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# REGULATION OF IRREGULAR AIR CARRIERS

JOHN P. MOORE\* AND K. ROBERT HAHN†

Commercial air transportation in the United States began at the conclusion of the first world war, and federal regulation developed slowly in the decade that followed as the Government attempted to maintain appropriate control over this new industry. The pattern of regulation which followed from the Air Commerce Act of 1926,<sup>1</sup> the Federal Aviation Commission Hearings of 1934,<sup>2</sup> and the numerous hearings before Congress between 1934 and 1937 was solidified in the Civil Aeronautics Act of 1938.<sup>3</sup> In the past decade this basic statute has been altered in only minor respects. However, the dynamic civil air transport industry has grown far beyond the concepts of the draftsmen and it has been necessary for the Civil Aeronautics Board to draw heavily upon its "administrative discretion" in the absence of necessary and fundamental amendments.

This dependence upon administrative discretion has been greatest in the efforts to direct the development of nonscheduled air transportation.<sup>4</sup> The problems there have been myriad, with the regulations formulated on the bare statutory authority of Section 416(b)(1):<sup>5</sup>

The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof,

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<sup>1</sup> 44 STAT. 568 (1926), 49 U. S. C. § 171 (1946).

<sup>2</sup> The Federal Aviation Commission was a special ad hoc body established to report on long range civil air policy for the United States. SEN. DOC. NO. 1115, 74th Cong., 1st Sess. (1935).

<sup>3</sup> 52 STAT. 973 (1938) *et seq.*, 49 U. S. C. § 401 (1946) *et seq.*

<sup>4</sup> Inasmuch as § 401 of the Act of 1938 prohibits a carrier from offering scheduled air services unless it has a certificate of public convenience and necessity, the nonscheduled operators are often referred to as "noncertificated" lines. Included in this category, but not within the scope of this article, are the noncertificated cargo carriers created by § 292.5 of the Economic Regulations of the Board, 14 CODE FED. REGS. § 292.5 (Supp. 1947). In the *Air Freight Case*, C.A.B. No. 810, 1A CCH Av. LAW REP. ¶ 21,186 (1949) four of these carriers were awarded certificates of public convenience and necessity for the transportation of freight in the domestic field. By express provision of the Regulation (Part 295.5 as recodified July 1, 1949, 14 FED. REG. 3522) the exemption terminated 60 days after final action by the Board upon the certificate applications.

<sup>5</sup> See Note 3 *supra*. The Board's power to grant a blanket exemption to an entire class of carriers under § 416 (b) (1) has been contested by the certificated carriers in connection with each proposed revision of the nonscheduled regulations. There is a dearth of information in the legislative history of the Act on the point, such statements as do exist being of little probative value either in support of or in opposition to the Board's authority to grant such exemptions pursuant to that provision.

or any rule, regulation, term, condition, or limitation, prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such an air carrier or class of air carriers and is not in the public interest.

It might be noted, at the outset, that in the opinion of a senior legislator, often described as the sponsor of the Civil Aeronautics Act of 1938, this exemption power was never intended to apply to nonscheduled operations.<sup>6</sup>

Nonscheduled air transportation was relatively insignificant in 1938, and consisted largely of crop dusting services, aerial photography units, flight instruction firms, aerial advertising companies, and those groups engaged in the operation of airports. Today the latter, the so-called "fixed base" operators, have enlarged the scope of their activities to forest fire fighting, mosquito control, plant pollinization, spraying, seeding, power line patrol and even such bizarre projects as coyote and eagle hunting.<sup>7</sup>

But the greatest increase in recent years has been in the nonscheduled transportation of passengers and property for hire. This has been one of the most remarkable phenomena of the postwar economic evolution and re-orientation of our national transport system. The major factors contributing to this tremendous growth in nonscheduled movement of passengers and cargo were (a) the familiarization of great numbers of people both in and out of the armed forces with the special advantages of air travel during the course of World War II, and (b) the availability of large numbers of low-cost surplus aircraft to returning veterans thoroughly trained in the requisite ground and flight techniques.<sup>8</sup> The regulatory system embodied in the Civil Aeronautics Act was hardly designed to provide a thorough coverage of this type of flying service, and in recent years irregular air transportation has, like Topsy, "just grown."

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<sup>6</sup> See 95 Cong. Rec. 505 (Jan. 20, 1949), letter from Senator Pat McCarran to Joseph J. O'Connell, Jr., Chairman of the Civil Aeronautics Board, wherein he states: "Being the principal author of the Civil Aeronautics Act of 1938, as well as its sponsor throughout its whole legislative history, I may be presumed to have a clear idea of the legislative intent of Congress in enacting the law. I wish to state unequivocally and unalterably that the Act never at any time in its history contemplated the economic regulation of nonscheduled or fixed base operators."

<sup>7</sup> C. A. A. Statistical Handbook of Civil Aviation 38 (1948).

<sup>8</sup> See Investigation of Nonscheduled Air Services, 6 C. A. B. 1049 (1946).

*The Civil Aeronautics Act—Two Main Types of Regulation*

Two principal types of regulation are established by the Civil Aeronautics Act of 1938—the economic regulation embodied in Title IV and safety controls in Title VI. Perhaps the most significant aspect of Title IV is the requirement that any “air carrier” engaged in “air transportation” must have an authorization in the form of a “certificate of public convenience and necessity.”<sup>9</sup> Title IV confers upon the five man bi-partisan Civil Aeronautics Board economic regulatory jurisdiction over “air carriers” and “air transportation.” It may, therefore, be helpful to take into account the definitions of these terms contained in Title I:

*Air carrier* means any citizen of the United States to undertake, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation; *provided*, that the authority may by order relieve *air carriers* where not directly engaged in the operation of aircraft and air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest. (Sec. 1(2)).

“Air transportation” means interstate, overseas or foreign air transportation or the transportation of mail by aircraft. (Sec. 1(10)).

Interstate air transportation, overseas air transportation and foreign air transportation respectively mean the carriage by aircraft of persons or property *as a common carrier for compensation or hire for the carriage of mail by aircraft, in commerce* between respectively . . . . (Sec. 1(20)).

It is significant that the authority to prescribe economic controls extends only to common carriers operating scheduled air transport services in interstate, overseas and foreign air transportation. Carriers engaged in contract or private carriage are not subject to the economic regulations of Title IV.<sup>10</sup>

Title IV stipulates that the carriers being regulated must file their tariffs with the CAB,<sup>11</sup> that passenger and cargo rates may be fixed by the regulatory agency,<sup>12</sup> that accounting practices may be prescribed<sup>13</sup> and reports required,<sup>14</sup> that consolidations, mergers and acquisitions of

<sup>9</sup> 52 STAT. 987 (1938), 49 U. S. C. § 481 (1946).

<sup>10</sup> The tendency of the enforcement staff of the CAB to consider all operations as common carriage operations in order to maintain jurisdiction over all civil air transport activities is discussed, *infra*, pp. 64 *et seq.*

<sup>11</sup> 52 STAT. 992 (1938), 49 U. S. C. § 483 (1946).

<sup>12</sup> 52 STAT. 993 (1938), 49 U. S. C. § 484 (a) (b) 1946.

<sup>13</sup> 52 STAT. 1000 (1938), 49 U. S. C. § 487 (d) (1946).

<sup>14</sup> 52 STAT. 1000 (1938), 49 U. S. C. § 487 (a) (1946).

control may be effected only after the approval of the Board,<sup>15</sup> that interlocking relationships involving air carriers and certain other types of firms may exist only with Board consent,<sup>16</sup> that the Board shall issue cease and desist orders upon determining that unfair or deceptive practices or unfair methods of competition in air transportation<sup>17</sup> are being utilized, as well as a requirement that certain inter-carrier agreements must be filed<sup>18</sup> with the Board and are effective only after ratification.<sup>19</sup>

Safety regulation under Title VI of the Act is governed by a different set of statutory definitions. The provisions apply generally to any aircraft, airman or flight of aircraft. The "air carrier" as heretofore defined is, however, subject to two special additional safety requirements under the Act. An "air carrier" must secure an air carrier operating certificate from the Administrator of Civil Aeronautics, who must first find that the carrier "is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations and standards prescribed thereunder."<sup>20</sup>

In implementation of the provisions of Title VI, the Board has promulgated safety regulations, officially classified as operation rules, governing the various types of air carriers, viz. (1) domestic scheduled carriers,<sup>21</sup> (2) scheduled air carriers operating outside the continental limits of the United States,<sup>22</sup> (3) irregular air carriers,<sup>23</sup> and (4) foreign air carriers.<sup>24</sup> Operation rules applicable generally to flight operations are also in effect.<sup>25</sup> In 1949, a new regulation was added requiring a commercial operating certificate for aircraft operations of contract carriers.<sup>26</sup>

<sup>15</sup> 52 STAT. 1001 (1938), 49 U. S. C. § 488 (a) (1946).

<sup>16</sup> 52 STAT. 1002 (1938), 49 U. S. C. § 489 (a) (1946).

<sup>17</sup> 52 STAT. 1003 (1938), 49 U. S. C. § 491 (1946).

<sup>18</sup> 52 STAT. 1004 (1938), 49 U. S. C. § 492 (a) (1946).

<sup>19</sup> 52 STAT. 1004 (1938), 49 U. S. C. § 492 (b) (1946).

<sup>20</sup> 52 STAT. 1010 (1938), 49 U. S. C. § 554 (1946).

<sup>21</sup> 14 CODE FED. REGS. § 40 (Cum. Supp. 1943) (Air Carrier Operating Certification).

