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Regulation of Rates in Air Transportation†

PART I
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I

The regulation of rates in the field of public utilities, particularly with respect to common carriers, and the manifold problems raised have been the subject of many extensive examinations. It is not the intent of this study to review again these problems, except incidentally where they may touch upon air transportation, and then for comparative purposes only. Rather it is the scope of the present article to inquire into the process of rate regulation in the field of air transportation, to point up some of the basic problems involved, and to indicate trends in their treatment. Many such issues will appear familiar to one acquainted with rate regulation in other fields. However, the development of the air transport industry, especially its international character and its relationship to the policies of the national government, has created the necessity for a new approach to old issues, the working out of new concepts, and progress in unexplored areas.

Rate regulation in air transportation presents two aspects which may be intermingled, but each of which has its own distinctive type of problems. One such aspect is the determination of rates for the carriage of persons and property.¹ This is the familiar field of rate making which is a part of all common carrier regulation. In air transportation it has a particular significance because of the competitive development of the industry in relation to surface transportation, its connection to the problems of mail rates, and its relation to the many political and economic issues arising from international operations. The second aspect of rate regulation in air transportation is the fixing of compensation to be paid air carriers by the federal government for the transportation of the mails. Although the federal government has from the earlier periods of our history provided compensation for carriers transporting the mails, the develop-

† No statements contained herein are to be construed as expressions of opinion by the Civil Aeronautics Board.
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1. Often charges for the carriage of persons are called "fares" while those for the carriage of property are called "rates." Throughout this article, the term "rates" will cover both classes of charges.
ment of the air transport industry has brought a statutory recognition of such payments as an instrument of national policy and defense. This policy of the "subsidization" of air transportation through mail payments has given rise to many problems to be investigated here. The two aspects of rate regulation in the air transport industry will be treated separately in this review.

II

Rates for the Carriage of Persons and Property

Development of machinery for regulation — Domestic air transportation. Beginning with the Connecticut air-navigation act of 1911, the first measure regulating aviation in the United States, there has been a steady growth of state and federal legislation aimed at the control of air transportation. However, prior to the passage of the Civil Aeronautics Act in 1938, none of these statutes set up machinery for the control of rates. The adoption of various parts of the uniform aeronautical acts created a framework of state regulation which concerned itself principally with the legal right of flight, the liability of the owner or operator of aircraft for damage to persons or property on the ground, laws respecting collisions, and jurisdiction over crimes, torts, and contracts relating to air traffic. Likewise, federal legislation of this period did not attempt any regulation of the rates of carriage. The reason for this can be found in the prevailing view that air transportation had not yet developed to the point where it was necessary for governmental regulation to enter the picture.

Economic control of commercial air transport by government, including control of rates charged for carriage, came sooner than was anticipated. With the report of the Federal Aviation Commission to Congress on January 30, 1935, serious steps were taken toward the formulation of legislation to provide economic con-

2. In the history of railroads "subsidies" have been granted through the gift of land, and it is the opinion of many that the "fair compensation" paid to railroads for the carriage of the mails contains an element of subsidy. As early as July 7, 1838 (5 Stat. 271) railroads were made "post routes" for the carriage of the mails.

3. An exception was an Alaskan Statute of 1929 (Alaskan Laws of 1929, c. 46, approved April 27, 1929).

4. The earliest of these uniform laws, the Uniform State Law for Aeronautics, was adopted by the National Conference of Commissioners on Uniform State Laws in 1922.

During the next three years such legislation was thoroughly discussed in committee hearings and in debates on the floor of Congress. All this discussion finally culminated in the adoption of the Civil Aeronautics Act of 1938, which included provisions for administrative control of rates in the air transport industry.

Control of rates to be charged by airlines for interstate and overseas air transportation largely was patterned after similar provisions in the Interstate Commerce Act. This control contemplated (1) the formulation of rates in the first instance by the air carriers themselves, (2) the review of such rates by the Civil Aeronautics Board, and (3) the determination of rates by the Board in the event that it should find the published rates of an air carrier to be unjust, unreasonable, or discriminatory.

Machinery was provided in the act for the publication of rates by filing with the Board, and air carriers were prohibited from charging other than the rates so published with certain designated exceptions. Standards were also set up for the Board to follow in its determination as to whether published rates are lawful.

