²The principles inhibiting discrimination have been extended to certain aspects of private industry. The United States Supreme Court has recently held that a basing point price system fixed by a producer of dextrose to candy manufacturers which did not allow for actual differences in freight rates on shipments constituted a violation of Section 2 (a) of the Clayton Act forbidding discrimination in price, and that the manufacturer's discounts and furnishing of special advertising to favored purchasers constituted discrimination under the Act. *Corn Products Refining Co. v. Federal Trade Comm.*, 323 U. S. 706, 65 Sup. Ct. 961 (1945) and *Federal Trade Comm. v. A. E. Staley Mfg. Co.*, 323 U. S. 702, 65 Sup. Ct. 971 (1945).

public use. The franchise granted to a public service enterprise was a contract which it was bound to perform and which on the other hand the state could not impair. Consistent with this concept it was early held that a transportation agency fulfilled its obligation to render service to all comers if it accepted only that type of freight which it was peculiarly fitted to carry. Chancellor Kent is quoted as saying ". . . a common carrier is bound to transport unless there are circumstances justifying its failure if they have the requisite conveniences to carry. . . ." ¹³

In 1838 a New York court said, "A man may become a common carrier or not at his option; and that he may limit his office to the carrying of persons or goods if he pleases. . . ." ¹⁴

"A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. It is entitled in the first instance to determine what class of commodity it will engage in carrying." ¹⁵

The applicable principles are broadly summarized in *Platt v. Lecocq* where the Court declared:

A common carrier has the right to conduct its own business in its own way in accordance with the rules of the common and statutory law. It is bound to receive and to transport goods of the character which it offers to carry at reasonable times and places, but at no other times or places. It has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that Commissions or Courts may lawfully interfere to annul or change them. ¹⁶

The specialized nature of the carrier early qualified its obligation to carry. In *Pfister v. Central Pac. R. Co.*, although suit was brought under a

¹³*Fitch v. Newberry*, 1 Doug. (Mich.) 1 (1843), *Mathis v. Southern Ry.*, 43 S. E. 684 (S. C. 1903).

¹⁴*Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 259 (1838).

¹⁵*Harp v. Choctaw, O. & G. R.R.*, 125 Fed. 445, 449 (C. C. A. 8th, 1903); *Michigan Southern & Northern Indiana R.R. v. McDonough*, 21 Mich. 165 (1870); 4 ELLIOTT, RAILROADS (2d ed. 1907) § 1468. In 1927 a Florida court averred: "Under its general public obligation a common carrier is not bound to furnish other means of transportation than such as it owns and uses or holds out to the public on its own route for that purpose." *Atlantic Coast Line Ry. v. Florida Fine Fruit Co.*, 93 Fla. 161, 168, 112 So. 66, 69 (1927).

¹⁶158 Fed. 723, 730 (C. C. A. 8th, 1907).

specific California statute which prohibited discrimination, the reasoning of the Court is of sufficient interest to bear quotation here particularly because the Court considered the nature and equipment of the individual carrier.

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as "transfer companies" engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our code, to accepting and carrying property "of a kind that he undertakes or is accustomed to carrying."¹⁷

In the absence of statute, a common carrier may limit not only the type of goods that it will undertake to transport, but also may make reasonable rules and regulations as to the conduct of its business with respect to the fixing of business hours, selection of stations for certain types of traffic, determination of the time and manner in which it will carry persons and property, and kinds of service, etc.¹⁸

The general rule, in the absence of statutory provision to the contrary, is that a railway company may adopt reasonable regulations prescribing that certain of its passenger trains running regularly upon its road shall stop only at designated stations.^{18a}

The term 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the questions of convenience and cost.¹⁹

¹⁷11 Pac. 686, 690 (Cal. 1886); see also *Crescent Coal Co. v. Louisville & N. R.R.*, 143 Ky. 75, 79, 135 S. W. 768, 770 (1911) where it is held: "A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles, it would not be under any obligation to carry other things." *Mulligan v. Illinois Central Ry.*, 36 Ia. 181 (1873); 4 WILLISTON, *CONTRACTS* (rev. ed. Williston and Thompson, 1937) § 1072, n. 10.