<sup>22</sup> 14 CODE FED. REGS. § 41 (Supp. 1945) (Certification and Operation Rules for Scheduled Air Carrier Operations outside the Continental Limits of the United States).

<sup>23</sup> 1 CCH AV. LAW REP. ¶ 8810 (1949) (Irregular Carrier and Off-Route Rules, effective June 1, 1949. The first safety regulations governing nonscheduled carriers became effective August 1, 1946 and were entitled "Non-Scheduled Air Carrier Certification and Operation Rules.").

<sup>24</sup> 14 CODE FED. REGS. § 44 (Supp. 1945) (Foreign Air Carrier Regulations).

<sup>25</sup> 14 CODE FED. REGS. § 43 (Supp. 1945) (General Operation Rules).

<sup>26</sup> 1 CCH AV. LAW REP. ¶ 9250 (1949) (Commercial Operator Certification and Operation Rules, effective June 1, 1949). By a recent revision of Part 45, effective November 10, 1949, intrastate operators are required to maintain the safety standards of domestic certificated carriers (Part 40). This action was taken chiefly as a result of the outgrowth of six intrastate carriers in California, operating between San Francisco and Los Angeles, at rates drastically below the fares of the certificated carriers operating this route.

*Early Regulation of Nonscheduled Carriers Under the Act*

Acting pursuant to the exemption authority of Section 416(b)(1) the CAB adopted Section 292.1 of the Economic Regulations<sup>27</sup> shortly after the effective date of the Act of 1938.<sup>28</sup> That early authorization of what has since become the most highly controversial economic regulation in American air transport history permitted nonscheduled services without compelling the operators to comply with the economic and safety requirements referred to above.<sup>29</sup> Nonscheduled operations were defined in the following terms:

Within the meaning of this regulation any operation shall be deemed to be nonscheduled if the air carrier does not hold out to the public by advertisement or otherwise that it will operate one or more airplanes between any designated points regularly, or with a reasonable degree of regularity, upon which airplane or airplanes it will accept for transportation, for compensation or hire, such members of the public as may apply therefor or such express or other property as the public may offer.<sup>30</sup>

Impressed with the tremendous strides made by air transportation in the course of the War, the Civil Aeronautics Board anticipated that a re-examination of the operating authority for nonscheduled carriers would be necessary and launched an *Investigation of Nonscheduled Air Services* in 1944. The result of this proceeding was an amendment of Section 292.1 to require registration of nonscheduled carriers and to discontinue the exemption from the bar against unfair methods of competition embodied in Section 411.<sup>31</sup> On June 15, 1946, just ten days

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<sup>27</sup> On July 1, 1949, the Civil Aeronautics Board recodified and renumbered its Economic Regulations to conform with the scope and style of the Code of Federal Regulations. As a result, § 292.1 has now become Part 291, but because it is much more commonly known by its previous designation, it will be referred to as § 292.1.

<sup>28</sup> August 22, 1938.

<sup>29</sup> See note 23 *supra*.

<sup>30</sup> *Investigation of Nonscheduled Air Services, supra*, note 8.

<sup>31</sup> On May 26, 1947, the Office of Aviation Information of the Civil Aeronautics Administration released a document on "The Development, Operation, and Regulation of the Non-Scheduled Air Carrier," which pointed out that Amendment 2 to 292.1 of the Economic Regulations "was the result of an investigation of nonscheduled carriers which the CAB had begun in 1944. Because this investigation had not developed 'the full factual basis which the Board usually required before making determinations of regulatory policy,' the amendment continued the exemption of the nonscheduled air carriers from the economic regulations.

"But the amendment recognized the lack of official information regarding the size of the nonscheduled industry by requiring all nonscheduled operators to register their names and addresses, their proposed services, the number and type of aircraft on hand and on order, miles flown, etc. The Board hoped this provision would supply it with the data necessary to formulate regulations of a permanent nature.

"Weakness of these reports was that they were to be non-recurring and were only required to cover the two calendar months prior to the submission of the report, or if the carriers were already engaged in such operations on or before September 3, 1946" (p. 3).

before this amendment was to become effective, a new revision of the exemption authority for the nonscheduled operators was proposed and was distributed widely throughout the industry for written comments. After having studied the comments and heard extensive oral argument, the CAB adopted this revision which became effective on June 10, 1947.<sup>32</sup> It was this version of Section 292.1 which was in use during most of the period of postwar growth of the noncertificated airlines, and this revision has compounded confusion in the industry and within the Board during the past two years.

### *Creation of "Irregular Air Carriers"*

The amended regulation abandoned the term "nonscheduled" which had existed previously, created a classification of "irregular air carriers"<sup>33</sup> and redefined the scope of Section 292.1. Irregular carriers were divided into two categories—large and small, the distinction depending upon the size and take-off weight of the aircraft employed.<sup>34</sup> An irregular carrier in domestic transportation was permitted to engage in both passenger and freight operations, while in the international field the irregular operator was restricted to movement of property. To qualify as an irregular carrier the applicant was required merely to file a request for a Letter of Registration with the Civil Aeronautics Board on a form prescribed by the Board.<sup>35</sup> The regulation defined an irregular carrier as one which:

does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transporta-

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<sup>32</sup> 14 CODE FED. REGS. § 292.1 (Supp. 1949).

<sup>33</sup> 52 STAT. 1004 (1938), as amended, 49 U. S. C. § 496 (a) (1946).

<sup>34</sup> Large Irregular Air Carriers were defined as carriers utilizing an aircraft with an allowable gross take-off weight in excess of 10,000 pounds or a number of aircraft which together had allowable gross take-off weights exceeding 25,000 pounds. Small Irregular Air Carriers were those operators with smaller units of equipment.

<sup>35</sup> With respect to the Board's views concerning the legal effect of a Letter of Registration, see NATS Air Transportation Service Enforcement Proceeding, 1A CCH Av. LAW REP. ¶ 21,149.03 (1949), wherein it is characterized as: ". . . only an acknowledgment evidencing registration under the regulation and not in any sense a certification that the holder was, at the time of issuance and still continues to be in fact and in law an irregular air carrier."

It is to be noted that the application for a letter merely required setting forth the date, name of carrier, mailing address, location of plane operating base, type of business organization with names and/or citizenship of its officers, directors and 75% of its stockholders, and the type and number of each type of aircraft utilized in air transportation (*See* 14 CODE FED. REGS. § 292.1 (d) (2)) (Supp. 1947).

tion, for compensation or hire, such members of the public as apply therefore or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.<sup>36</sup>

The accompanying Explanatory Statement directed attention to several CAB decisions in which questions of "regularity" and "frequency" were at issue.<sup>37</sup> The explanatory text also referred to and quoted *in extenso* the consent order adopted in the matter of *Trans-Caribbean Air Cargo Line, Inc.*<sup>38</sup> wherein on March 14, 1947, the Board defined the permissive scope of irregular operations and prohibited those which were offered:

(b) regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service: it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and intervals between flights and through frequent and extended definite breaks in service . . .<sup>39</sup>

Presumably the authors of the above "definition" intended narrowly to circumscribe the operating authority of the irregular carriers. It

<sup>36</sup> Definition of irregular air carrier under § 292.1.

<sup>37</sup> Page Airways, Inc. Investigation, 6 C. A. B. 1061 (1946); Trans-Marine Air-Lines, Inc. Investigation, 6 C. A. B. 1071 (1946). These cases were referred to in the Board's opinion in the Investigation of Non-Scheduled Air Services, *supra* note 8.

<sup>38</sup> Order Serial No. E-370, dated March 14, 1947, Docket No. 2593.

<sup>39</sup> Identical language was used by the Board in final orders in subsequent enforcement proceedings, including: Order Serial No. E-467, April 22, 1947, Docket No. 2589—Trans-Luxury Airlines, Inc.; Order Serial No. E-558, May 20, 1947, Docket No. 2635—Skyline, Inc.; Order Serial No. E-567, May 23, 1947, Docket No. 2637—Union Southern Airlines; Order Serial No. E-466, April 22, 1947, Docket No. 2639—Willis Air Service, Inc.; Order Serial No. E-1841, August 3, 1948, Docket No. 3244—Transocean Airlines, Inc.; Order Serial No. E-1908, August 27, 1948, Docket No. 3358—Trans-Atlantic Airways; Order Serial No. E-2683, E-2684, April 5, 1949, Docket No. 3415—Mt. McKinley Airways, Inc., C. A. B. No. 3415, 1A CCH AV. LAW REP. ¶ 21,159 (1949); Golden North Airways, Inc., C. A. B. No. 3416, 1A CCH AV. LAW REP. ¶ 21,159 (1949) (noncertificated operations).

might, therefore, appear anomalous that there could have developed, in effect, a noncertificated air transportation industry providing a variety of services, including local and transcontinental "coach type" accommodations which the established airlines have since adopted; that businesses were established of sufficient size and resources to employ hundreds of technical and operating personnel. In view of the complexity of the above quoted formula, however, it is probably a safe assumption that where doubts existed they were resolved by the carriers in favor of their operations.

It would also appear that the Civil Aeronautics Board was either hampered in its enforcement activities by a lack of enforcement personnel, or else that it was willing to permit the situation to develop, feeling that by attrition and by the philosophy of the survival of the fittest, the problem of regulation would ultimately take care of itself.

This apparently was the case until August 6, 1948 when the Board announced a series of actions affecting all large irregular air carriers moving passengers and property under the exemption authority of Section 292.1. The Board:

(1) Instituted a general investigation into the practices and activities of the large irregular air carriers and stated that hearings would be initiated forthwith.

(2) Amended Section 292.1 again to freeze applications for Letters of Registration for large irregular carriers as of August 6, 1948.