7. 52 Stat. 973, 46 U.S.C.A. § 1279 (1938). More than 30 bills dealing with the subject were introduced between 1934 and 1938.
8. Cf. Sections 1(4), 1(5), 1(6) and 15 of the Interstate Commerce Act. “Interstate” and “overseas” air transportation are technical terms which are defined in the act. Generally, “interstate” air transportation embraces carriage between states (including the District of Columbia). It also includes carriage within the District and within Territories or possessions except the Philippine Islands. “Overseas” air transportation covers carriage between the United States and Territories or possessions or between Territories and possessions.
9. Sections 403 and 404 of the Civil Aeronautics Act. Under Section 1002(i), the Board may on its own initiative establish through service and joint rates. In the case of “overseas” air transportation such rates may only be maximum and/or minimum joint rates.
10. Such review may be carried out pursuant to Sections 1002(d), 1002(e), 1002(g), and 1002(h) of the Civil Aeronautics Act. Under Section 1003 the Board may also in conjunction with the Interstate Commerce Commission review joint rates of air carriers and surface carriers which are subject to the jurisdiction of the Commission.
11. Such power is exercised under Section 1002(d) of the Civil Aeronautics Act. Under Section 1002(g) the Board may suspend rates not yet effective for 90 days (subject to an extension up to a total of 180 days) while it is determining their lawfulness.
12. Requirements for filing rates are contained in Section 403 of the Civil Aeronautics Act and Section 224.1 of the Board’s Economic Regulations. New rates may be filed to be effective on one day’s notice, while changes in rates must have 30 days’ notice unless a special tariff permission is granted by the Board.
13. These standards are laid down in Section 1002(e) of the Civil Aeronautics Act and include (1) the effect of the rate upon the movement of traffic; (2) the need in the public interest of adequate and efficient transportation of
International air transportation. In the field of international operations, the administrative controls provided by the Civil Aeronautics Act were limited.\textsuperscript{14} Carriers engaged in such operations are required to file with the Board rates covering the carriage of persons and property and to abide by the schedules of rates as published.\textsuperscript{16} However, with respect to such rates the Board was given a power of review that is narrow in scope compared with its authority over domestic rates. It may examine rates in foreign air transportation only to determine whether or not they are unlawfully discriminatory, preferential, or prejudicial and can act only to the extent necessary to remove such defects.\textsuperscript{19} The Board was also given authority to prevent unfair methods of competition and to conduct investigations.\textsuperscript{17} It is not clear what the effect of these provisions might be with respect to the powers of the Board over international rates, and thus far no resort has been had thereto in dealing with rate problems.

The question of control of rates of American carriers engaged in international operations is directly connected with the problem of the rights to be granted such carriers by foreign governments and the extent of competition to be permitted in this field. At the Chicago Aviation Conference in November, 1944, it was proposed that rates for international operations should be controlled as a part of any general agreement for operating rights. The purpose of this proposal was to prevent American carriers from taking full advantage of their lower operating costs in competition with foreign carriers. Disagreement as to such control was one of the main obstacles in the path of reaching an agreement on the "freedoms of the air." The seriousness of this problem was again emphasized when Pan American Airways proposed a $275 rate for its New York to London operation in October, 1945. This proposal brought an unfavorable reaction

persons and property by air carriers at the lowest cost consistent with the furnishing of such service; (3) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; (4) the inherent advantages of transportation by aircraft; and (5) the need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

\textsuperscript{14} Under the Civil Aeronautics Act international operations are included under the term "foreign air transportation" which is defined to include carriage between the United States and any place outside thereof (not including Territories and possessions).
\textsuperscript{15} Civil Aeronautics Act, § 403.
\textsuperscript{16} Civil Aeronautics Act, § 1002(f).
\textsuperscript{17} Civil Aeronautics Act, §§ 411, 1002(b).
from the British government which has evidenced fear of "cut-throat competition" by United States carriers, and Pan American increased the rate to $375.\textsuperscript{18} As long as American carriers have a competitive advantage in terms of lower costs of operation, it is likely that control of rates for international air transportation will be foremost in agreements between countries for the operating rights which are necessary before such transportation can start.

Very little progress has been made in the development of machinery and procedures for the control of such rates. The Interim Agreement and the permanent Convention of International Civil Aviation, adopted at the Chicago Conference,\textsuperscript{19} gave no direct authority over rates to the organizations contemplated by the agreements. The Interim Agreement provides for the collecting, analyzing, and reporting of information with respect to tariffs,\textsuperscript{20} and both agreements provide an arbitration procedure for the settlement of disputes, which might involve, among other possible issues, the level of rates set by the airlines of a member country for international operations.\textsuperscript{21}

The most significant development in the field of international air rates has been the agreement between the United States and Great Britain concluded at the Bermuda Conference held in February of this year.\textsuperscript{22} Many important questions affecting the operation of international air transport were settled by this conference, with one of the most important being the agreement covering control of rates for such operations.\textsuperscript{23} The purpose of this control is to "prevent rate wars resulting from unfair and

\textsuperscript{18} The previous rate in effect between New York and London was $525.

\textsuperscript{19} International Civil Aviation Conference—November 1 to December 7, 1944—Chicago, Illinois. This conference drafted several international agreements. Among these were an Interim Agreement on International Civil Aviation, which established a temporary organization known as the Provisional International Civil Aviation Organization (PICAO) which came into being during 1945 with headquarters in Montreal. The conference also drafted a Convention of International Civil Aviation providing for a permanent international organization, which should come into being when 26 states ratify the Convention. The United States Senate ratified the Convention in July, 1946, and it is expected to come into effect by the spring of 1947.

\textsuperscript{20} Interim Agreement, Art. III, § 6, sub. 3a(13), Department of State, Publication 2282, Conference Series 64.

\textsuperscript{21} Interim Agreement, Art. III, § 6, sub. 8; Convention—Air Transport Agreement, Art. IV, § 2, c. xviii, also adopted at the Chicago Conference, provided a procedure for settling disputes that might have involved rates. The United States has now renounced this agreement.

\textsuperscript{22} Bermuda Civil Aviation Conference—January 15 to February 11, 1946.