¹⁸*Atchison, T. & S. F. R.R. v. Denver & N. O. R.R.* 110 U. S. 667, 4 Sup. Ct. 185 (1883).

^{18a}*Chicago, R. I. & P. Ry. v. Sheets*, 54 Okla. 586, 154 Pac. 550, 551 (1916).

¹⁹*Atlantic C. L. R. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121 (1907); *Platt v. Lecocq*, 158 Fed. 723 (C. C. A. 8th, 1907); *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. 551 (1895).

If we apply the principles of the foregoing cases, we can see that there was no common law obligation on the part of the air carrier to carry freight since there was no offering or dedication by the air carrier of its facilities for such purpose. On the other hand, there was no specific contract or franchise obligation on the part of the air carrier to carry freight unless it can be said that the conditions of the certificate of public convenience and necessity constituted such an obligation. Although the certificate uses the term "property," the history of the development of transportation regulation and that of administration of discrimination prohibitions of the Interstate Commerce Act would indicate that the use of the term is in a permissive rather than a mandatory sense and that it is as flexible as the service that can be reasonably provided.

However, as above stated, the strict contract conception no longer prevails and the Courts today freely sustain regulation if the public welfare requires it regardless of its effect on the obligations of contracts. Furthermore, in construing the obligations imposed by law, they consider this broader conception of public interest. Although a certificate of public convenience and necessity may not be a contract in the old franchise sense, it is an operating privilege which cannot be lightly revoked or modified. There must be adequate cause.²⁰

There is further evidence that the term "property" was used in the Civil Aeronautics Act in a relative and evolutionary sense. A comparison of that act with the Interstate Commerce Act readily shows a difference in design with respect to carriage of freight. In the former there are but a few general references to cargo carriage, while in the latter there are numerous provisions which deal with the various problems of freight transportation such as property classification, bills of lading, handling, storage, switching, car service, interchange of equipment,²¹ export rates on farm commodities, prepayment

²⁰Civil Aeronautics Act § 401 (h) states: "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provisions of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with the order of the Board commanding obedience to the provision, or to the order (other than an order issued or in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." 52 STAT. 989 (1938), 49 U. S. C. A. § 481 (h) (Supp. 1944).

²¹49 U. S. C. A. §§ 1 (6) to (17).

of and liability for freight charges in certain cases, interchange of traffic requirements, common use of terminals, etc.²² None of the foregoing appear in the Civil Aeronautics Act, nor does the "long-and-short-haul clause,"²³ the omission of which is of particular significance. There are also omitted provisions covering rail-water connections and traffic;²⁴ prohibition of combinations to obstruct continuous carriage of freight;²⁵ liabilities of carrier, remedies of shippers,²⁶ designation of routing by shipper; the forbidding of disclosure of information regarding shipments; allowances to shippers.²⁷ The Carmack and Cummins amendments to the Interstate Commerce Act dealing with the liability of carriers, initial and connecting, for loss or damage to goods shipped,²⁸ and the limitation of such liability, likewise have no counterpart in the Civil Aeronautics Act. It is significant that the Motor Carrier Act of 1935²⁹ which was enacted by Congress only three years before the Civil Aeronautics Act contains many provisions similar to those above mentioned.

The pattern that emerges is whole, it is consistent with the common law concept of gradual growth and the proposition that in 1938 Congress did not intend to prophesy the course of air cargo development by anticipatory law-making, but left it, for the time being, to the interplay of technological development and economic forces. As a matter of fact even at the time of the passage of the Act, carriage of passengers in substantial numbers was just becoming general after having evolved from a system of air transportation in which primarily mail was carried.

It may be argued, however, that the airlines are actually rendering a type of cargo service through the medium of R.E.A. and that this would establish a holding out on the part of the airlines. While the first proposition is true, the second does not necessarily follow. In that situation it is R.E.A. which holds itself out to the public as the common carrier and not the airline as such. The special contract with R.E.A. was a natural start for the furnishing of extensive cargo service of a special kind. The appearance of this widespread air-express service so early was due, in no small part, to the considerable facilities of R.E.A. for pick-up and delivery already available. It is doubtful if more could have been reasonably required of the airlines. As

²²*Id.* § 3.