(3) Directed its staff to re-evaluate Section 292.1 in light of the experience gained since the regulation was promulgated in May of 1947.

Possibly in anticipation of such action by the Civil Aeronautics Board and with a realistic recognition that their operations under 292.1 could not continue for long without enforcement action by the Board,<sup>40</sup> or by the certificated carriers,<sup>41</sup> numerous companies had filed applications for individual exemptions to secure a more liberal operating authority

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Other enforcement proceedings before the CAB involving determination of "frequency" and "regularity" include: Docket No. 3167—American International Airways, Inc.; Docket No. 3209—Alaska Airlines, Inc.; Docket No. 3244—Transocean Airlines, Inc.; Docket No. 3288—Continental Charters, Inc.; Docket No. 3357—Standard Air Lines, Inc.; Docket No. 3405—American Air Transport and Flight School, Inc.; Docket No. 3422—Virgin Islands Air Services, Inc.; Docket No. 3447—Viking Airliners; Docket No. 3450—Investigation re Large Irregular Carriers; Docket No. 3456—NATS Air Transportation Service.

<sup>40</sup> One result of the extensive activities of the irregular air carriers and the continued demands of the scheduled operators that the former be restricted to the letter of the law was the creation of a special Office of Enforcement to detect and pursue violators. It has had an extremely small staff of lawyers and investigators.

<sup>41</sup> Complaint of T. W. A. against Seaboard & Western Airlines, Inc., Docket No. 3302.

than Section 292.1 allowed.<sup>42</sup> In practically all instances these applications were summarily denied.<sup>43</sup>

In numerous instances enforcement proceedings initiated by the Board resulted in cease and desist orders,<sup>44</sup> and, in several cases, the carriers' Letters of Registration were revoked.<sup>45</sup> Most enforcement proceedings were met with dogged resistance and resourceful defense tactics by the noncertificated carriers. These tactics resulted in some not insignificant additions to the body of administrative law and gained, for some of the protagonists, temporary extensions of their tenuous economic existence.

### *Proceedings Against Standard Airlines*

Standard Airlines, Inc., perhaps the largest of the domestic carriers engaged in the nonscheduled movement of persons, was soon involved in a welter of administrative and judicial enforcement proceedings. The Board's Office of Enforcement struck first against Standard on May 20, 1948, with an order to show cause why its Letter of Registration should not be suspended during the pendency of the proceeding and thereafter revoked.<sup>46</sup>

In an interesting, if not arbitrary, exercise of its enforcement authority, the Board suspended the carrier's Letter of Registration one week

<sup>42</sup> See Exemption Requests of: Seaboard & Western Airlines, Inc., Docket No. 3304; Trans-Caribbean Air Cargo Lines, Inc., Docket No. 2123; Air America, Docket No. 3491; America Air Transport, Inc., Docket No. 3670; Airline Transport Carriers, Inc., Docket No. 3434; Viking Air Lines, Docket No. 3433; Standard Air Lines, C. A. B. No. 3430, 1A CCH Av. LAW REP. ¶ 21,125 (1948); Mt. McKinley Airways, Inc., Docket No. 3439; Golden North Airways, Inc., Docket No. 3446; Totem Air Service, Inc., Docket No. 3689.

<sup>43</sup> Some of the carriers petitioned the Board for reconsideration on the denial of their applications. These petitions were also denied: Seaboard & Western Airlines, Inc., Order Serial No. E-2146, Docket No. 3302; Air America, Order Serial No. E-2824, Docket No. 3491; Standard Air Lines, Inc., Viking Air Lines and Airline Transport Carriers, Inc., Order Serial No. E-2543 for Dockets No. 3439, 3433 and 3434. Seaboard & Western Airlines, Inc., having exhausted its administrative remedies, has petitioned the United States Court of Appeals for the District of Columbia to review the Board's action. See note 50 *infra*.

<sup>44</sup> See note 39 *supra*.

<sup>45</sup> Trans-Atlantic Airways, Docket No. 3358, Order Serial No. 1908; Letter of Registration No. 791 revoked July 1, 1948. Standard Airlines, Docket No. 3357, Order Serial No. E-2950; Letter of Registration No. 826 revoked July 20, 1949.

The only grounds for revocation of the irregular carrier's Letter of Registration are knowing and willful violations of the Act or the rules and regulations thereunder. The ascertainment of willfulness is difficult, particularly in questions arising under the distinction between contract and common carriage. In one such case, the report and recommendations of the Examiner state: "Where there is a reasonable difference of opinion, the disregarding of opinions of the legal staff of the CAB should not automatically result in willful violations." (Report of Examiner Baker, Transocean Airlines Enforcement Proceeding, Docket No. 3244, p. 49).

<sup>46</sup> Docket No. 3357, *supra* note 45.

after the parties had met in a prehearing conference at which the issues had been framed. At the request of Standard, the United States District Court for the District of Columbia issued a temporary restraining order, prohibiting the Board from carrying out the suspension. Thereafter, upon a petition by Standard, the Court of Appeals for the District set aside the Order of Suspension and remanded the case for a hearing to permit the carrier to present orally its reasons why its letter of registration should not be suspended pending revocation proceedings.<sup>46a</sup>

The opinion of the Court of Appeals takes a realistic view of the problem presented when an administrative agency acts to suspend a permit or license concededly suspendable. What the court terms the "controlling practicability" is that the effect of the suspension would be to destroy not merely the license, but property—the substantial business investment of the licensee. In such a situation, the statute and due process of law require a public hearing of such extent as at least to permit the air carrier to present its contentions orally. Interesting is the court's comment:

There is an assurance that contentions will be heard and understood upon a verbal statement, a degree of certainty not secured by the mere filing of written material.<sup>46b</sup>

During the pendency of the above proceeding, the enforcement efforts of the Civil Aeronautics Board were buttressed by a civil action initiated against Standard Airlines by American Airlines.<sup>46c</sup> Plaintiff, a certificated trunk line operator, sought to enjoin Standard from operating coast-to-coast and from holding itself out as operating regular flights as a common carrier between these points. The action was brought by American Airlines as a "party in interest" under Section 1007(a) of the Act which confers upon private parties the right to apply to the appropriate District Court for an injunction against violations of the Act. It was the position of American that Standard's operations exceeded the limitations of regularity and frequency prescribed by Section 292.1 of the Economic Regulations and therefore constituted a violation of the certification requirements of Section 401(a) of the Act.

Somewhat ingenuously, Standard contended that the District Court lacked jurisdiction because Section 292.1 contained a broad exemption from all of the provisions of Title IV, except such as were specifically excluded; that since Section 401(a) was not specifically excluded, regular operations by an irregular air carrier would not constitute a violation of

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<sup>46a</sup> Standard Airlines, Inc. v. CAB, 177 F. 2d 18 (App. D. C. 1949).

<sup>46b</sup> *Id.* at 21.

<sup>46c</sup> American Airlines, Inc. v. Standard Airlines, Inc., 80 F. Supp. 135 (S. D. N. Y. 1948).

that provision of the Act. This contention, that a letter of registration removes the carrier from the requirements of Section 401, insulating it from possible violation of that Section even if it conducts regular instead of irregular operations, was effectively sustained in a finding in the final order of the District Court, reading as follows:

4. By Section 292.1 of the Civil Aeronautics Board's Economic Regulations irregular air carriers are exempt from the requirements of Section 401(a) of the Civil Aeronautics Act of 1938, as amended, and therefore cannot violate that Section of the Act.<sup>46a</sup>

The Court's opinion, however, carefully avoided any ruling on the question whether the defendant was an irregular air carrier within the meaning of Section 292.1. Kaufmann, J., adopted the view that the determination of whether a carrier has forfeited the right to operate as an Irregular Carrier is a matter for the Board, in the first instance at least, to decide.<sup>47</sup>

Standard Airlines' Letter of Registration was ultimately revoked by Board Order dated June 20, 1949,<sup>48</sup> effective July 20, 1949, accompanied by an opinion which found the carrier's operations to be in willful violation of Section 292.1. Although the contention sustained by Judge Kaufmann in the *American case* was urged in brief and oral argument before the Board, the argument was flatly rejected in the Board's opinion, and that decision is nowhere cited.<sup>49</sup> The Board does, however, refer to *Civil Aeronautics Board v. Modern Air Transport*,<sup>49a</sup> wherein the court (Coxe, J.) characterized the contention as "untenable", holding the clear intention of the law to be that the exemption from Section 401(a) is applicable only so long as the air carrier engages in irregular operations.

Prior to the recent experience of the Board in the enforcement problems occasioned by Section 292.1, it was one of the agencies of the Federal Government whose actions and decisions had provided least

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<sup>46a</sup> This Order is not included in the official reports.

<sup>47</sup> In NATS Air Transport Service Enforcement Proceeding, C. A. B. No. 3456, 1A CCH Av. LAW REP ¶ 21,140 (1949), the Board pointed out, note 6, at 7, that: "Other District Courts have found it possible to apply the standards established by the Board to the operations of irregular air carriers," citing, inter alia, *Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd.*, 73 F. Supp. 68 (D. Hawaii 1947), which has since been reversed, 174 F. 2d 63 (9th Cir. 1949); and *Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*, 80 F. Supp. 592 (D. Alaska 1948).

<sup>48</sup> See note 45 *supra*.

<sup>49</sup> The only appellate ruling on the point was reached in *Trans-Pacific Airlines, Inc. v. Hawaiian Airlines, Ltd.*, *supra* note 47, which reversed the District Court's holding that so long as the irregular carrier involved retained its Letter of Registration, it was under the jurisdiction of the Board and the District Court had no power to enjoin its operations.

