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THE TEXAS AERONAUTICS COMMISSION AND ITS RATE REGULATING FUNCTION

RICHARD GARY THOMAS

Aviation law, an offspring of the transportation industry, is a relatively new and developing field of jurisprudence. It is certain to develop and expand as air travel plays a larger role in our vastly mobilized society. Even at this early date Congress has passed three major enactments pertaining to the regulation of aeronautics.¹ These acts were a necessary outgrowth of the increased use of air carriers as a means of transportation between distant points.

Recently the air transportation industry has found a new market in passengers traveling shorter distances. This necessarily resulted in some air passengers traveling only within the borders of a single state. Air transportation activity wholly within the borders of one state brought the entry of intrastate airlines into the competitive market providing shuttle or commuter type services. Basically the only states which furnish markets that lend themselves toward commuter type services are those with a sufficient number of large metropolitan areas with similar or common economic and geographical characteristics.² California, Texas, and Florida appear to be the only states that possess these requisites.³ Nevertheless, it has been the practice of many states to economically regulate intrastate airlines.⁴ By 1961 eighteen states,⁵ including Texas,⁶ were in the practice of issuing certificates of public convenience and necessity to air carriers operating wholly within state boundaries. The scope of this comment is to review the power of the Texas Aeronautics Commission to economically regulate intrastate carriers in general, and explore the Commission's authority, if any, to regulate rates charged by such intrastate carriers.

BASIS OF STATE POWER TO ECONOMICALLY REGULATE INTRASTATE AIR TRAVEL

The "commerce clause" of the United States Constitution provides:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .⁷

¹ Air Commerce Act of 1926, ch. 344, 44 Stat. 568; Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973; *superseded by* Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1964).

² Taylor, *Economic Regulation of Intrastate Air Carriers in California*, 41 CALIF. L. REV. 454, 455 nn.3 & 4 (1953).

³ *Id.*

⁴ Comment, *State-Federal Economic Regulation of Commercial Aviation*, 47 TEXAS L. REV. 275 (1969).

⁵ *Id.*

⁶ TEX. REV. CIV. STAT. ANN. art. 46c-6, § 3(b) (Supp. 1970).

⁷ U.S. CONST. art. I, § 8.

It is firmly established that where the subject is national in character and requires uniform regulation the power of the federal government is supreme.⁸ Commerce in this category encompasses not only transportation among states but all commercial intercourse and its component parts.⁹ Nevertheless, it is equally well established that when the subject is national in character but its nature does not require uniformity of regulation, and is susceptible to dual regulation, the states may regulate the subject matter until the federal government expresses an intent otherwise.¹⁰ This simply means that where the federal government has refused to legislate upon an item that affects interstate commerce, the states have exclusive power of regulation.¹¹

Congress expressed an intent to legislate upon certain areas of aeronautics by enacting the Federal Aviation Act of 1958.¹² The act granted to the Civil Aeronautics Board (CAB) the authority to economically regulate "air transportation"¹³ which is earlier defined in the act as "interstate air transportation."¹⁴ The act defines interstate air transportation as being the transportation of passengers between a location in one state and a location in another state, or between two locations in the same state but the travel route being through airspace of any place outside of the state of departure and destination.¹⁵ In accordance with the congressional definition of "interstate air transportation," the CAB authority is limited to air travel that actually crosses state lines. Therefore, since Congress has refused to legislate upon intrastate air travel, the states have the implied power to economically regu-

Transportation by land, water, and air have all been classified as commerce within the meaning of the "commerce clause".

Guinness v. King County, 202 P.2d 737, 739 (Wash. 1949).

⁸ *Escanaba Co. v. Chicago*, 107 U.S. 678, 687, 2 S. Ct. 185, 192, 27 L. Ed. 442, 446 (1883); R. FIXEL, *THE LAW OF AVIATION* 22-24 (4th ed. 1967).

⁹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 56 S. Ct. 855, 867, 80 L. Ed. 1160, 1182 (1936).

¹⁰ *Clark Distilling Co. v. Western Ind. Ry.*, 242 U.S. 311, 327, 37 S. Ct. 180, 185, 61 L. Ed. 326, 339 (1917); *Simpson v. Shepard*, 230 U.S. 352, 399, 33 S. Ct. 729, 740, 57 L. Ed. 1511, 1541 (1913); R. FIXEL, *THE LAW OF AVIATION* 22 (4th ed. 1967); Rhyme, *Federal, State and Local Jurisdiction Over Civil Aviation*, 11 *LAW & CONTEMP. PROB.* 459, 472 (1946).