\textsuperscript{23} Bilateral Air Transport Agreement between the Government of the United Kingdom and the Government of the United States relating to Air Services Between Their Respective Territories—Annex, § 11.
uneconomic rates." The machinery provided to accomplish this purpose covers two separate periods. The first such period is the interval during which there is no authority in any United States administrative agency to determine reasonable rates in foreign air transportation similar to the power of the Civil Aeronautics Board with respect to interstate and overseas rates. During this period (which covers the present situation) control over international rates is to be exercised primarily through the traffic and rate conference procedure of the International Air Transport Association (IATA), an organization of air transport operators, subject to review as to American carriers by the Board.24 If this procedure should fail in the establishment of satisfactory rates, recourse will be had to consultation and bilateral agreement between the two countries "within the respective constitutional powers and obligations of the Governments."25 The second period of control and the procedures contemplated for such period would come into existence only if Congress should grant authority to the Board to fix fair and economic rates for United States air carriers on international air services. New rates will then be required to be filed with both governments thirty days before the effective date of such rates. If either the Board or the British government cannot agree on a proposed rate, it may go into effect provisionally, if so permitted by the government of the air carrier proposing the rate, pending settlement of the issue. Such settlement may be accomplished either through consultation between the governments or through the medium of an advisory report from PICAO (Permanent International Conference on Aeronautical Operations) which each government is to use its best efforts to put into effect.26 The proposed machinery for the long run control of international air rates has provided a basic pattern

24. IATA is an association of the airlines of all nations engaged in international air services. The Articles of Association of IATA were approved by the Board on June 5, 1945, as an agreement under Section 412 of the Civil Aeronautics Act. At a meeting in October 1945 IATA adopted a resolution entitled "Provisions for the Regulation and Conduct of the Traffic Conference of IATA." This resolution contemplated rate making conferences similar to those in the shipping field. It was such conferences that the United States undertook to approve at least for a limited period at the Bermuda Conference.

25. Bilateral Agreement—Annex II, paragraph (g)—February 11, 1946. Rates to be fixed under the agreement are to be set at "reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers." Annex II, paragraph (h).

26. Ibid.
for agreements with other nations interested in air transportation.27

The rate level. Since the effective date of the Civil Aeronautics Act on August 22, 1938, the number of tariff filings covering rates for the transportation of persons and property has steadily increased with development of new routes and the general growth of the air transport industry.28 In addition, there has been a continuous extension of the coverage of such tariffs. In 1942, the first air freight tariffs were filed with the Board, and since the tremendous increase in this type of operation following the end of the war, the number and extent of such tariffs have shown a like increase.29

The most important power given to the Board with respect to such tariffs is that of determining the reasonable level of charges for interstate and overseas air transportation.30 This power has been used only infrequently by the Board, though from time to time a number of informal complaints have been received as to specific rates. These have been settled on an informal basis without recourse to formal proceedings under the statute. It was not until 1943 that the Board embarked upon a formal proceeding to determine the reasonable level of rates. At that time, an order was issued directing eleven domestic air carriers to appear and show cause why the Board should not find that the passenger rates of such carriers were unreasonable and should be reduced by ten per cent.31

This order grew out of the war situation and the actions of the carriers with respect to their passenger rates. The transfer of aircraft to the armed services brought about a reduction of air transport operations. At the same time, the order found that the average amount of traffic of all classes transported by the carriers had increased.32 On July 1, 1942, the carriers involved had suspended all discounts on passenger rates, and all special passenger rates previously allowed by them, thus effect-

27. A similar agreement was entered into with France on March 27, 1946. This superseded an agreement between Air France and TWA which provided for rate control.
28. After one year of operation under the Civil Aeronautics Act 30 tariffs had been filed embracing over 1,000 pages. Increases in filing since that date have ranged as high as 216 per cent for a single year.
29. In 1940 the first joint air-surface carrier tariffs were filed; in 1942 the first air express tariffs; also in 1942 the first air freight tariffs. These latter have increased rapidly within the past year.
30. Civil Aeronautics Act, § 1002(d).
31. Order No. 2164, dated February 27, 1943 (Docket No. 850).
32. Id. at 2.
ing an increase in revenue.\textsuperscript{33} Under these circumstances, the Board found, and the show cause order recited, that the income of the carriers was and would continue to be excessive and that "the public interest in economic stabilization and price control necessitated the restoration, insofar as consistent with the maintenance of the sound financial condition of the respondents, of the average passenger revenue per revenue passenger mile to the approximate level existing before the elimination by the respondents on July 1, 1942 of all discounts on passenger fares and of all special passenger fares."\textsuperscript{34}

The proceeding was never carried through to a conclusion because of voluntary reductions in rates by the carriers.\textsuperscript{35} However, it is significant because of the views expressed therein by one member of the Board as to the interrelation of mail, passenger, and property rates. These views, expressed in a dissent to the action of the Board in dismissing the proceeding as to five carriers who had offered rate reductions, set forth the opinion that the Board should institute a comprehensive general rate investigation covering all rates: \textsuperscript{36}

"The pressing character of our rate problems has advanced them beyond the stage where it is any longer necessary to study the desirability of instituting a general rate proceeding. In my opinion, therefore, any act of the Board short of an order instituting a comprehensive proceeding for the purpose of investigating the rates for all classes of air transportation service—mail, passenger, and express—would be a temporizing action which would fail to meet our public obligations in the present situation."