²³*Id.* § 4 (1).

²⁴*Id.* § 6 (11).

²⁵*Id.* § 7.

²⁶*Id.* §§ 8 to 10, 16.

²⁷*Id.* § 15.

²⁸*Id.* §§ 20 (11) and (12).

²⁹49 STAT. 543-567 (1935), 49 U. S. C. 301-327 (Supp. 1944).

long as the public is satisfactorily served, a carrier may enter into an arrangement with a third party for the rendition of special services or the supplying of special facilities such as express service,³⁰ pullman service,³¹ baggage transfer,³² and hack stands.³³ At the same time, such contracts may be exclusive.³⁴ "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them."³⁵ The delegation in a sense of an air transportation function would also seem to be consistent with the definition of "air carrier" in the Act as including an "indirect air carrier."³⁶ This has been held to cover express companies.³⁷

It is significant that as yet the Civil Aeronautics Board has not invoked Sections 401 (g) or 404 (a) for failure to provide freight transportation directly. If the test of public convenience and necessity were applied, it would carry with it an inquiry into what would constitute a reasonable freight or cargo rate for carriage of goods between various points. This in turn would mean an investigation into the economics of air-freight transportation which would no doubt reveal that during the period that the various air carriers had not undertaken to carry property, there had been substantial reason to believe that the cost would have been so great and the consumer market correspondingly limited that it would not have served the public convenience and necessity. That Congress had the technological and economic limitations of air carriage in mind at the time of the passage of the Act is indicated by its many omissions for the proper regulation of the transportation of freight, as previously detailed herein. It would seem rather that it used the term "property" in a general sense and permitted the airlines to fill in the reality.

DISCRIMINATION AS TO LOCALITIES

This problem is presented by the addition of air cargo carriage to the transportation services offered by the airlines. Once an airline has offered to

³⁰Express Cases, 117 U. S. 1, 6 Sup. Ct. 542 (1886).

³¹Chicago, St. L. & N. O. R.R. v. Pullman Southern Car Co., 139 U. S. 79, 11 Sup. Ct. 490 (1891).

³²Cosby v. Richmond Transfer Co., 23 I. C. C. 72 (1912).

³³Delaware, L. & W. R.R. v. Morristown, 276 U. S. 182, 48 Sup. Ct. 276, 56 A. L. R. 756, 757 (1928); Black and White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U. S. 518, 48 Sup. Ct. 404, 57 A. L. R. 426, 435 (1928).

³⁴See cases cited *supra* notes 28 to 31.

³⁵Express Cases, 117 U. S. 1, 24, 6 Sup. Ct. 542, 544 (1886).

³⁶Civil Aeronautics Act, 52 STAT. 977, 49 U. S. C. A. § 401 (2) reads in part: "Air Carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation. . . ."

³⁷Railway Express Agency, Grandfather Certificate, 2 C. A. B. 531, 537 (March 13, 1941).

carry air cargo, must it carry air cargo between all points on its system? Will the basic principles of economic balance still be applied?³⁸ Rationally, the same reason for justifying the refusal of an air carrier to transport freight in the first place, may well justify its refusal to carry freight between all stations on its system. The economic considerations prompting the inclusion of this service would no doubt impose their limitations. Limited air freight service is really a service of a special character unless its offering is specifically made unlimited.

In the development of air transportation to the point where it could carry freight for the public, it was natural that at first only long-haul carriage could be justified economically. One of the important cost factors in air transportation is the expense involved in landing and taking off.³⁹ It is not altogether surprising, therefore, that the first airline to file an air freight tariff was the largest airline in the country, a transcontinental carrier, with a domestic system covering 7,918 route miles.

If certain localities or stations are omitted from this new air freight service because of short hauls, may such localities justifiably charge discrimination? The principles justifying the omission of a locality would be the same as the principles justifying the omission of a service. There is again a balancing of economic interests.

"The law does not attempt to equalize opportunities among localities. . . . In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values or by other transportation conditions."⁴⁰ The same principles have been applied in passing upon alleged discrimination against a commodity.⁴¹

The essential long-haul character of present air freight transport may be compared to through-train passenger service which necessarily omits many local stops.⁴² There, in considering the question of discrimination as between

³⁸The freight tariffs filed by American Airlines do not cover all the certificated points on its system. Generally freight service between points less than 450 miles apart or in some instances points which make the route too circuitous have been omitted.