¹¹ *Southern Ry. v. Reid*, 222 U.S. 424, 437, 32 S. Ct. 140, 142, 56 L. Ed. 257, 260 (1912); *Galveston H. and S.A. Ry. v. Wells*, 121 Tex. 310, 321, 50 S.W.2d 247, 250 (1932). In *Sheboygan Airways v. Indus. Comm'n*, 245 N.W. 178, 182 (Wis. 1932), the Wisconsin court made a similar statement concerning the conflict of economic regulatory jurisdiction between the state and federal governments in the field of aviation.

¹² 49 U.S.C. §§ 1301-1542 (1964).

¹³ Federal Aviation Act of 1958, 49 U.S.C. §§ 1371-1387 (1964).

¹⁴ Federal Aviation Act of 1958, 49 U.S.C. § 1301(10) (1964) provides:

"Air Transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

¹⁵ Federal Aviation Act of 1958, 49 U.S.C. § 1301(21)(a) (1964) provides:

"Interstate air transportation" . . . mean[s] the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between . . . a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia

late intrastate air carriers whose routes do not carry them across the borders of a single state.¹⁶

There is a want of federal judicial guidance concerning the power of states to regulate intrastate air transportation. The leading case in this area is *People v. Western Airlines, Inc.*¹⁷ which involved the authority of the California Public Utilities Commission (PUC) to collect statutory penalties from Western Airlines, Inc., for increasing its rates between Los Angeles and San Francisco without permission from the PUC to do so. The court held:

Congress has not sought to extend the economic regulation of the board [CAB] to intrastate transportation of persons . . . nor has it attempted to oust the states of control over such rates.¹⁸

The court further stated:

Any doubts on the subject should be resolved in favor of state power for the principal reason . . . that the regulation of intrastate fares of common carriers traditionally has been subject to state regulation.¹⁹

In 1963 the Supreme Court of Hawaii upheld the state's power to economically regulate rates.²⁰ The court determined that the state PUC was required by statute to fix rates of air carriers.²¹ Finally, in 1970, the Texas Supreme Court in *Texas Aeronautics Comm'n v. Braniff Airways, Inc.*²² held:

Congress has not pre-empted the field of the economic regulation of air carriers, and the States have the power to act so long as there is no conflict with federal law.²³

Therefore it may be concluded on the basis of opinions rendered by the state courts and a reasonable interpretation of the FAA Act of 1958, that states have the power to economically regulate intrastate air carriers.

TEXAS AERONAUTICS COMMISSION AUTHORITY TO REGULATE INTRASTATE AIRLINES

At common law a carrier could fix its rates at will as long as the compensation received was reasonable.²⁴ Thus, carriers had a right to

¹⁶ C. Murphy, *The Preemption Myth*, 8 TAC BULLETIN no. 6 (1971).

¹⁷ 268 P.2d 723 (Cal. 1954), *appeal dismissed for want of a substantial federal question*, 348 U.S. 859, 75 S. Ct. 87, 99 L. Ed. 677 (1954).

¹⁸ *Id.* at 736. (Emphasis added.)

¹⁹ *Id.* at 737. For a comprehensive review of economic regulation of interstate and intrastate airlines in California until 1953, see Taylor, *Economic Regulation of Intrastate Air Carriers in California*, 41 CALIF. L. REV. 454 (1953).

²⁰ Application of Island Airlines, Inc., 384 P.2d 536 (Hawaii 1963).

²¹ *Id.* at 542.

²² *Texas Aeronautics Comm'n v. Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970).

²³ *Id.* at 200.

²⁴ *In re Dry Dock*, 172 N.E. 516, 518 (N.Y. 1930).

reasonable compensation, but they did not have a right to charge an unreasonable rate.²⁵ Through experience it was learned that certain industries (including many carrier type industries) did not lend themselves to a free competitive enterprise, but since such industries were beneficial to society the device of economic governmental regulation was used to preserve the industry and protect the public.²⁶

The effect of this policy was to create a quasi monopoly in the industries that were regulated.²⁷ In order to effectuate economic governmental control, administrative agencies were established to administer the policies of the government which often called for the regulation of rates. Administrative rate regulatory authority is not inherent but may be acquired by a direct delegation or indirect devolution of authority.²⁸ Rate making has generally been held as a valid delegation of authority in public utility regulatory agencies if the statute provides a determinate guide for administrative action.²⁹ Because of the high degree of technicality and complexity of the industries involved, very general standards have been held permissible so long as an adequate guide to the administrative body has been formulated.³⁰

The Texas Legislature has delegated the authority to the Texas

²⁵ See *Lewis-Simas-Jones Co. v. S. Pac. Co.*, 283 U.S. 654, 661, 51 S. Ct. 592, 75 L. Ed. 1333, 1337 (1931).