The dissent indicated a need to establish "service mail rates"\textsuperscript{37} now that air carriers were becoming self-supporting, but that this could not be done without a proper allocation of costs and revenues between passenger and express operations on the one hand and mail operations on the other. The opinion also emphasized that the growth of air express and the anticipated

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\textsuperscript{33} Table 1 of Order No. 2164 showed that the average revenue per revenue passenger mile of the 11 carriers involved had increased from 4.90 cents in June 1942 to 5.137 cents for the period from July 1, 1942, to November 30, 1942.

\textsuperscript{34} Order No. 2164, p. 5.

\textsuperscript{35} Order No. 2302, dated June 15, 1943, dismissed the proceeding as to 5 of the carriers. The proceeding was finally dismissed by Order No. 5102, dated August 21, 1946.

\textsuperscript{36} Order No. 2302, p. 3.

\textsuperscript{37} Id. at 6.
air cargo development in the post-war period created a necessity for the Board and the industry to lay immediately the bases for air express and air cargo rate structures. All of these needs required an integrated rate study:

"Since it is clear that the Board will never be able to properly discharge this duty if its rate problems are approached in disjointed and piecemeal fashion, a comprehensive and formal proceeding for the purpose of simultaneous investigation of all air transportation rates—wherein allocation and similar problems would receive adequate attention—is imperative."

One of the reasons for the passenger fares proceeding, as stated in the order, was the public interest in stabilization and price control. This public interest has also moved the Board to refuse to permit a change in rates that the Board found to be inconsistent with the purposes of the Federal stabilization program. This action grew out of a proposed revision by Pan American Airways of its tariffs rules affecting discounts in its Latin American operations. The revision would have reduced the discount for official government travel by United States and foreign government personnel from twenty-five to fifteen per cent, and would have eliminated the discount for personal travel by certain of such persons entirely. The Office of Price Administration protested the proposed revision on the ground that it would produce an increase in common carrier rates which was inconsistent with the purposes of the federal stabilization program as embodied in the Emergency Price Control Act, the Stabilization Act, and executive orders pursuant to such legislation. After hearing, the Board permanently suspended the proposed revision of tariff rules insofar as they were applicable to overseas air transportation in Latin America. The Board's

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38. Id. at 6, 7.
40. Tariff Rules (20) and (22), paragraph B of Pan American Airways System Joint and Local Passenger Tariffs, No. CL-1.
41. Emergency Price Control Act of 1942, § 1 [50 U.S.C. § 901(a), supp. iv]; Stabilization Act of 1942, § 1 [50 U.S.C. § 961, supp. iv]; Executive Order No. 9328, April 8, 1943 [8 F.R. 4681]. The effect of these provisions was to require common carrier rates to remain at the level of September 15, 1942, unless there were compelling reasons to permit them to go above that level.
42. Order No. 2767, dated June 25, 1945, temporarily suspended the rule changes until after hearing. This was amended by Order No. 3902, dated August 1, 1945, and Order No. 4039, dated September 19, 1945. The rule changes were permanently suspended by Order No. 4340, dated December 27, 1945.
opinion clearly sets forth its concept of the relation of the control of air carrier rates to the stabilization program as follows:43

"We are required by the stabilization program of the Federal Government, including legislation and Presidential orders thereunder, to examine all proposed increases of rates and fares of air carriers under our jurisdiction, so that rate increases will be disapproved consistently with the Stabilization Act of 1942 in order to keep down the cost of living and effectuate the purpose of that program. The performance that duty requires us to examine the proposed changes in the tariff rules proposed by Pan American to determine whether they result in a "general increase" of rates and fares for travel by government employees above the level prevailing on September 15, 1942, and, if they do result in such an increase, to determine whether there are any reasons for permitting such an increase which outweigh the public interest in the stabilization of common carrier rates as expressed in legislation and executive orders."

A dissenting opinion in the case emphasized that the "ultimate decision" remained with the Board to determine whether the increase that would result from the change of discount rates was "so inflationary that the evil effects thereof overcome the right of the public to non-discriminatory and non-preferential charges." It concluded that the removal of the discount would have no substantial effect upon the stabilization program.

Property rates have not generally been reviewed by the Board. However, in December, 1944, an investigation of such rates was begun.44 Hearings in this proceeding have not yet been held. In addition, the Board has conducted an investigation to determine whether or not contracts between Railway Express Agency and various air carriers for the transportation of air express are in violation of Civil Aeronautics Act or adverse to the

43. Opinion in Docket No. 1941, dated April 18, 1946, pp. 15, 16.
44. Order No. 3376 (December 22, 1944). The reasons for this investigation appeared in the show cause orders issued for each of the "big four" carriers on January 1, 1945—American, Eastern, TWA, and United. The reasons were as follows: "Concurrently with this order to show cause, we are issuing an order instituting an investigation into the rates, fares, and charges for the transportation of property by the domestic air carriers. It appears appropriate at this time to commence an investigation of rates for the transportation of property by air. Air express and air freight are aspects of air transportation which increasingly will demand the close attention of the air carriers and government authorities alike in order that no impediments will stand in the way of their rapid and economically sound growth. . . ."
The contracts were approved after amendments by the parties to eliminate provisions which the Board found to be objectionable. One of these was the agreement in Section 8 of the contracts that the Express Company “shall not be required without its consent to establish air express rates less than twice the existing first class rail express rates between the same points unless required by law.” The Board found that this provision was objectionable in that it set an artificial level of air express rates not based upon a competitive situation:

“Air transportation has reached now a stage of development at which it appears clearly essential that the air lines be freed from certain of the restrictions imposed by the contracts in order that they will be in a position to move in whatever direction the public interest may require in the future in the development of cargo service. . . . while the contracts provide specifically that the air carriers will establish the rates to be charged by the Express Agency for the transportation of air express, they contain a provision by which the air carriers agree not to reduce rates to a point below twice the rail express rates without the consent of Express Agency. This provision has been of no practical importance since the air express rates have been maintained by the air carriers at a point much higher than twice the rail express rates. Nevertheless, it appeared to the Board that the provisions should be eliminated in order that air express rates could find their own proper level without regard to those being charged for the transportation of express by rail.”