³⁹See discussion of costs of short-haul air transportation by Hon. Edward Warner, Vice-Chairman of the Civil Aeronautics Board, in his paper *Requirements of Local Air Transport Service* in which he stated that one of the prohibitive cost factors is frequent landing and taking-off, p. 11.

⁴⁰*Illinois C. R.R. v. The Commerce Commission*, 342 Ill. 11, 20, 173 N. E. 804, 807 (1930); "Preference between cities and localities under common law not forbidden," ROBERTS, *FEDERAL LIABILITIES OF CARRIERS* (2d ed. 1929) 507; see also D. P. Locklin, *Discrimination Between Places*, 1934) 42 J. POL. ECON. 613; *McGrew v. Missouri P. Ry.*, 230 Mo. 496, 132 S. W. 1076 (1910).

⁴¹*Davis Hotel Co. v. Platt*, 172 Fed. 775 (C. C. N. D. W. Va. 1908).

⁴²Local points, however, must have been provided with proportionately adequate facilities. *State v. Missouri K. & T. R.R.*, 117 Kan. 62, 230 Pac. 329 (1924); *Gulf, C. & S. F. Ry. v. Moore*, 98 Texas 302, 83 S. W. 362 (1904).

localities, the needs of the particular communities are weighed against the facilities available. In *Atlantic Coast Line R. Co. v. Wharton*, the United States Supreme Court discussed the matter:

The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.⁴³

The convenience of the small number of local passengers was weighed against that of the large number of through passengers:

But assuming that the number actually inconvenienced by the want of fast trains was "*quite large*," as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the State.⁴⁴

Further, with respect to facilities allocable to small communities:

Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities, and the defendants in error, it may be conceded, make no such demand.⁴⁵

Consistently entering into the considerations of the courts are such elements as volume of business done, proximity to other stations, accessibility, cost of furnishing service,⁴⁶ economic character of the locality, competition between trunk lines, relative needs of local and national commerce.⁴⁷

The following rulings further illustrate the application of these principles. In *Bodine & Clark L. Com. Co. v. Great Northern Ry. Co.*,⁴⁸ the defendant railroad had an operating rule restricting west-bound live stock shipment to one train weekly except on special showing of necessity. This rule was held not "unreasonable, prejudicial, discriminatory or otherwise objectionable."

In *St. Louis I. M. & S. R. Co. v. Adcox*,⁴⁹ the railroad's refusal to designate a small town as a flag stop for its through train was held to be not

⁴³207 U. S. 328, 335, 28 Sup. Ct. 121, 123 (1907).

⁴⁴*Id.* at 336, 28 Sup. Ct. at 124.

⁴⁵*Id.* at 337, 28 Sup. Ct. at 124.

⁴⁶Residents etc. v. Central Vt. Ry., 100 Vt. 443, 138 Atl. 782 (1927).

⁴⁷Mississippi R.R. Comm. v. Illinois C. R.R., 203 U. S. 335, 27 Sup. Ct. 90 (1906).

⁴⁸63 F. (2d) 472 (C. C. A. 9th, 1933).

⁴⁹52 Ark. 406, 12 S. W. 874 (1890).

unreasonable. In *State v. Public Service Commission*⁵⁰ it was held that a preference granted by a railway to Seattle as between the cities of Tacoma and Seattle for milling in transit was not unreasonable because the Tacoma mill required a larger back haul.