<sup>49a</sup> — F. Supp — (S. D. N. Y. 1949).

occasion for litigation in Federal Courts. During the course of the development of the noncertificated air carriers, many of them have taken an aggressive stand against the Board both in connection with proceedings within the Board and in the case of the Court actions initiated by the Board itself. One of the large irregular carriers is at the present time the appellant in four separate proceedings in the United States Court of Appeals for the District of Columbia.<sup>50</sup>

While it was not to be expected that the court actions of certain of the noncertificated carriers seeking judicial stays of enforcement proceedings by the Board would accomplish much more than a temporary prolongation of their existence, these maneuvers and the various petitions for judicial review are an obvious deterrent to arbitrary Board action. Although in the past the Board had been content to set forth in its official orders merely the ultimate conclusions of fact, its more recent actions have demonstrated greater care in stating the underlying facts upon which they have been predicated.<sup>51</sup>

#### *New Regulations of Irregular Air Carriers*

The general investigation initiated by the Civil Aeronautics Board into the activities and practices of large irregular air carriers following its pronouncement of August 6, 1948,<sup>52</sup> resulted in the promulgation of a new revision of Section 292.1 on December 10, 1948.<sup>53</sup> These new regulations, which became effective on May 20, 1949, should reduce the number of large irregular air carriers and sharply curtail the activities of these who survive.

The central feature of the new regulation is its withdrawal of the blanket exemption authority heretofore conferred upon large irregular carriers and its requirement that the individual carrier make a new application, pursuant to Section 416(b) of the Civil Aeronautics Act, for an individual Exemption Order authorizing continued irregular operations extending to all or part of the air transportation which the particular carrier was authorized to perform as of June 19, 1949.

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<sup>50</sup> Appeals of Seaboard & Western Airlines, Inc., international air freight carrier, from: (1) Order denying its application for exemption order, Case No. 10089; (2) Order denying intervention in T. W. A. Temporary Mail Rate Proceeding, Case No. 10086; (3) Order refusing consolidation in P.A.A.-A.O.A. merger, North Atlantic Route Case, Case No. 10193; (4) Order denying intervention in A.O.A.-P.A.A. Temporary Mail Rate Case.

<sup>51</sup> Compare Order No. E-1915, August 31, 1948, denial of Seaboard & Western application for Exemption Order wherein the "findings" did little more than recite the precise language of § 416 (b) (1) with Order No. E-2085, October 13, 1948, denial of Standard Airlines, Inc. (Exemption Request) which was accompanied by a detailed opinion by the Board.

<sup>52</sup> *Infra*, p. 55.

<sup>53</sup> 14 FED. REG. 1879 (1949).

The new regulation preserves the dichotomy of large and small irregular carriers and in addition to the withdrawal of the blanket exemption, it also withdraws the exemption previously conferred with respect to Sections 408, 409(a) and 412 of the Civil Aeronautics Act.<sup>54</sup>

It is abundantly clear from the introductory statement to the new regulation, that the Board is fixedly determined to restrict the activities and operations of large irregular air carriers and to simplify its own enforcement problems in connection therewith. The introductory statement disclaims that the large irregulars have not been meeting a public need and positively affirms that a "definite need exists for the use of such aircraft under proper circumstances." However, the Board emphasizes its viewpoint that during the past few years large aircraft have had a "limited and restricted utility in meeting the need for irregular air service" and avers that the owners of such aircraft have had a natural tendency to employ them on heavily traveled routes—already certificated to established airlines—in order to attain maximum utilization.

The requirement that each individual operator now come before the Board to request an individual exemption is sound. It is somewhat incredible that, at the outset of the growth of nonscheduled operations, the Board did not require more than the mere filing of an application for a Letter of Registration which could be had for the asking. Civil air transportation is, after all, a regulated industry and it would seem that a proper exercise of administrative discretion should have dictated from the beginning that the irregular air carrier demonstrate in each individual case its right to the exemption from the certificate requirements of the Act.

In this connection, however, the philosophy and approach of the new regulation may indeed be suspect. The individual large irregular air carrier applicants may obtain no broader operating authority than was heretofore conferred inasmuch as the same restrictions upon regularity and frequency have been retained. Some 96 companies have filed applications pursuant to this regulation.<sup>55</sup> It is hardly conceivable that the same restrictions upon regularity and frequency should apply to all. It is more than likely that in many instances geographic conditions and the absence of certificated routes would well justify a noncertificated operation on a basis of frequency and regularity in excess of that con-

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<sup>54</sup> These sections of the Civil Aeronautics Act relate respectively to the requirements for approval of control, approval of interlocking relationships and the filing of agreements.

<sup>55</sup> These applications have been on file for over four months. Recently they have reached an "under active consideration" stage. In the meantime, pursuant to the revised regulation, the irregular carriers are permitted to continue their operations to the same extent as was permitted prior to the effective date of the new revision.

templated by the regulation. In the field of international operations particularly does there appear to be a need for specialized regulatory treatment, yet the new regulation requires the international irregular air carrier of property to operate under the same restrictions as are applicable in the domestic field under 292.1 and continues the former prohibition against the foreign transportation of persons.<sup>55a</sup> Carriers engaged in such operations may, it is true, file applications for broader authority pursuant to Section 416 (b). However, in view of the general philosophy of the revised regulation, such applications would appear to have little chance for success.<sup>56</sup>

Perhaps the chief weakness of the new regulation is its retention of this concept of "irregular" and "infrequent" operations. The enforcement of the regulations under both of these headings has harassed the Board for at least two and one-half years.<sup>57</sup> It would appear the better part of administrative discretion to have abandoned these concepts and, so long as the field was thrown open for applications from each individual carrier, to have adopted procedures for granting in each case such a degree of operating authority as the particular area or the particular type of service required.

#### *Opposition to the Regulations*

Adherents of the functional approach to the administrative process may take some sanguinary interest in the pressures upon the Civil Aeronautics Board at the time the above regulation was promulgated written comment in December 1948. Clearly, the actions of the Board exemplify the sensitivity of administrative bodies to the demands of interests affected by proposed regulations. Some 140 large irregular carriers had been engaged in domestic operations. The aircraft operated by these companies ranged from one or two to twenty. In addition to their large capital investments, many had large numbers of ground and flight personnel in their employ. Some of these carriers could validly

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<sup>55a</sup> This prohibition is contained in the new Part 291.23.

<sup>56</sup> In practically all cases, the certificated carriers have intervened in opposition to the individual exemption applications. While under the Administrative Procedure Act and § 416 (b) (1) of the Civil Aeronautics Act the Board may properly act upon these applications without a hearing, it is quite possible that hearings on some of the applications will be held. It is also to be expected that court litigation will ensue as a result of the denial or granting of many of these applications.

<sup>57</sup> On December 10, 1948, the Board issued interpretation No. 1 to § 292.1 (Serial No. ER-136) for the guidance of air carriers and other interested parties consisting primarily of a number of examples of regular and irregular service illustrated by the use of calendars with rings around the days of the week. The Board in its Explanatory Statement disclosed that it expects to use these illustrative examples as standards to apply to the operations of irregular air carriers.

argue that they were providing a service in the public interest, a service which the certificated carriers were either not interested in or unable to provide. Feeling that the regulation, if adopted, would sound their death knell, a number of the large irregulars organized into an association and conducted a vigorous campaign against the adoption of the regulation. The association was successful in obtaining two days of oral argument before the Civil Aeronautics Board, where none had originally been proposed.<sup>58</sup>

Congressional committees and individual members of both Houses of Congress therefore became aroused.<sup>59</sup>

As a matter of legal theory, the federal administrative agencies are independent of Congress, acting under delegated authority. As a practical matter, however, where questions of fundamental public interest are involved, as in the field of air transportation, it is to be expected that the administrative agency will take notice of the interests of local groups as represented by members of Congress. In the instant case, the conduct of the CAB would appear to be no more than a demonstration of congressional courtesy since, after appearing before the above Committees, the Board proceeded with dispatch to the adoption of the proposed regulation.<sup>60</sup>

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<sup>58</sup> Although the Board's official release announcing the oral argument sought to restrict its scope, the transcript of the proceedings discloses that all aspects of irregular operations were presented. The Department of Justice appeared in opposition to the proposed regulation. Most of the certificated carriers were represented. They advocated the complete elimination of the exemption or the prompt adoption of the new regulation.

<sup>59</sup> Senator Edwin C. Johnson, Chairman of the Senate Committee on Interstate and Foreign Commerce, dispatched a communication to Chairman O'Connell of the Civil Aeronautics Board requesting the full Board to appear before his committee in executive session after the oral argument and before final action was taken on the proposed regulations. The full Board appeared as requested on March 3, 1949, and on March 24, the Chairman made public a letter to Senator Johnson setting forth in some detail, including statistical appendices, the position of the Board on the various questions which the Committee had raised.

A similar invitation to the Board was extended by Representative Robert Crosser, Chairman of the House Interstate and Foreign Commerce Committee, and the Board appeared in executive session before that Committee on April 5, 1949. Senator Wayne Morse of Oregon, member of the Senate Committee on Interstate and Foreign Commerce, transmitted a series of questions to the Civil Aeronautics Board relating to the irregular air carriers and, on July 13, 1949, the Board made public its detailed reply to these questions.

<sup>60</sup> The same firm attitude was demonstrated by the Board in connection with a request made by Senator Johnson by letter dated April 22, 1949, that the effectiveness of the new regulation be postponed until the completion of certificate proceedings in which certain of the noncertificated carriers were applicants. The Board's reply, dated June 1, 1949, denied this request, stating in part: "We are unable to accept your suggestion, believing that our announced program for handling the problem is sound and that the fulfillment of our statutory responsibility requires that we adhere to it."