The level of passenger and property rates in the future will, of course, determine the development of the airplane as a mode of “mass transportation.”

Since 1929, passenger rates in interstate operations have been steadily reduced, though the decrease has been very gradual in later years. Between 1929 and 1934 passenger rates dropped from twelve cents per mile to less than six cents per mile. Though unit rates among air carriers vary somewhat, the average today ranges between four and five cents per mile. In many instances, the rates are below those charged by the railroads for first class

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45. Docket No. 325. This action was begun on October 31, 1939.
47. Id. at 158.
transportation. In the field of international air transportation passenger rates have been much higher, and until recently the reductions limited. They have averaged around eight to nine cents per mile in Latin America and sixteen cents elsewhere. Reductions within the past year have lowered these rates somewhat. For operations to Europe they have been reduced to about nine and one-third cents per mile. Whether the airlines will be able to maintain existing rates levels for passenger travel in domestic operations or make further reductions will depend on the relationship of basic unit costs to the level of such rates and the policy of the government with respect to mail payments. If the carriers are to be purely self-sustaining enterprises which are paid only a "service rate" for the transportation of the mails, it will be necessary for them to maintain high load factors and to reduce their basic unit costs.\(^4\) On the other hand, "mail rate" policy may permit lower fares than would be justified upon a self sustaining basis. International operations have hitherto been faced with high costs and a lack of competition which have been the predominant factors in the maintenance of exclusive passenger rates. With the development of four motored land type aircraft, the opportunity for reduction in costs and rates is presented. This trend should also be aided by the policy of competition for international operations expressed in the Civil Aeronautics Board's new route decisions within the past year.\(^5\) However, the ultimate level of passenger rates in such operations must be dependent to a large degree upon factors of international relationships which will probably keep rates above the level of the lowest cost of operation.\(^6\)

In the field of property rates, lack of experimentation by certificated air carriers and the limitations imposed by the war

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49. During the war a large proportion of available space was sold and this trend has continued during 1946. In 1944 approximately 89 per cent of the total seat miles operated by the domestic air carriers and available for passengers was occupied.

50. Northeast Airlines—North Atlantic Routes, 6 C.A.B. 319 (1945). In this proceeding the Board rejected the argument that the North Atlantic route to Europe should be operated by a single carrier and certified three carriers for such operation: American Export (now American Overseas), Pan American, and TWA. Similar results have been reached in the Latin American Route case (Docket No. 525); The Hawaiian case (Docket No. 851); The Pacific case (Docket No. 547); and The South Atlantic Route case (Docket No. 1171) all decided within the past few months of 1946. Only one carrier was certified in the South Atlantic case (Pan American) because the volume of traffic would not support more.

51. This is the fear of European countries desirous of operating international airlines that they may not be able to meet the rates of American carriers.
combined to keep rates at a high level. Thus air express rates have averaged around sixty-five cents a ton mile, while air cargo rates were above fifty cents a ton mile. The development of so-called “non-scheduled” operations has been supplying a much needed competition in this field with the result that air cargo rates are now down to around twenty-five to thirty cents a ton mile, and in some instances lower. Until such rates can establish a permanent level below twenty cents per ton mile, air transportation can never realize its potentialities in this type of operation. The ultimate level of such rates is a problem of an integrated rate structure involving all rates and policy as to competition in air cargo operations.

**Discriminatory rates.** We have previously noted that the Civil Aeronautics Act conferred power upon the Board to remove unlawful discriminations, preferences, and prejudices from air transportation rates. This power was derived from the Interstate Commerce Act which in turn was based on English statutes prohibiting such types of rates. The general rule laid down by our courts is that such a prohibition requires that charges be equal to all recipients of the same service under substantially similar circumstances and conditions. Rates may be unlawfully discriminatory either because they give one individual an unfair advantage over an economic competitor, or because they impose upon an individual or a class more than a just proportion of the entire cost of the service.

The Board has interpreted the provisions of the Civil Aeronautics Act prohibiting discriminations in the light of the effect that any particular discrimination will have in the encouragement of air transportation as that policy is laid down by Congress in Section 2 of the act. Such a construction is more liberal than that adopted by the courts generally in dealing with dis-

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52. On February 1, 1946, new cargo rates became effective, which brought the existing rates down to an average of about 26 cents per ton mile. Since then other similarly low air cargo rates have been filed. Many of the “non-scheduled” carriers are charging under 20 cents a ton mile.