²⁶ Cf. McGowen, *An Economic Interpretation of the Doctrine of Delegation of Governmental Powers*, 12 TUL. L. REV. 179, 184 (1938).

²⁷ *Incorporated Town of Mapleton v. Iowa Public Service Co.*, 223 N.W. 476 (Iowa 1929). In this case the court, referring to municipal public utilities, stated that when a governing body

. . . exercises the power of fixing rates, it waives competition and establishes a quasi monopoly. In the field of unregulated enterprise, competition tends to secure reasonable prices. Collusion between competitors creates secret monopoly. The evil of monopoly is that it tends to create unreasonable prices. A public utility becomes, by the common consent of the owner and the public, a monopoly. The evil which would ordinarily arise therefrom is avoided by public regulation. It does not result in unreasonable prices, because the public tribunal is charged with the duty of fixing reasonable ones. *Id.* at 470.

The court further stated that: "A public utility operating under a franchise, has no constitutional right of *competition*." *Id.* at 479. (Court's emphasis.)

²⁸ 3 R. POUND, JURISPRUDENCE 644, 646 (1959); see *Trustees v. Saratoga Gas, Light and Power Co.*, 83 N.E. 693, 695 (N.Y. 1908).

²⁹ *United States v. Atchison, Topeka, and Santa Fe Ry.*, 234 U.S. 476, 486, 34 S. Ct. 986, 991, 58 L. Ed. 1408, 1422 (1914); 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 318 (3d ed. 1943).

³⁰ 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 318 (3d ed. 1943); McGowen, *An Economic Interpretation of the Doctrine of Delegation of Governmental Powers*, 12 TUL. L. REV. 179, 184 (1937). In his book Sutherland takes the position that in determining whether the statute provides a sufficient guide so that the delegation is proper, the antiquity of the regulation is not controlling.

There have been limitations established on the effect of the statutory standards. See *United States v. Atchison, Topeka, and Santa Fe Ry.*, 234 U.S. 476, 484, 34 S. Ct. 986, 991, 58 L. Ed. 1408, 1421 (1914), where the court held that the standard imposed by the delegation should not operate to exclude competition. Also, see *Los Angeles Gas and Electric Corp. v. Railroad Comm'n of California*, 289 U.S. 287, 303, 53 S. Ct. 637, 643, 77 L. Ed. 1180, 1191 (1933); *Seward v. Denver*, 131 P. 980, 984 (N.M. 1913), where it was held that a governmental agency fixing rates that prevents a carrier from receiving its common law right to reasonable compensation is invalid on constitutional grounds as being confiscatory. *Contra*, *Lichten v. Eastern Airlines, Inc.*, 189 F.2d at 939, 941 (2d Cir. 1951), where the court held that the common law had no place in the regulation of rates in the airline industry.

Aeronautics Commission (TAC) to economically regulate air carriers in Texas.³¹ In 1969 the legislature amended the act by substantially enlarging the powers and duties of the Commission.³² The amended act contains the following provisions:

Without limiting the right, power, and authority of the Commission, to the extent necessary to enable it to perform its functions, it may approve or disapprove the maximum or minimum or maximum and minimum rates, fares, and charges of each air carrier. . . .³³

The extent and circumstances under which the legislature delegated rate making authority to the TAC are not readily ascertainable from the language of the statute. The trend of the common law courts in the present century has been to:

. . . refuse to receive the legislative innovation fully into the body of the law, and instead give effect to the legislative enactment directly only. That is, they might refuse to reason from it [legislation] by analogy, but nevertheless give it a liberal interpretation to cover the whole field it may reasonably be made to cover.³⁴

Thus, by using this principle in interpreting the rate making authority of the TAC the legislature appears to declare that it is delegating the authority to the Commission to regulate rates so long as such regulation is used to fulfill the *functions* that have been conferred upon it. The extent of the delegation appears to hinge on the interpretation of the term *function*.³⁵ It may be argued that the statute extremely limits the rate regulatory power of the TAC because such power is not essential to the performance of the Commission's functions. This argument may be further supported by contending that the lack of authority to regulate rates will not limit the right, power, and authority of the Commission to effectively regulate intrastate airlines.