If in rail transportation the roads are permitted to omit through service to certain stations, how much more reasonable would it be to do so in the case of air transport where the very nature of the transportation agency may require such omission. That transportation cost in serving local traffic is generally proportionally higher than for through traffic seems generally conceded.⁵¹ In air transport, multiplied take-off and landing, and the accompanying loading and unloading operations, make for very substantial if not prohibitive costs. As a matter of fact, for a short haul the locality could in all probability use surface transportation facilities just as expeditiously and much more economically.⁵²

Applying the foregoing principles, it is doubtful if any omitted locality could justify a demand for air freight service, or could make the required showing that it was harmed by an unreasonable discrimination. To show discrimination a competitive relation between communities must first be shown to exist,⁵³ then actual injury must be established.⁵⁴ If such service were to be rendered, it would have to be rendered at a greatly increased rate. This would in turn have an adverse effect upon demand.⁵⁵ If the service were rendered at the same rate, this in turn might be discriminatory and even confiscatory as to the air carrier, since the air carrier would be obliged to render service below cost. On the other hand, if the air carrier were permitted to increase its over-all rates so that the additional cost of rendering this service to the otherwise omitted localities could be absorbed by the system as a whole, then that would be discriminatory as to some sections of the public, *i.e.* consumers residing in cities to which the service

⁵⁰112 Wash. 520, 192 Pac. 1075 (1920).

⁵¹III-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 546; *Baltimore & Ohio S. W. R.R. v. Settle*, 260 U. S. 166, 43 Sup. Ct. 28 (1922); W. L. McMillen, *Air Express Service in the United States* (1936) 11 J. LAND & PUB. UT. ECON. 266.

⁵²Investigation of Local Feeder and Pickup Air Service, Civil Aeronautics Board, Doc. #857, July 11, 1944.

⁵³*Western Carolina Shippers Ass'n v. Ashville S. Ry.*, 174 I. C. C. 353 (1930); *City of Moorhead v. Great Northern Ry.*, 172 I. C. C. 38 (1931).

⁵⁴*Federated Metals Corp. v. Pennsylvania R.R.*, 161 I. C. C. 287 (1930); *Parsons v. Chicago and N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887 (1897); *cf.* *Three Lakes Lumber Co. v. Washington W. Ry.*, 61 I. C. C. 408 (1921); SHARFMAN, *op. cit. supra* note 50 at 560; *Union Pacific R.R. v. United States*, 313 U. S. 450, 61 Sup. Ct. 1064 (1941).

⁵⁵Investigation of Local Feeder and Pickup Air Service, Civil Aeronautics Board, Doc. #857, July 11, 1944.

could be rendered on a reasonably economical basis would have to pay for the cost of extending the service to other localities that otherwise could not afford it. At this stage it is extremely doubtful that short-haul points can economically justify air freight service at the same rates available to long-haul points.⁵⁶ As was said in *Atchison T. & S. R.R. Co. v. United States*:

Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay.⁵⁷

It may be noted that it is not the policy of the Government in the regulation of railways under the Interstate Commerce Law to require them to carry on the transportation business at a loss.⁵⁸

It would thus appear that localities that would generate little traffic or would involve too short a haul or too circuitous routing, may be reasonably excluded from air freight service on the ground of sound transportation economics. This situation may be likened somewhat to the omission by the Civil Aeronautics Board of a provision for air service between pairs of cities although they lie along a certificated air route.

Furthermore, it may well be that omitted intermediate points are outside the scope of the Act in any event where they are not originating or destination points. In the fairly recent case of *Texas & P. R. Co. v. United States*, the Supreme Court, construing Section 3 of the Interstate Commerce Act, defined "localities" in the light of the purposes of the Act previously adverted to:

. . . the purpose of Sections 2, 3 and 4, as exhibited by committee reports and explained by those in charge of the bill in Congress, was to prevent unjust discrimination resulting from existing practices. Similar commodities were, without reason or excuse, carried at different rates. Shippers similarly situated were put on unequal terms. Producers and consumers at points of origin and destination were prejudiced by unequal treatment in the matter of rates or service. Obviously localities of origin or destination might also be prejudiced by undue discrimination. One of the most prevalent and reprehensible practices at which the Act was aimed was the charging of a less or an equal rate for a longer haul upon the same line or route. *The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare. The word "localities", therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers. The term was, how-*

⁵⁶*Ibid.*

⁵⁷232 U. S. 199, 217, 34 Sup. Ct. 291, 295 (1913).