53. Civil Aeronautics Act, §§ 1002(d), (f).


criminations or by the Interstate Commerce Commission in construing similar discrimination provisions in the Interstate Commerce Act.\textsuperscript{57} Thus in its \textit{Air Passenger Tariff Discount Investigation}, the Board was confronted with the problem of whether or not certain discounts extended to persons who used a minimum of air transportation were unjustly discriminatory and in violation of the act.\textsuperscript{58} The Board found that the granting of the discount did not per se amount to an unlawful discrimination under the act in the light of prevailing conditions.\textsuperscript{59}

More recent utterances of the Board indicate a belief that air transportation has developed beyond the stage where discounts are needed as a stimulus to travel, and that all discounts should now be dropped as undesirable elements in a sound rate structure. Thus the Board in the Pan American discount proceeding expressed itself as sympathetic with a program for the elimination of discounts and made clear that it was sustaining their retention in that case only because of the demands of the federal stabilization program.\textsuperscript{60}

\textit{Rates through agreements between carriers.} Section 412 of the Civil Aeronautics Act requires every air carrier to file with the Board copies of all contracts or agreements, whether oral or written, between such air carrier and any other air carrier, foreign air carrier, or other carrier, affecting air transportation, and relating to (among other things) "the establishment of transportation rates, fares, charges, or classifications."\textsuperscript{61} Any contract or agreement approved by the Board under this section is relieved from the operations of the federal anti-trust laws and "from all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary" to do anything authorized, approved, or required by action of the Board.\textsuperscript{62}

Although there have been numerous legislative precedents for Section 412, it was largely based on Section 15 of the Shipping Act of 1916, which exempts from the federal anti-

\textsuperscript{57} I.C.C. Rep. 147, 152; I.C.C. Rep. 156, 158 (1887); 28 M.C.C. 363 (1941).
\textsuperscript{58} 3 C.A.B. 242 (1942).
\textsuperscript{59} Id. at 248, 250, 251, 253.
\textsuperscript{60} Government Travel Discount Tariff Investigation (Docket No. 1941) Opinion of April 18, 1946, p. 15. There the Board stated that "even if such discounts were justified in the past as a device to promote the development of air transportation, they have now outlived their usefulness for such purpose and should be abandoned as rapidly as circumstances will permit."
\textsuperscript{61} 49 U.S.C. § 492, Supp. V (1942). This section also requires the filing of other agreements involving cooperative working arrangements between air carriers.
\textsuperscript{62} Civil Aeronautics Act, § 412(b) [49 U.S.C. 492, Supp. V (1942)].
trust laws all trade agreements between water carriers engaged in foreign commerce which are approved by the Maritime Commission.\(^\text{63}\) There have been no agreements between domestic air carriers relating to the establishment of rates which have come before the Board for decision.\(^\text{64}\) However, in the field of international operations the air transport companies have organized for the purpose of conference rate making such as is practised in the shipping field. The organization to achieve this result is the International Air Transport Association (IATA), the existence of which we have previously noted in discussing the machinery for the international control of rates. This group came into being in 1945, and it consists of over forty airlines either already engaged or planning to engage in international air operations. The Articles of Association of IATA were submitted to the Board for approval under Section 412 of the act, and, as already noted, were approved by order of June 5, 1945. However, that approval merely constituted a recognition of the organization and did not in any way amount to an approval of any action taken by IATA pursuant to its articles. Each such action must be submitted to the Board for approval if the subject matter comes within the scope of Section 412.\(^\text{65}\) At a meeting in October, 1945, the members of IATA adopted a resolution providing for the organization and operation of traffic conferences. These traffic conferences have a number of expressed purposes among which are “International air traffic matters involving . . . (1) Tariffs, rates, and schedules.”\(^\text{66}\) Under the resolution these conferences will have broad powers to reach agreements for all international air carriers.

The resolution providing for the organization and operation of these traffic conferences was submitted by the United States carriers who were parties thereto for action by the Board under Section 412 of the act. In the absence of Board approval rate agreements pursuant to the resolution would probably have been in violation of the federal anti-trust laws. As we have previously seen, the approval of IATA conference rate making for


\(^{64}\) Except for two minor cases of charter rates the Board has not been presented with rate agreements between domestic carriers.

\(^{65}\) 40 Opinions of the Attorney General (October 31, 1944) No. 85.

\(^{66}\) Article IV of the IATA Resolution setting up traffic conferences.
a period of at least one year was a part of the undertakings of the United States in the bilateral agreement concluded with Great Britain at the Bermuda Conference on February 11, 1946. By order of February 19, 1946, the Board carried out this undertaking and approved the IATA traffic conferences. Such approval did not, however, constitute approval of any rate agreement reached by such conferences. Each rate agreement must still be submitted to the Board for separate approval. One member of the Board dissented from the action of approval and filed an opinion in support of his views.

The majority opinion adopted the position that the basic issue as to the resolution was whether the Board "shall exert an effective influence upon the rates charged by our American carriers in international air transportation or whether those rates shall be subject to no control by our government, thereby provoking unilateral control by other governments." The opinion emphasized that both the British and French governments had expressed fears concerning "uncontrolled, competitive rate-making," and that they insisted that American air carriers operating into their respective territories "shall either charge rates that have been approved by an appropriate international governmental agency or rates that have been fixed by agreement among all carriers operating throughout a given region." Under such circumstances, the only alternatives were unilateral control by individual governments or approval of the IATA procedure.