The furor created by the opposition of the noncertificated carriers to the new regulations did have some salutary effects. The noncertificated carriers, operating successfully without benefit of air mail subsidies, lashed out with charges of inefficiency on the part of the certificated carriers and the vast amounts of money being expended each year from the public treasury in mail pay. The Board, too, aware that its policies had not been wholly successful, felt vulnerable at many points and was faced with a growing barrage of criticism from many quarters.

During the course of this ferment, the Board put forth, on February 26, 1949, a noteworthy Declaration of Policy with respect to the airline industry. A number of investigations were launched into various aspects of certificated airline operations, and it was announced that hearings would be instituted in connection with the pending applications of many of the non-certificated carriers in the field of domestic transportation of passengers and of one carrier in foreign transportation of property.<sup>61</sup> This latter action of the Board, coupled with its subsequent action in adopting a new and more stringent 292.1 regulation, would indicate that the present philosophy of the Board with respect to the "non-sked" problem is two-fold.

(a) That those noncertificated carriers who will survive enforcement action by the Board can be adequately dealt with under the new exemption order adopted by the Board; and

(b) That certification is the ultimate solution.<sup>62</sup>

This philosophy may or may not represent a form of administrative lethargy, depending upon one's view with respect to the public interest involved in nonscheduled operations. It does appear that the Board has been guilty of a certain amount of administrative ineptitude in dealing with the nonscheduled air carrier problem. Much confusion could have been avoided by providing at the outset for the present belated system of individual exemption applications, rather than the extension of a blanket exemption authority. Fundamentally, the weakness lies in the absence of amendatory legislation whereby this new field could be

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<sup>61</sup> Hearings in the Transcontinental Coach Case (Docket No. 3397) have been scheduled for November 16, 1949. The application of Seaboard & Western Airlines for an international freight certificate (Docket No. 3041) went into hearings on October 3, 1949.

<sup>62</sup> With respect to the certification process, it should be understood that the average certificate proceeding is both time-consuming and costly. In the Air Freight Case, *supra* note 4, 14 freight applications were on file in late 1945. The Board's final decision was not reached until July 29, 1949. In the interim, more than one-half of these carriers had discontinued operations.

adequately regulated.<sup>63</sup> This, however, is another instance of the lag of the law behind the dynamic developments of industry.

*Related Enforcement Problems—Contract vs. Common Carriage*

In determining the limitations of "regularity" and "frequency" under Section 292.1 of the Economic Regulations, the Civil Aeronautics Board has been the sole arbiter. Because contract carriage operations are beyond the scope of the Civil Aeronautics Act,<sup>64</sup> the enforcement attorneys of the Board have frequently been met with the defense that certain air transport operations constituted contract carriage and that accordingly the restrictions upon regularity and frequency of Section 292.1 were, with respect to such flights, inoperative.<sup>65</sup>

In such situations, the enforcement staff has strained to find the alleged contract activities to be common carriage. Here the Board is obviously not the sole arbiter, for the question is not one of technical expertise requiring the exercise of administrative discretion. Rather, it is one to be decided upon the basis of common law precedents.<sup>66</sup> However, the Board has, in a rather practical sense, the upper hand. The irregular carrier must decide at his peril whether his proposed activities are private carriage and assume the risk of costly and time-consuming enforcement proceedings and possible loss of his limited franchise.

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<sup>63</sup> On January 24, 1949, Senator McCarran introduced S. 636, a bill to amend the Civil Aeronautics Act to provide for the creation and regulation of noncertificated air carriers. No hearings have been held or scheduled on this bill. It contemplates a system of licensing and attempts to deal with the problem of "regularity" and "frequency" by the authorization of a fixed number of flights per week between the same two points.

<sup>64</sup> Congress delegated only the power to regulate common carriers. Although the term "common carrier" appears in the Act as an integral part of the definition of air carrier it is not defined. § 1 (2), § 1 (10), § 1 (21) of the Act; see also Neal, *The Status of Non-Scheduled Operations Under the Civil Aeronautic Act of 1938*, 2 LAW AND CONTEMPORARY PROBLEMS 508 (1946).

<sup>65</sup> *Complaint of Transcontinental & Western Air, Inc. v. Seaboard & Western Airlines, Inc.*, Docket No. 3346; *Enforcement Proceeding against Transocean*, Docket No. 3244; *Alaska Air Transport, Inc. v. Alaska Airplane Charter Co.*, 72 F. Supp. 609, 610 (D. Alaska 1947); *Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*, 80 F. Supp. 596 (D. Alaska 1948).

<sup>66</sup> See Wagner, *Common Contract and Private Motor Carriers Defined and Distinguished*, 9 I. C. C. PRACTITIONER'S JOURNAL 119 (1941); Gorenstein, *The Place and Function of a Contract Carrier in a National Transportation System*, 10 I. C. C. PRACTITIONER'S JOURNAL 107 (1942); *Air Cargo—A New Force in Marketing*, 14 JOURNAL AIR LAW AND COMMERCE 11 (1947); *Determining Status of Motor Carriers; Common or Private*, 24 VA. L. REV. 168-176 (1937); *Distinction Between Common Carriers and Contract Carriers*, 36 MICH. L. REV. 802 (1938); *Carriers—Differences Between Private and Common Carriage in Respect to Motor Transportation of Goods*, 6 WIS. L. REV. 35 (1930); *What Constitutes a Common Carrier?* 15 MARQ. L. REV. 67 (1931); *When Are Carriers of Passengers by Air Common Carriers?* 2 AIR L. REV. 86 (1931).

The problem of distinguishing between contract and common carriage operations is not one affecting the noncertificated carriers alone.<sup>67</sup> However, it is in connection with their operations that the distinction has come into sharp focus.

The common carrier concept is of common law origin.<sup>68</sup> The general criteria which have evolved in the field of surface transportation are easily understood but difficult to apply. Fundamentally, the test is whether a carrier has *held out* to the public generally—that it will, within the limits of its facilities, carry for hire all persons applying or any property brought to it for carriage. This is the so-called “holding out test.” Its application to the diverse number of situations which are possible in the field of air transportation is the source of much difficulty.<sup>69</sup>

The decided transportation cases have established some fairly definite methods whereby the so-called “holding out” may be accomplished. Thus, it may result through advertising,<sup>70</sup> solicitation through agents;<sup>71</sup>

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<sup>67</sup> The certificated carriers are authorized, pursuant to § 401 (f) of the Act to conduct “charter” and “special services” operations. Many of the certificated carriers have for long been engaged in the transportation of football teams and other organizations on the assumption that this constituted contract carriage, hence no tariffs were filed pursuant to § 403 of the Act. Recently, by direction of the Tariff Division of the Board, the filing of tariffs for these charter operations has been compelled.

It is also noteworthy that the certificated carriers themselves have engaged in controversies arising out of the conduct of so-called charter operations. For example, Transcontinental & Western Air, Inc. has filed a formal complaint against Pan American Airways, Inc. (Docket No. 3264) in connection with the latter’s attempted charter operations to Saudi Arabia under contract with the Saudi Arabia Oil Company. This proceeding reached the stage of a public hearing, but on May 23, 1949, the Trial Examiner announced that discussions were “in process looking toward voluntary settlement . . . and that the parties have agreed to a postponement of further procedural steps pending the outcome.”

<sup>68</sup> For origin of carrier’s unusual liability, see HOLMES, *THE COMMON LAW* 164-205 (1881); Beale, *The History of the Carrier’s Liability*, 11 HARV. L. REV. 158 (1897); Anderson v. Fidelity Insurance Company, 228 N. Y. 475, 480, 127 N. E. 584 (1920). Note in the latter case the forecast of Judge Elkins for the need to classify all airplanes as common carriers to reduce the dangers inherent in such transportation by placing a high degree of responsibility on those in control.

<sup>69</sup> See *McCusker v. Curtiss-Wright Flying Service*, 269 Ill. App. 502 (1933), 132 U. S. Av. R. 102; *Curtiss-Wright Flying Service v. Glose*, 66 F. 2d 710 (3d Cir. 1933), cert. denied 290 U. S. 696 (1933); *Ziser v. Colonial Western Airlines*, 10 N. J. Misc. 1118, 162 Atl. 591 (Sup. Ct. 1932); *Conklin v. Canadian Colonial Airways*, 242 App. Div. 625 (1934), aff’d 266 N. Y. 244, 194 N. E. 692 (1935); *Law Admx. v. Transcontinental Air Transport* (not officially reported), 1931 U. S. Av. R. 205 (E. D. Pa. 1931); *Allison v. Standard Airlines*, 1930 U. S. Av. R. 292 (S. D. Cal.), aff’d on other grounds, 65 F. 2d 668 (9th Cir. 1933); *Smith v. O’Donnell*, 215 Cal. 714, 5 P. 2690 (1931), aff’d per curiam, 12 P. 2933 (1932); *Alaska Air Transport, Inc. v. Alaska Airplane Charter Co.*, supra note 65; *Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc.*, supra note 65.