However, a close analysis of the entire act logically leads to a different conclusion. In the provision defining the general powers and duties of the Commission,³⁶ the legislature directed the TAC to encourage, foster,

³¹ TEX. REV. CIV. STAT. ANN. art. 46c-6 subd. 3 (Supp. 1970).

³² TEX. REV. CIV. STAT. ANN. art. 46c-6 (Supp. 1970).

³³ TEX. REV. CIV. STAT. ANN. art. 46c-6 subd. 3 (Supp. 1970).

³⁴ 3 R. POUND, JURISPRUDENCE 658 (1959). (Emphasis added.) See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). See generally Pope v. Atlantic Coast line R. Co., 345 U.S. 379, 73 S. Ct. 749, 97 L. Ed. 1094 (1953); Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942).

³⁵ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 574 (Unabridged ed. 1966) defines the term *function* as "the kind of action or activity proper to a person, thing, or institution."

³⁶ TEX. REV. CIV. STAT. ANN. art. 46c-6 (Supp. 1970) provides:

The Commission, and its Director acting under its authority, is empowered and directed to encourage, foster, and assist in the development of aeronautics in this state

and assist in the development of aeronautics in Texas, but this is not the only duty of the Commission. The declaration clause³⁷ states that one of the purposes of the act is to provide for the accomplishment of the purposes of federal legislation and prevent needless duplication of functions between state and federal agencies. It therefore appears that one of the primary functions of the TAC is to *encourage the development of aeronautical progress in Texas keeping in consideration the purposes of federal aeronautical legislation without unnecessarily burdening areas of regulation within the jurisdiction of federal agencies.*

Can Regulating the Rates of Intrastate Airlines in Texas be a Proper Function of the TAC

Unquestionably, California has had a larger amount of intrastate airline activity than any other state. Hence competition between CAB regulated airlines and intrastate airlines for the California markets has reached comparatively large proportions. It is therefore advisable to analyze the history of the air travel market in California in order that Texas may benefit from this experience.

The California Public Utilities Commission is vested with the authority to economically regulate intrastate airlines.³⁸ Unlike the CAB, its practice does not include the issuance of certificates of public convenience and necessity nor the regulation of minimum rates, but like the CAB it does regulate maximum rates.³⁹ As a result of unregulated price decreases, the competitive rivalry between CAB regulated carriers and PUC regulated carriers was expressed in the form of lower rates by the PUC regulated airlines.⁴⁰ Likewise, the CAB certificated carriers did not raise their fares as often as they had opportunities to do so. By 1965, due to the existence of intrastate competition, fares of all airlines were 47 per cent lower than the fares would have been had the across-the-board increases and other policies of the CAB been followed.⁴¹ As a result, air passenger travel between 1957 and 1964 increased 257 per cent.⁴² The primary reason for this impressive increase

³⁷ TEX. REV. CIV. STAT. ANN. art. 46c-2 (Supp. 1970) provides:

It is hereby declared that the purpose of this Act is to further the public interest of and aeronautical progress . . . by providing . . . for the coordination of the aeronautical activities of those [federal] authorities and the authorities of this state by assisting in accomplishing the purposes of federal legislation and eliminating costly and unnecessary duplication of functions properly in the province of the federal agencies.

The declaration of purpose clause demands consideration because it is as much a part of the act as any other part. *American Airlines v. CAB*, 192 F.2d 417, 420 (D.C. Cir. 1951).

³⁸ *People v. Western Airlines*, 268 P.2d 723, 728 (Cal.), *appeal dismissed for want of a substantial federal question*, 348 U.S. 859, 75 S. Ct. 87, 99 L. Ed. 677 (1954).

³⁹ W. JORDAN, *AIRLINE REGULATION IN AMERICA* 35, 158 (Johns Hopkins Press—Boston 1970).

⁴⁰ *Id.*

⁴¹ *Id.* at 113, 226.