The opinion also emphasized that without proof as to their actual operation, it could not be said that the IATA traffic conferences were inconsistent with the policy of controlled competition contemplated by the Civil Aeronautics Act:

"The competition contemplated by the Civil Aeronautics Act is not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation but having the power to provoke subsidy wars among nations. The Civil Aeronautics Act as construed by this Board provides regulated competition which seeks to avoid the stifling influences of monopoly on the one hand and the economic anarchism of unrestrained competition on the other. We cannot accept without proof the proposition

67. Order No. 4525 (February 19, 1946).
69. Id. at 7.
70. Id. at 9 and 10.
that the present resolution, which establishes the only presently available machinery whereby the United States government through this Board can share and have a voice in the regulation of rates of our international air carriers, is inconsistent with that policy of controlled competition which the Civil Aeronautics Act contemplates. . . ."

The Board further expressed the view that it could not "justifiably identify the rate agreements sought by the newly established traffic conferences with those secret price-fixing agreements to which certain industrialists have at times resorted for the purpose of fixing and maintaining prices at exorbitant levels at the expense of the public, well knowing that their agreements would not have to submit to investigation and judgment of any regulatory body."71

The dissenting opinion concluded that the traffic conference agreement "is adverse to the public interest for the reason that it is incompatible with the carefully established international air policy of the United States, and no sound reasons have been advanced why we should abandon this policy, permanently or temporarily."72 This established policy is one founded on the principle of competition which is the strongest incentive to the development and promotion of air travel. The IATA traffic conference agreement "creates the antithesis of a competitive system. Competition by consent is not competition." The rates determined under such a procedure will be compromise rates designed to provide a reasonable profit to the high-cost operator, and "might well approach the old monopoly level of 'all the traffic will bear'." When the elimination of competitive rates is combined with an elimination of competition in service, the evil is multiplied. "The inevitable result of 'agreements' with respect to rates and services will be stagnation. The incentive to reduce costs will be eliminated. The use of obsolete and outmoded equipment will be encouraged."73

It was also the view of the dissent that the reasons for abandoning the established policy of competition were inadequate. One of these reasons was to avoid the imposition of restrictions by the British and the French. "...the remedy is worse than the situation which the majority seeks to cure." The privilege of American carriers to determine their own rates throughout the

71. Id. at 10.
72. Id. at 1, dissenting opinion of Member Lee.
73. Id. at 6-13, dissenting opinion.
world was given up in return for freedom to operate to England and its territories. Another reason was the fear of rate wars. The dissent regarded this fear as unfounded and felt that there were sufficient controls in existence to avoid such conflicts. Finally the dissent took the position that the safeguards inserted in the order of approval were not strong enough to protect from the evils of the traffic conference system "which is repugnant to the whole principle of free enterprise."

A reading of the majority and dissenting opinions in this case clearly illustrates the fundamental nature of the problem posed by this rate making agreement. It is clear that if control over rates of American carriers in foreign air transportation is not attained by an administrative agency and the second portion of the Bermuda Agreement on rates does not come into play, the question will arise as to whether our policy should be one of (1) no international control over rates for international operations; (2) control through the conference procedure of IATA; or (3) control through an international aviation body—PICAO or its permanent successor.

In the meanwhile, the control of rates for international operations has been exercised through the procedure of rates set by IATA and review of those rates as to American carriers by the Board. The first of the regional traffic conferences of IATA, the North Atlantic, held meetings commencing on February 26, 1946, and adopted a series of twenty resolutions affecting rates and general conditions of carriage. These were submitted by the United States members of the conference to the Board for approval or disapproval under Section 412 of the act. After public hearing with respect thereto, the resolutions establishing the rates to be charged for the carriage of persons and property on transatlantic routes were disapproved by the Board as adverse to the public interest. In its opinion accompanying the order of disapproval, the Board laid down the principles which will guide it in determining whether to accept conference rates:

"As the responsible government agency in the United States, the Board considers it appropriate in determining

74. Id. at 13-28, dissenting opinion.
75. Id. at 28-32, dissenting opinion.
76. Agreements C.A.B. Nos. 541, 556, and 585-602.
77. Order No. 4748 (May 8, 1946).
whether to approve a conference rate agreement to require evidence that the rate conference has acted in accordance with the basic tenets laid down in the Board’s opinion approving the IATA Traffic Conference resolution, and has reasonably sought to establish “the cheapest rates consistent with sound economic principles.”

The Board found that the rates established by the first North Atlantic Conference meeting did not meet this test.79 “The Conference at its February meeting signally failed to relate the rates there agreed upon to costs of operation in any manner whatsoever . . . The Board cannot condone the failure of the Conference to follow a basic tenet laid down for its guidance . . . that there must be a reasonable relation between any conference rates and the attainable costs of operation.”80

Subsequently, new traffic conference meetings were held and a new set of rates submitted to the Board for approval. These rates, which were about ten per cent lower to Europe, were approved by the Board.81

**Non-scheduled operations.** Under the Civil Aeronautics Act, the operations of all common carriers, whether such carriers are “scheduled” or “non-scheduled” operators, are subject to the economic regulation provided by that act.82 However, when the Board was first created, it was decided not to extend such regulation to the operations of carriers who were flying on a “non-scheduled” basis, even though such carriers might be operating in a manner so as to make them common carriers subject to regulation. Accordingly, such operators were exempt from economic control under the Act.83 The test of whether an operator came within the exemption depended upon whether there was a holding out to the public to operate with a reasonable degree of regularity.84 If there was not such a holding out, the carrier was exempt from regulation. Among the restrictions from which