<sup>70</sup> *Grolbert v. Board of Railroad Commissioners of Iowa*, 60 F. 2d 321, 323 (S. D. Iowa 1932); *Red Ball Transit Company v. Marshall*, 8 F. 2d 635, 639 (S. D. Ohio 1925); *Merchants Transfer & Warehouse Company v. Gates*, 180 Ark. 96, 21 S. W. 2d 406, 409

or through a course of business or conduct.<sup>72</sup> It is not necessary, it has been held, that the carrier hold himself out generally to the entire public, a holding out to a class or segment of the public being sufficient<sup>73</sup> Again the fact that the transportation is pursuant to written contracts does not alter its status as common carriage,<sup>74</sup> and the number of contracts which the carrier may have in force is not alone determinative.<sup>75</sup> Similarly, the proclaiming of so-called "charter services" offering transportation facilities to groups or organizations on an "anywhere-anytime"

(1929); *McCusker v. Curtiss-Wright Flying Service, Inc.*, *supra* note 69; *Breuer v. Public Utilities Commission*, 108 Ohio St. 95, 160 N. E. 623, 624 (1928); *Northeastern Lines, Inc.*, 11 M. C. C. 179, 182 (1939); *Alaska Air Transport, Inc. v. Alaska Airplane Charter Co., Inc.*, *supra* note 69. *State v. Whitthaus*, 340 Mo. 1004, 102 S. W. 2d 99 (1937): "However, the absence of such advertising practice does not take one out of the common carrier class and make it a private carrier if otherwise it is, in fact, a common carrier."

*Stoner v. Underseith*, 85 Mont. 11, 277 P. 437 (1929); *N. S. Craig Contract Carrier Operation*, 31 M. C. C. 708 (1941); *Page Airways, Inc. Investigation*, 6 C. A. B. 1061, 1065 (1946); *In re Riss and Company, Inc.*, 9 P. U. R. (N. S.) 331 (Col. P. U. C., 1934).

<sup>71</sup> *Breuer v. Public Utilities Commission*, *supra* note 70; *Garnish v. Public Utilities Commission*, 134 Pa. St. 565, 4 Atl. 2d 569, 571 (1939); *State v. Washington Tug & Barge Co.*, 140 Wash. 613, 250 P. 50 (1926); *Globe Cartage Company, Inc., Common Carrier Application*, 42 M. C. C. 547 (1943), *aff'd sub nom. United States v. Hancock Truck Lines*, 324 U. S. 774 (1945); *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211, 227 (1938), *aff'd* 30 F. Supp. 968 (S. D. N. Y. 1940), 309 U. S. 638 (1940); *Motor Haulage Company, Inc., Contract Carrier Application*, 46 M. C. C. 107, 116 (1946).

Note also, the same principle applies to the carriage of traffic solicited by other carriers, who may themselves be responsible to the public for such transportation. *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919); *Union Stockyard & Transit Company v. United States*, 308 U. S. 213 (1939).

<sup>72</sup> *In re Riss & Co., Inc.*, *supra* note 70; see also *Stoner v. Underseith*, *supra* note 70, at 441; *Marshall v. Public Service Commission*, 129 Pa. St. 272, 195 Atl. 475, 476 (1937); *Klawansky v. Public Service Commission of Pennsylvania*, 123 Pa. St. 375, 187 Atl. 248, 250 (1936); *James v. Public Service Commission*, 116 Pa. St. 577, 177 Atl. 343, 346 (1935); *Bingaman v. Public Service Commission*, 105 Pa. St. 272, 161 Atl. 892 (1933); *State ex rel. Department of Public Works v. Higgins*, 155 Wash. 227, 283 P. 1074, 1075 (1930). *State v. Rosenstein*, 217 Iowa 985, 252 N. W. 251, 253 (1934); *N. S. Craig, Contract Carrier Application*, *supra* note 70; *Northeastern Lines, Inc.*, *supra* note 70; *McBriety v. Phillips*, 180 Md. 569, 26 A. 2d 400, 405 (1942).

<sup>73</sup> *Terminal Taxi Company v. Kutz*, 241 U. S. 252, P. U. R. 1916 D, 972 (1916).

<sup>74</sup> *Producers Transportation Company v. Railroad Commission*, 251 U. S. 228, 230 (1920); *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (S. D. N. Y. 1941); *Denver & Rio Grande Western Railway Co. v. Linck*, 56 F. 2d 957, 961 (10th Cir. 1932); *Sanger v. Lukens*, 24 F. 2d 226 (S. D. Idaho 1927); *Smitherman and McDonald v. Mansfield Lumber Co.*, 6 F. 2d 29 (W. D. Ark. 1925); *Breuer v. Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623 (1928); *Bingaman v. Public Utilities Commission*, 105 Pa. St. 272, 161 Atl. 892 (1933); *State v. Washington Tug and Barge Co.*, 140 Wash. 613, 250 P. 49 (1926); *State v. Rosenstein*, 217 Iowa 985, 252 N. W. 251, 253 (1934).

<sup>75</sup> *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570 (1924); *Film Transport Company v. Michigan Public Utilities Commission*, 17 F. 2d 857 (E. D. Mich. 1927).

basis does not immunize the carrier against regulation as a common carrier.<sup>75</sup>

The Civil Aeronautics Board, in establishing its position in the various enforcement proceedings which it has initiated or in which it has participated has relied heavily upon judicial precedents in the field of surface transportation, and has not been persuaded that these authorities are inapplicable because of the essential differences between surface and air transportation and the fact that contract operations are defined and regulated in the Motor Carrier Act.<sup>77</sup>

In an early case the ICC set forth certain affirmative tests for qualification as a contract carrier under the Interstate Commerce Act.<sup>78</sup> The carrier, it was held, must transport under written contracts or agreements which (1) provide service for a particular shipper or shippers, (2) are bilateral in nature, (3) impose specific obligations on both carrier and shipper, and (4) cover a series of shipments during a stated period of time, in contrast to contracts of carriage governing individual shipments. In reaching this conclusion the Commission reasoned that the requirements that these contracts be bilateral and cover a series of shipments over a period of time is necessary if there is to be any practical and effective means of preventing alleged contract carriers from trespassing on the field of common carriers.

The effectiveness of the contract limitation depends not on itself but on other factors, as whether or not the contract prevents serving a class of consumers who depend on the continuity of the service under the contract. If the service is of short duration and its rapid completion leaves the carrier free to make more and similar contracts, then there is a strong justification for viewing the contract relation as an illusory limitation and no obstacle to actual public service as a common carrier in a common calling.<sup>79</sup> The Courts and Commissions have taken this

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<sup>76</sup> Such a representation, of course, is merely self-serving and warrants no consideration, where the facts otherwise clearly indicate common carriage. *Curtiss-Wright Flying Service, Inc. v. Glose*, U. S. Av. R. 228 (D. N. J. 1933). The basic consideration is what the carrier is actually doing, rather than the descriptive label it places upon its operations. *United States v. California*, 297 U. S. 175 (1936); *McKay v. Public Utilities Commission*, 91 P. 2d 965 (Colo. 1939); *Alaska Air Transport Inc. v. Alaska Airplane Charter Co.*, *supra* note 65; *Page Airways, Inc. Investigation*, *supra* note 70 at 1065; *Pacific Northern Airlines v. Alaska Airlines, Inc.*, *supra* note 65.

<sup>77</sup> See Briefs of Respondents in Docket No. 3346 and 3244, *supra* note 65.

<sup>78</sup> See *Contracts of Contract Carriers*, 1 M. C. C. 628, 632 (1937).

<sup>79</sup> *Tucker Contract Carrier Application*, 2 M. C. C. 335 (1937); *Walls, Common Carrier Application*, 7 M. C. C. 138 (1938); *Liederback, Common Carrier Application*, 41 M. C. C. 595 (1942); *U-Drive-It Co. of Pa., Inc., Common Carrier Application*, 23 M. C. C. 799 (1940); *Joseph Newman, Common Carrier Application*, 17 M. C. C. 101 (1939); *Barrows, Common Carrier Application*, 19 M. C. C. 179 (1939); *Blue and Gray Sight-Seeing Tours, Common Carrier Application*, 8 M. C. C. 124 (1938).

stand in the case of taxi cabs,<sup>80</sup> and also in the case of delivery services,<sup>81</sup>

Consistently with the above principles, it has been held that contract operations can be very extensive and still remain within the definition of so-called private carriage so long as there is no "holding out" to the public.<sup>82</sup>

### *Duality of Operations*

Air transportation is a dynamic business. Here, opportunities for contract operations are far more abundant than in the field of surface transportation, because of the expansion of air transportation and demands for its rapid service by groups and organizations for business, recreational and numerous other purposes. As the development of contract operations is clearly consistent with the avowed purposes of the Civil Aeronautics Act,<sup>83</sup> this type of operations should be encouraged provided appropriate controls with respect to safety are maintained. As will be noted, however, there has been an unfortunate tendency to discourage this type of business in the Board's zeal to bring all air transport operations within the scope of the Act.

This attitude of the Board is particularly demonstrated in the position taken by the enforcement attorneys that a carrier which has common carrier status under Section 292.1 is perforce a common carrier as to *all* its flight operations.<sup>84</sup> This contention has not been sustained by the Board (notwithstanding its restricted view of such operations) and it

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It is the Commission's view that contracts of carriage covering only individual transactions are common carriage. The Commission's view has since had judicial approval in the *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (S. D. N. Y. 1941).

<sup>80</sup> *Anderson v. The Yellow Cab Company*, 179 Wis. 300, 191 N. W. 148 (1923); *Burke v. Shaw Transfer Company*, 211 Mo. App. 353, 243 S. W. 449 (1922); *Terminal Cab v. Kutz*, *supra* note 73; *Re Yellow Cab & Baggage Co.*, P. U. R. 1932 D 121 (Neb.).

<sup>81</sup> *United Parcel Service & Intercity Parcel Service*, P. U. R. 1927 E 111 (Cal.).

<sup>82</sup> In one case the carrier operated 47 trucks and employed 75 men in transporting automobile bodies between Detroit, Michigan, and Toledo, Ohio. *Michigan Public Utilities Commission v. Duke*, *supra* note 75.