⁵⁸*Johnson v. Chicago St. P. M. and O. R.R.*, 9 I. C. C. 221, 243 (1902).

ever, not intended to cover a junction, a way station, a gateway, or a port, as respects traffic passing through it.⁵⁹

. . . the word localities is used with reference to places of origin and destination; its employment is not intended to permit the Commission, in its discretion, to favor or hamper a community having no such relation to the service of transportation.⁶⁰

The Court excluded "ports" from the purview of the Act:

We conclude that ports as such are not localities with respect to export and import traffic routed through them, susceptible of undue preference or prejudice within the intent of the Act.⁶¹

SOME RATE DISCRIMINATION PROBLEMS

An airport serves a large surrounding area which may include a number of towns. Where the published tariff includes pick-up and delivery service, at the same rate to the points within the area,⁶² it may be contended that this would constitute a preference as to localities located in the outer perimeter of the area served. To begin with, it may be observed that the practice seems reasonably necessary in order to make airport facilities and air transportation available to a greater area as well as promote greater volume of traffic.

The practice of blanketing an area with a single or group rate is one familiar to railroading and has been upheld by the Interstate Commerce Commission.⁶³ It would appear that when group rates are attacked before the Commission as unduly preferential of the furthest removed sections of an area and unduly prejudicial to nearer points, an especially heavy burden of

⁵⁹289 U. S. 627, 638, 53 Sup. Ct. at 768, 772 (1933) (italics added).

⁶⁰*Id.* at 640, 641, 53 Sup. Ct. at 773.

⁶¹*Id.* at 644, 53 Sup. Ct. at 774. After this decision, this section of the Interstate Commerce Act was amended by the Transportation Act of 1940 to include every territory and region of any kind and description. No such amendment, however, has been made to Section 404 (b) of the Civil Aeronautics Act. See also: D. P. Locklin, *Discrimination Between Places* (1934) 42 J. Pol. Econ. 613, where Professor Locklin holds that "localities" must be points of origin or destination of traffic, in order to come within the statute.

⁶²Transportation has been held to include delivery to the door. *Hanna Furnace Corp. v. United States*, 53 F. Supp. 341 (W. D. N. Y. 1943); *Merchant Truckman's Bureau of N. Y. v. Reardon et al.*, 10 F. Supp. 358 (S. D. N. Y. 1935).

⁶³III-B SHARFMAN, *op. cit. supra* note 50 at 672, 673. For an example of unreasonable spread of blanket rates as applied by rail carriers see *United States v. M. & M. Ass'n of Sacramento*, 242 U. S. 178, 37 Sup. Ct. 24 (1916), where ocean-terminal rates had been applied to about 190 California cities, although only six were so located that they might receive ocean vessel freight, and the Supreme Court followed the I.C.C. decision limiting such terminal rates to the six actual port cities; see also the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729 (1913) and the *Shreveport Cases*, 234 U. S. 342, 34 Sup. Ct. 833 (1914), dealing with intrastate rates discriminating against interstate points or traffic.

proof is imposed upon complainants. The existence of injury appears to be determined only after a process of balancing the gains to some as against the losses to others that result from the group arrangement.⁶⁴ If group rates do not work positive injury to the near points, they will not be considered objectionable.⁶⁵ Groups may be larger for long distance shipments than for shorter ones.⁶⁶

A discrimination question may arise when a shipper does not choose to avail himself of the pick-up and delivery service, but merely requires airport to airport transportation. In that event the better practice would be to make a reasonable allowance to the shipper in order to avoid discrimination. In rail freight practice where a shipper supplies a service or facility which otherwise would be furnished by the railroad, a reasonable allowance is required.⁶⁷

It has already been noted that the air express service is in law as well as in fact rendered by a common carrier other than the airline. This would appear to make ineffective as against either the airline or the express agency a claim that a difference in air express and air freight constitute discrimination.⁶⁸ In any event, it would seem that a higher rate for air express could not reasonably be regarded as unjustly discriminating. Differences in rates when based upon differences in service, circumstances and competitive conditions are not discriminatory.⁶⁹ There are basic differences between air freight and air express. Air express service has a priority over air freight and leaves on the first available plane after air mail.⁷⁰ It may be anticipated that when cargo volume increases sufficiently, that generally air express will be carried on passenger or mail planes and air freight on cargo planes which may be on slower schedules.

⁶⁴SHARFMAN, *id.* at 674; *Mitchell v. Atchison, T. & S. F. R.R.*, 12 I. C. C. 324, 325 (1907).