⁴² Comment, *Intrastate Carrier—Competitive Impact—Pacific Southwest Airlines*, 32 J. AIR L. & COM. 607, table I at 610, 613 (1966).

is attributed to the low fares, but the cause of the decrease in fares is in dispute. It may be argued that the reduction of fares was a result of PUC regulation, but the better argument is that affirmative action taken by the PUC had little effect on the relatively low rates. This conclusion is supported by the fact that the PUC lacked control over rate decreases, eventually approved every fare increase requested of it,⁴³ and generally regulated its maximum rates in accordance with fare adjustments of the CAB.⁴⁴

Clearly, it was the independent fare policies and actions of the intrastate carriers and, eventually, the certificated carriers—working in an environment of limited regulation—that determined the low coach fares in the major California markets.⁴⁵

Therefore, it may be deduced that rate regulations of the type that will encourage intrastate air carriers to express competition in the form of lower rates will significantly increase the airline's share of the transportation market in Texas and thereby encourage and promote aeronautical progress in Texas.⁴⁶

Increasing the volume of air transportation is not the only method of encouraging aeronautical progress in Texas. Improving the airline's quality of service by faster, safer, and more comfortable transportation is another way to accomplish this "progress." Where there was rivalry between two or more interstate airlines in a major market in the United States, competition was expressed by improving service quality as a consequence of the strict maximum and minimum rate regulation policy of the CAB.⁴⁷ In California, the intrastate airlines placed a larger emphasis on price competition since the PUC does not regulate price decreases. This is evidenced by the fact that the intrastate carriers have a poorer safety record than the interstate carriers,⁴⁸ and the record of the intrastate carriers in adopting innovations of the industry is not equal to the record of the interstate carriers.⁴⁹ Thus it may be concluded that maximum and minimum rate regulation encourages service quality improvement of the regulated airlines.⁵⁰ Such a practice by the TAC would indeed promote aeronautics in Texas.

⁴³ W. JORDAN, *AIRLINE REGULATION IN AMERICA* 99, 114 (Johns Hopkins Press—Boston 1970).

⁴⁴ Comment, *State—Federal Economic Regulation of Commercial Aviation*, 47 TEXAS L. REV. 275, 280 (1969); see, eg., Decision No. 57990, 56 Cal. PUC 779 (1959).

This argument is further supported by the theory that the original fares charged by the intrastate airlines at initial entry, being relatively low, affected prices. W. JORDAN, *AIRLINE REGULATION IN AMERICA* 114 (Johns Hopkins Press—Boston 1970).

⁴⁵ W. JORDAN, *AIRLINE REGULATION IN AMERICA* 114 (Johns Hopkins Press—Boston 1970).
⁴⁶ Cf. Comment, *Intrastate Carriers—Competitive Impact—Pacific Southwest Airlines*, 32 J. AIR L. & COM. 607, 615 (1966).

⁴⁷ W. JORDAN, *AIRLINE REGULATION IN AMERICA* 35 (Johns Hopkins Press—Boston 1970).

⁴⁸ *Id.* at 50, table 3-4.

⁴⁹ *Id.* at 36-44.

⁵⁰ *Contra*, W. JORDAN, *AIRLINE REGULATION IN AMERICA* 176 (Johns Hopkins Press—Boston 1970).

The rate of attrition among the intrastate airlines is a significant factor affecting the history of the California market, and demands attention. Sixteen intrastate air carriers initiated service in California between 1946 and 1965.⁵¹ Only two remained in operation at the end of 1965.⁵² Therefore, it may be deduced that the lack of minimum price regulation by the PUC played a substantial role in the high percentage of industry failure.

At this point it is evident that rate regulation in general should have a favorable effect upon the airline industry by (1) increasing the airline's share of the transportation market, (2) promoting the quality of service, (3) aiding in preventing industry failure. All of these effects would *encourage the development of aeronautical progress in Texas.*

Which Type of Rate Regulation of Intrastate Airlines Would Best Encourage Aeronautical Progress in Texas

The limited or maximum fare regulatory practice of California favored the airline industry as a whole in that it significantly increased the percentage of the transportation market shared by the industry. This was an advantage to all airlines that survived because lack of minimum rate regulation appears to have played a large role in the high rate of attrition in California. Conversely, limited fare regulation had an adverse effect upon the consuming public because of the lack of motivation to express competition by improving quality of service. A major criticism of regulatory agencies is that they tend to be more concerned with the interests of the industry that they are designed to regulate, than the protection of the public for which they were created.⁵³ Any action on the part of the TAC should be founded upon protecting the interest of the public. The history of the California market offers affirmative evidence that the proper use of both maximum and minimum rate regulation would benefit the consuming public by encouraging competition to be expressed by improving service quality while gaining a degree of control over airline industry failure. It follows that maximum and minimum fare regulation by the TAC would be the best tool to protect the interest of the public and promote aeronautics in Texas.