In another situation, a trucking company operated 154 motor trucks, 69 tractors and 116 semi-trailers. Approximately 95% of the transportation performed was under a contract of a special nature ranging from an outright rental to a type of contract under which the tenant assumed complete responsibility for the transportation of goods. The remaining 5% of its operations involved transportation of individual shipments in arrangements negotiated by letter or by telephone conversations subsequently confirmed by letter. The court held that the defendant's activities constituted contract operations. *Motor Haulage Co. v. Maltbie*, 293 N. Y. 338, 57 N. E. 26, 41 (1944).

<sup>83</sup> Declaration of Policy, 52 STAT. 980 (1938), 49 U. S. C. § 402 (1946).

<sup>84</sup> See *In Matter of the Complaint of T.W.A., Inc. v. S.W.A., Inc.*, Docket No. 3346; *Enforcement Proceeding, Transocean Air Lines, Inc.*, Docket No. 3244.

represents an extreme position which judicial precedents do not support.<sup>85</sup>

One of the leading cases in the surface field is *Terminal Taxi Company v. Kutz*,<sup>85a</sup> frequently cited by the carriers in Civil Aeronautics Board proceedings for the proposition that irregular carriers may engage in dual operations, i.e., common carriage under Section 292.1 and private carriage operations which are not subject to CAB jurisdiction. The evidence showed that about one third of the business of the defendant company consisted in the operation of a taxi cab and transfer business between the railroad station and various points in the District of Columbia. It also engaged, under contract, in the business of providing hotels with taxi and limousine service. The remainder of its business was the furnishing of cars from its central garage on orders.

The Court held that the company was a common carrier as to the first two phases of its business, but was a private carrier as to the third. It is significant that although the defendant company advertised its business rather extensively, and it was assumed by the public that it would generally accept all solvent customers, yet the Court recognized that it could appropriately engage in private carriage as a separate but coordinate activity, since there was no uniformity of rates with its general taxi service.<sup>86</sup>

While it may be that *Kutz* represents a liberal view on the subject, certainly the case underscores the narrow position taken by the CAB staff.

As in the case of common carriage generally the test should be whether or not the alleged private carriage is within the carrier's holding out to the public. The case would seem to be clear when the carrier, purporting to conduct dual operations confines its private carriage to a specialized service, limited with respect to the general service which it offers to the public.<sup>87</sup> Thus, an airline engaged in freight operations as a common carrier which does not hold out to the public that it engages in the transportation of persons should have established thereby a *prima*

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<sup>85</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916); *Santa Fe P & P Railway Co. v. Grant Brothers Construction Co.*, 13 Ariz. 186, 108 P. 467 (1910); *Memphis-News Publishing Co. v. Southern Ry. Co.*, 110 Tenn. 684, 75 S. W. 941 (1903); *Honeyman v. Oregon & C. R. Co.*, 13 Ore. 352, 10 P. 628 (1886).

<sup>85a</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916).

<sup>86</sup> The establishment by a carrier of a definite tariff or rate is considered a strong factor in determining its legal status as a common carrier. In such case, the carrier is the offeror of a definite contract at a definite price to the public at large without need for any further negotiations. *Anderson v. Fidelity Insurance Co.*, 228 N. Y. 475, 127 N. E. 584 (1920); *Sanger v. Lukens*, 24 F. 2d 226 (S. D. Idaho 1927).

<sup>87</sup> *Railroad Company v. Lockwood*, 17 Wall. 357 (U. S. 1873); *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916); *Bernardi Greater Shows v. B. & M. R. R.*, 89 N. H. 490, 1 A. 2d 360 (1938), *cert. denied* 306 U. S. 662 (1938); *California Powder Works v. Atlantic & Pacific Ry. Co.*, 113 Cal. 329, 45 P. 691 (1896).

*facie* case for contract carriage of persons. It would also seem clear that the enforcement staff of the Board would have no basis for a proceeding if:

(1) flights are not available to all members of the public requesting such services and willing to enter into a written or oral contract of carriage therefor;

(2) such flights, when viewed in the light of other common carriage activities, do not constitute an inseparable part of such activities;

(3) the traffic is not solicited from or obtained from the general public by freight forwarders, brokers, travel and ticket agencies, other carriers, and other similarly situated persons; and

(4) the aircraft is not under the control and responsibility of the carrier and the practice is not followed of obtaining so-called charters or contracts through a broker or transportation agent offering to arrange for air transportation services for those members of the public who desire such services.<sup>88</sup>

#### *Possible CAB Solutions*

The entire problem of contract operations by irregular carriers will come before the Board for determination in a pending enforcement proceeding involving the extensive contract activities of Transocean Airlines, Inc., perhaps the largest of the charter carriers.<sup>89</sup> The proceeding was instituted by the Board on January 6, 1948, and involves the legality of contract flights on behalf of the Military Establishment and private business concerns. The carrier's brief to the Examiner has forcefully taken the position that the burden is upon the Board to establish that these operations were, in fact, common carriage, and that the carrier does not itself have the burden to establish the private nature of its operations.

The Report of the Examiner, published on September 19, 1949, contains a searching analysis of the authorities on contract operations in the surface field as well as the cases which have arisen in the field of air transportation.<sup>90</sup>

The Report adopts the eminently practical point of view that the Board should not be in the position of having endless hearings relating

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<sup>88</sup> Cf. Standard Air Lines, Inc., Noncertificated Operations, Docket No. 3357, Serial Order No. E-2950, June 20, 1949, at 230, *supra* note 39.

<sup>89</sup> In the Matter of the Suspension and Revocation of Letter of Registration No. 803 issued to Transocean Airlines, Inc. issued by a Show Cause Order Serial No. E-1105. Transocean's charter operations are world-wide and have aggregated four and one-half million passenger miles in addition to a rather substantial volume of freight. For the year ending May 31, 1949, its gross transportation revenue was \$7,435,000.

<sup>90</sup> Report of Examiner Warren E. Baker in which it is recommended that the Board

to the same carrier to determine whether alleged private carriage for hire is in fact common carriage and that the carrier should also be assisted in keeping its common carrier operations within its authority. Accordingly, the suggestion is made that the Board require the carrier, so long as it engages in dual operations, to set up its operations and its reports in such a manner as to permit the Board to ascertain without a hearing whether the carrier is violating the Act or not.<sup>91</sup> As a result:

The necessity for enforcement proceedings could then be minimized and furthermore, the carrier would be more certain of the field in which it was operating.<sup>92</sup>

The Examiner's Report in the *Transocean* Case is particularly noteworthy in its attempt to offer definite guidance to the carrier in conducting contract flights. Notwithstanding a disclaimer that the "suggested action" is a definition of the only method whereby an air carrier may operate in private carriage for hire, the following recommendations contained in the Report will, if adopted by the Board, provide a greater measure of certainty than has heretofore existed:

(1) All alleged private carriage for hire should be performed pursuant to written contracts which provide:

- (a) for a series of flights over a stated period of time;
- (b) mutual obligations on both parties; and
- (c) clear definitions of the categories and ownership of property or the character of the persons to be carried.<sup>93</sup>

(2) Carriage of persons or property between two points under contract where such transportation would be covered by a tariff on file, prevents the transportation from being private carriage for hire, unless the type of persons or property which is the subject of the alleged private carriage is excluded from the tariff filed for transportation between points.

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find that *Transocean* has violated the Act (§ 401 (a)) by engaging in air transportation without a certificate in that it has transported passengers in foreign air transportation as a common carrier; but that such violation had not been "knowing and willful."

<sup>91</sup> *Id.* at 50-54. The authority of the Board to prescribe such separate accounting procedures is conferred by the Act (§ 407). The Board, furthermore, has the authority under the Act to make such special rules and regulations as are reasonable for the conduct of common carrier activities by the certificated airlines operating pursuant to exemptions issued under the authority of § 416 (b) (§ 416 (a)). Thus, although the Board has no direct control over contract operations of air carriers, it may accomplish some measure of control by indirection.

<sup>92</sup> *Id.* at 52.

<sup>93</sup> The Report points out at page 52 that: "The character of the persons or property carried is a vitally important operative fact. Thus:

(3) That being in the business of air transportation, single flights or short-term contracts with different groups of persons constitutes an indiscriminate holding out to carry the general public. Therefore, private carriage for hire by its nature must be a long-term operation, either based on a long-term contract or a course of conduct over a substantial period of time.

(4) Transportation otherwise non-common carriage becomes common carriage when commingled<sup>94</sup> with transportation of the same type in common carriage. Therefore, commingling should be prohibited.

#### *Approval of Specific Contracts*

In another pending enforcement proceeding<sup>95</sup> the Trial Examiner has recommended that the carrier be required, as a condition to the transportation of persons or property in non-common carriage, to file an application for disclaimer of jurisdiction with reference to such operations and to wait until the Board has either (a) disclaimed jurisdiction or (b) failed to notify the carrier of any objection to such operations within thirty days.<sup>96</sup>

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(a) Where persons or property are gathered together solely for the purpose of obtaining transportation either as an accommodation or as a business and by which, pursuant to a contract, there still has been a holding out to the general public;

(b) On the other hand, where the persons or property are actually the responsibility of the shipper (such as employees, or dependents), or where some homogeneous group (students, religious, fraternal or eleemosynary) contracts for transportation through its own representatives and no other individual or property is transported, "In certain circumstances this might be private carriage."