⁶⁵Locklin, *Discrimination Between Places* (1934) 42 J. POL. ECON. 613, 628.

⁶⁶*Mutual Rice Trade & Development Ass'n v. International G. N. R.R.*, 23 I. C. C. 219 (1912); SHARFMAN, *op. cit. supra* note 49 at 729.

⁶⁷*Union Pacific R.R. v. Updike Grain Co.*, 222 U. S. 215, 32 Sup. Ct. 39 (1911); *American Trucking Ass'n v. United States*, 17 F. Supp. 655 (D. C. D. C. 1936); *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822 (1897); *United States v. Baltimore & Ohio R.R.*, 321 U. S. 403, 64 Sup. Ct. 752 (1944).

⁶⁸The discrimination must be by the same carrier or carriers. See *Central R.R. of New Jersey v. United States*, 257 U. S. 247, 42 Sup. Ct. 80 (1921).

⁶⁹ROBERTS, *FEDERAL LIABILITIES OF CARRIERS* (2d ed. 1929) 454; *New Orleans Cotton Exchange v. Illinois C. R.R. et al.*, 3 I. C. C. 534 (1890); *Leman, Higginson & Co. v. Southern Pac. Ry.*, 4 I. C. C. 1 (1890); *I. C. C. v. Chicago G. W. Ry. et al.*, 209 U. S. 108, 28 Sup. Ct. 493 (1907); *Barringer & Co. v. United States*, 319 U. S. 1, 63 Sup. Ct. 967 (1942).

⁷⁰W. L. McMillen, *Air Express Service in the United States* (1935) 11 J. LAND & PUB. UT. ECON. 266, (1935) 6 J. AIR L. 421.

CONCLUSION

At the time of the passage of the Civil Aeronautics Act, quantity carriage of passengers was becoming general, and as we have seen, regular transportation of cargo was hardly contemplated—much less provided for. Even though authorization for carriage of property is made in the certificate, it is significant that the hearings on route applications have been concerned mainly with passenger and mail traffic. Nor has the Civil Aeronautics Board yet invoked Sections 401 (g) or 404 (a) for failure to provide freight transportation. There is reason to believe that as concerns air cargo, the nature of the service required as to stations served and kind of property carried and frequency of scheduling will be measured by the developing capacities of the airlines in accordance with the realistic common-law principles adverted to.⁷¹ In fact, it may be said that the airlines are just beginning to become true direct common carriers of cargo with a necessarily limited service at the present. But these services in so far as they are actually rendered may not be unreasonably discriminatory as to localities or rates.⁷²

Although dedication to a public use is no longer a prerequisite to an order directing service to the public, the role of the governmental supervisory body is of necessity still pragmatic. If the carrier is ordered to render a service, it must be compensated either through increased rates or through reimbursement for its increased investment.⁷³ Whatever the method used, the cost is ultimately borne out of the public purse. Along this line it is worthy of note that no administrative agency has been given the power to direct a carrier to serve an entirely new route for which it had not applied, and for very good constitutional reasons. In a recent case the Civil Aeronautics Board held that it could not initiate a new route service but only direct an extension of an already existing route.⁷⁴

This study reaches the general conclusion that the airlines probably will only be compelled to render such freight service as their development makes feasible from the standpoint of transportation economics. The capacity of the airline will be balanced against the needs of the particular locality in terms of over-all public benefit.

⁷¹There is a marked analogy of this newly developing field of air freight transportation to the early days of radio broadcasting; here again the courts should give the regulating agencies the opportunity to experimentally develop the legal regulation in harmony with the actual developments of the new field in the highest public interest. See for example: *F. R. C. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 53 Sup. Ct. 629, 89 A. L. R. 406 (1932); *F. C. C. v. Sanders Radio Station*, 309 U. S. 470, 60 Sup. Ct. 693 (1940); *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 60 Sup. Ct. 437 (1940).

⁷²We are not here concerned with other aspects of discrimination, such as discrimination as to persons.

⁷³*E.g.*, By means of an increased rate for carriage of air mail.

⁷⁴*Panagra Case*, C. A. B. #779, decided May 24, 1944 (*Panagra Terminal Investigation*).