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79. Id. at 7.
80. Ibid.
82. Civil Aeronautics Act, § 1(21), brings under regulation all “common carriers” by air whether or not they are “scheduled” or “non-scheduled.”
83. Section 292.1 of the Board’s Economic Regulations (December 12, 1938).
84. Id. at par. (a): “any operation shall be deemed to be non-scheduled if the air carrier does not hold out to the public expressly or by a course of conduct that it operates one or more aircraft between any designated points regularly or with a reasonable degree of regularity upon which it accepts for transportation for compensation or hire, such members of the public as apply therefor or such express or other property as the public offers.”
such an operator was freed were those relating to the publishing of tariffs and the maintenance of such tariffs in accordance with the requirements of the Act which we have previously noted. Until the advent of the war the scope of "non-scheduled" operations was so small as not to create any but isolated problems. The tremendous growth of this type of operation following the end of the war has brought with it a host of issues as to the extent of regulation of these carriers. We are not concerned with most of these issues here. However the continued growth of "non-scheduled" carriers has been such that their relationship to rate control and rate structures must be considered.

The Board's recent amendment to the "non-scheduled" carrier exemption order did not subject the rates of such carriers to the rate control of the act. It did, however, for the first time require these operators to file with the Board a copy of the schedule of rates charged. This filing was for information purposes only. A new proposed amendment to the "non-scheduled" exemption would bring the rates of "Class A Non-Scheduled Air Carriers" (which includes such carriers using aircraft having a gross weight in excess of six thousand pounds and a weight for all aircraft used exceeding fifteen thousand pounds) under the rate control provisions of the act. Although these carriers would be exempt from many of the regulatory requirements of the act, including the necessity of obtaining certificates to operate, they would be required to file their rates with the Board and such rates would be subject to review. The application of these provisions to such carriers was pointed out in the Board's release of the proposed amendment for comment:

"Particular attention is directed to the proposal to make the tariff filing provisions of section 403 applicable. This would result in a requirement that Class A Non-Scheduled Air Carriers must file with the Board tariffs stating the rates and fares charged, keeping the tariffs available for public inspection, charging only the rates specified in the tariffs and making no changes except in accordance with the provisions of section 403 (c) of the Act. If the tariff-filing provisions are adopted,

\[\text{85. These are discussed in the Board's Investigation of Nonscheduled Air Services (Docket No. 1501) (May 17, 1946).}\]
\[\text{86. Regulations No. 367 (May 17, 1946).}\]
\[\text{87. "Classification and Exemption of Non-Scheduled Operations, Proposed amendment No. 3 of Section 292.1 of the Economic Regulations of the Board" (May 17, 1946).}\]
\[\text{88. Id. at par. (c).}\]
\[\text{89. May 17, 1946.}\]
a special regulation specifying the form and contents and the manner of filing will also be adopted."

Under the proposed amendment the rates of "Class B Non-scheduled Air Carriers" (which includes all Non-Scheduled Air Carriers which are not Class A Non-Scheduled Air-Carriers) would not be subject to the controls of the act, though such operators would still be required to file a schedule of rates charged for information purposes.90 Also rate agreements between Class A Non-Scheduled Air Carriers and any other Non-Scheduled Air Carrier would not be subject to Board approval under Section 412 of the act.91

Most of the discussion as to non-scheduled operators has raged around the issue as to whether or not such carriers should be required to obtain certificates from the Board as a prerequisite to operate.92 However, their significance in the rate structure of the air transport industry may well prove to be of greater importance than the question of operating rights. This is particularly true in the air cargo field where the violent growth of operations and the resulting strenuous competition has steadily forced down rates from their previous permanent high.93 Such fact was clearly recognized by the Board in its institution of an investigation into property rates.94 It emphasized that close attention must be paid to such rates "in order that no impediments will stand in the way" of the sound and rapid growth of air carriers.95 It has again been recognized in the proposed amendment to the non-scheduled exemptions so as to require the larger type of such carriers to file tariffs with the Board which would be subject to control under the act,96 even though the carriers are not required to obtain operating certificates from the Board.97 The contributions of these carriers to the public in the form of lower rates have thus far been beneficial. However, their ulti-

90. Proposed amendment No. 3 to Section 292.1, pars. (d) and (f), Economic Regulations.
91. Id. at par. (c) (7).
93. These rates have come down from in excess of 50 cents a ton mile to around 20 cents a ton mile for many non-scheduled operators with some going even lower.
94. Order No. 3376 (December 22, 1944).
95. Show Cause Orders in "big four" rate case, supra note 44.
96. Proposed amendment No. 3 to Economic Regulations, § 292.1, pars. (b) and (c).
97. Id. at par. (c).
mate position in an integrated rate structure should be decided with reference to the broad objectives of Congress in writing the Civil Aeronautics Act which embraces, among other things, the goal of the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges." This can only be done by bringing the rates of such carrier within the framework of control laid down by the act and the rules of rate making formulated therein.

(To be concluded)

98. Civil Aeronautics Act, § 2.
99. Civil Aeronautics Act, § 1002(e).