<sup>94</sup> The term "commingling" applies to the transportation of property or passengers under contract in the same plane and on the same flight with property or passengers transported in common carriage. Commingling has been infrequent in the field of surface transportation and there are only three State Court Decisions on the subject. *McKay v. Public Utilities Commission*, 91 P. 2d 965 (Colo. 1939); *Hubert v. Public Service Commission*, 118 Pa. Sup. 128, 180 Atl. 23 (1935); *York Motor Express Co. v. Public Service Commission*, 96 Pa. Sup. 174 (1929). These decisions, involving state motor carrier regulations, support the above recommendation. In the air transportation field, where vast distances are frequently involved, the carrier's inclination to commingle cargo or passengers can easily be understood. In the international field, particularly, maximum aircraft utilization is the key to economic operations. Increased load capacity by the addition to contract cargo or passengers of such common carriage cargo or passengers as may be available is dictated by practical economic considerations.

Analysis of the legal aspects of the practice indicates that it may sharply impinge upon the prohibition against discrimination set forth in § 404 of the Act. The question of discrimination, however, does not appear to exist in connection with the transportation of "contract" passengers and "common" carriage freight in the same aircraft. This has been recognized in the Report of the Trial Examiner in the Matter of the Complaint of Transcontinental & Western Air, Inc. v. Seaboard & Western Airlines, Inc., Docket No. 3302, p. 21.

<sup>95</sup> *Seaboard & Western Complaint Case, supra.*

<sup>96</sup> Report of Examiner Herbert K. Bryan, p. 63.

The suggested procedure of an application to the Board for a disclaimer of jurisdiction appears to be based upon a practice which has been voluntarily adopted in many instances<sup>97</sup> recently by irregular carriers reluctant to risk enforcement proceedings by the Board yet unwilling to concede that the operations proposed constituted common carriage. These applications have uniformly requested in the alternative that should the Board be of the opinion that the contemplated operations were actually common carriage, that an exemption order be granted pursuant to Sec. 416(b)(1) of the Act. The Board has found in all cases that the operations would be common carriage and that an exemption from the Act was necessary.

### *The Need for Contract Carriage Legislation*

The CAB is hampered in its administration of the Act and in the development of contract carriage by the absence of some type of regulation of non-common carriage operations. The necessity for authority to regulate such operations was recognized by the Congressional Aviation Policy Board, and by the President's Air Policy Commission.<sup>98</sup> The Civil Aeronautics Board and the industry are also in accord that regulation is desirable.<sup>99</sup> Unfortunately, such bills as have been proposed have aroused so much controversy with respect to the scope and detail of their provisions, that no legislation has ever emerged from the hearing stages.<sup>100</sup>

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<sup>97</sup> Coastal Air Lines, Docket No. 3815 (Order Serial No. E-2886, decided May 26, 1949); Trans-Caribbean Air Cargo Lines, Inc., Docket No. 3773 (Order Serial No. E-2818, decided May 12, 1949); and Seaboard & Western Airlines, Inc. Docket No. 3804 (Order Serial No. E-2906, decided June 3, 1949); Flying Tigers Line, Inc., Docket No. 3770 (Order Serial No. E-2812).

Technically, a more appropriate procedure would appear to be an application for a declaratory order pursuant to 5 (d) of the Administrative Procedure Act. Cf. Application of Nationwide Air Transport Service, Inc. for a Declaratory Order and for Alternative Relief, Docket No. 4063.

<sup>98</sup> "National Aviation Policy," REPORT OF THE CONGRESSIONAL AVIATION POLICY BOARD, SEN. REP. No. 949, 80th Cong., 2d Sess. (1948); "Survival in the Air Age," REPORT OF THE PRESIDENT'S AIR POLICY COMMISSION, January 1, 1948.

<sup>99</sup> C. A. B. ANN. REP. 38 (1949).

<sup>100</sup> In the present session of Congress, some 35 bills concerning air transportation have been introduced. A few of these proposals bear directly on the questions of contract carriage: (a) S. 1, introduced by Senator McCarran on January 5, 1949. This is a bill to rewrite the Civil Aeronautics Act with special attention given to provisions for defining and regulating air contractors by means of licensing and tariff requirements. (b) S. 432, introduced by Senator Brewster on January 13, 1949. A bill to provide for the regulation of contract carriers by air. As above noted, this proposal is substantially the same as S. 249. (c) S. 445, introduced by Senator Johnson on January 13, 1949. This is a bill to amend the Civil Aeronautics Act of 1938, as amended, with respect to regulation of civil aviation, by substituting the words "air navigation" for the words "intrastate, overseas, or foreign air commerce" and "air commerce" where they appear in the statute. It contains a redefinition of "air carrier" to exclude local operations within a state.

The most recent hearings on a proposed enactment were held before the Committees on Interstate and Foreign Commerce of the Senate and House in 1948.<sup>101</sup> Supporters of the bill included the Air Transport Association and the CAB.<sup>102</sup> Its adoption was opposed by representatives of the noncertificated carriers and by the office of Domestic Commerce of the Department of Commerce.<sup>103</sup>

Opposition to the measure was based chiefly upon two factors: (a) the air contract business has not yet sufficiently developed to impose upon it the rigid regulatory framework contemplated by the licensing and other provisions of S. 2449. Therefore, although some type of regulation is desirable in the public interest, legislation should be limited to the imposition of registration requirements to promote safety in operations and to provide a system for the reporting of the activities of such carriers; (b) the bill unfairly discriminated against the noncertificated carriers and would force them out of business.

These arguments have considerable merit. Although the Motor Carrier Act of 1935 contains many provisions similar to those contained in S. 2449, it does not follow that similar controls should be imposed on air contract carriers. The air contract business is still relatively new, whereas the motor carrier industry was fully developed in 1935. There are obvious dangers inherent in attempting to impose a rigid legislative framework before the pattern of growth has been ascertained and it is conceded that there is not sufficient information available with respect to the air contract carriage.

The discriminatory aspects of the bill were also quite apparent. Most obvious was the provision in Section 4107(e) for the issuance of a "grandfather" license to applicants who could establish: (1) that they had been engaged in bona fide operations as air contractors on or before August 10, 1947 and (2) that they had not, since August 10, 1947, operated in air transportation. Obviously, the noncertificated carriers operating under Section 292.1 as common carriers on an infrequent and irregular basis would not be entitled to receive grandfather licenses. On

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<sup>101</sup> S. 2449 and H. R. 6149, 80th Cong., 2d Sess. These bills were for the specific purpose of providing for "the regulation of contract carriage by air." The reports of these hearings have not yet been published.

<sup>102</sup> Robert Ramspeck, Executive Vice President, appearing for the Air Transport Association, indorsed the bill in its entirety. The testimony of Emory T. Nunneley, General Counsel of the Civil Aeronautics Board was favorable to the H. R. 6149 but took exception to the discriminatory aspects of the "grandfather" provisions.

<sup>103</sup> A strong presentation against the enactment was made by Raymond A. Norden, President of Seaboard & Western Airlines, Inc., noncertificated international air freight carrier. The Office of Domestic Commerce of the Department of Commerce was represented by H. B. McCoy, Director.

the other hand, the bill provided that a certificated air carrier would be entitled to a grandfather license solely by establishing that, during 1947, it had performed bona fide operations as an air contractor.<sup>104</sup>

It is disturbing to find, in the current session of Congress, that a bill has been introduced which contains the above and all other discriminating features of S. 2449 and provides the same rigid regulatory framework.<sup>105</sup> It might have been assumed that some constructive effort would have been made to analyze the record of testimony taken at the Hearings on the prior bill for the purpose of resolving differences and eliminating features obviously undesirable and unsound.

If the confusion in this field is to be corrected, some such effort must be undertaken. Cooperation in such a venture on the part of the certificated and noncertificated divisions of the industry cannot be expected. It seems, therefore, that as the agency of government charged with the responsibility of fostering civil aviation in the United States, the Civil Aeronautics Board itself should take aggressively in hand the task of producing a bill to cope with the problem.

Until this is accomplished, its own enforcement problems will be multiplied and an admitted undesirable gap in the law may seriously retard the proper development of the industry.

### *Conclusion*

In summary, it is rather clear that the numerous issues which have arisen within the air transportation industry and before the CAB during the gestation of the irregular carrier regulations, have made it one of the most turbulent periods in the brief history of civil air transportation in the United States.

Out of the conflict there has not yet arisen a constructive pattern. Practically all of the infirmities of the post-war regulation have been carried into the new. Whatever may be the views of the Board with respect to the desirability of creating a noncertificated industry by legislation, it is evident that there is little disposition on the part of the Board to accomplish that purpose by the use of its exemption power. For that reason, it may be expected that not only the process of economic

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<sup>104</sup> Another section of the bill (4102) relating to dual operations was also discriminatory. It prohibited the certificated carrier from engaging in contract operations over the routes or within the areas covered by its contract for licensed operations. Obviously, it would be a great deal easier for the certificated carrier to obtain authorization to engage in contract operations over its scheduled routes than it would be for noncertificated carriers to secure a certificate authorizing common carrier operations over the same routes or within the same areas covered by its contract license.

<sup>105</sup> S. 432, *supra* note 100.

attrition but a policy of rigid enforcement of the revised economic regulations will result in a substantial diminution of the large irregular operators. The entire problem, including the regulation of contract operations, seems largely one which should be resolved by Congress.

It should be recognized that, notwithstanding the confusion of the past few years, there have been positive gains. Although one may differ in details with the action of the Board in promulgating the blanket exemption authority, it is apparent that had its exemption powers not been exercised, the experimentation in air coach service, international air freight and various specialized types of air services could not have been realized. The so-called monopoly of the seventeen trunk lines and eighteen feeder lines certificated by the Civil Aeronautics Board has also been affected by the entrance of these new carriers into the field. The resulting interplay of their conflicting interests will, it may be expected, ultimately serve the development of our growing air transportation system.