Thus far the only function of the TAC under consideration has been encouraging the development of aeronautics in Texas. The legislature has also expressed an intent that the Commission should not engage in

⁵¹ W. JORDAN, AIRLINE REGULATION IN AMERICA 178 (Johns Hopkins Press—Boston 1970). In his book, Jordan takes the position that the high rate of attrition in California is significant upon the service quality required of intrastate airlines. He feels that to effectively compete with interstate carriers, the intrastate air carriers in California had to offer both significantly lower prices and comparable or superior service quality. W. JORDAN, AIRLINE REGULATION IN AMERICA 176 (Johns Hopkins Press—Boston 1970). See n.50 *supra*.

⁵² W. JORDAN, AIRLINE REGULATION IN AMERICA 178 (Johns Hopkins Press—Boston 1970).

⁵³ Moss v. CAB, 430 F.2d 891, 893 (D.C. Cir. 1970).

unnecessary regulation properly within the jurisdiction of federal agencies and that the purposes of federal legislation should be considered.⁵⁴ The broad purposes of the Texas Aeronautics Act and the FAA Act of 1958 overlap. Congress and the Texas Legislature both express an intent to encourage, foster, and promote aeronautics in general.⁵⁵ The federal aviation agencies are directed to cooperate with state authorities while the TAC is directed to cooperate with federal authorities.⁵⁶

In *Lichten v. Eastern Airlines, Inc.*⁵⁷ the Second Circuit held that the purpose of federal rate regulation was to provide for uniformity of rates to all persons through a single regulatory authority rather than different laws controlled by various jurisdictions. The *Lichten*⁵⁸ case was concerned with interstate air transportation and not intrastate air transportation; therefore, the policies espoused in that case are not applicable to intrastate fact situations. Congress has impliedly expressed an intent that the CAB does not have jurisdiction to economically regulate intrastate airlines.⁵⁹ Therefore state rate regulation of intrastate airlines will not contravene the purposes of federal rate regulation of interstate air transportation.

One of the policies of the CAB is to insure adequate service to smaller communities. The Board attempts to meet this objective by securing larger profits in major markets through rate regulation, thereby making it possible for carriers to offer better service to minor markets that yield little or no profits.⁶⁰ The Board has also sought to fulfill this policy by subsidizing its airlines.⁶¹ Lately, the CAB has been faced with the conflicting goals of reducing subsidy expenditures and insuring adequate service to smaller communities.⁶² The Board appears to have given precedence to the former rather than the latter resulting in a reduction of service to smaller communities.⁶³ It has been the experience in California that the intrastate airlines provided effective service to minor markets.⁶⁴ Consequently, state rate regulation that encourages

⁵⁴ TEX. REV. CIV. STAT. ANN. art. 46c-2 (Supp. 1970).

⁵⁵ 49 U.S.C. § 1302(f) (1964); TEX. REV. CIV. STAT. ANN. art. 46c-2 (Supp. 1970).

⁵⁶ 49 U.S.C. § 1324(b) (1964); TEX. REV. CIV. STAT. ANN. art. 46c-2 (Supp. 1970).

⁵⁷ 189 F.2d 939, 941 (2d Cir. 1951).

⁵⁸ *Id.*

⁵⁹ See Federal Aviation Act of 1958, 49 U.S.C. § 1301 21(a) (1964). Congress has granted to the CAB economic jurisdiction over air carriers that cross state borders. Since Congress has not passed legislation encompassing intrastate airlines, it may be deduced that it has expressed an intent by implication that the CAB does not have economic jurisdiction over intrastate airlines. See discussion *supra* at p. 267.

⁶⁰ W. JORDAN, AIRLINE REGULATION IN AMERICA 115 (Johns Hopkins Press—Boston 1970).

⁶¹ See generally 49 U.S.C. § 1376 (1964), authorizing subsidies to airlines.

⁶² Mathews, *Certificated Air Service At Smaller Communities: The Need For Service As A Detriment Of Regulatory Policy*, 34 J. AIR L. & COM. 27 (1968).

⁶³ *Id.* at 53, 60.

⁶⁴ W. JORDAN, AIRLINE REGULATION IN AMERICA 115-138 (Johns Hopkins Press—Boston 1970).

service to lower density markets will relieve some of the pressure on the CAB and serve to aid federal policy.

It has been suggested that a state agency applying its authority by reducing rates of intrastate carriers will decrease the profits of interstate carriers, thereby creating a need for larger subsidy expenditures.⁶⁵ If this theory is correct, such state action would conflict with federal policy, but the evidence does not support this conclusion. Previously, it was determined that lower rates greatly stimulated the air transportation market in general.⁶⁶ This provides an opportunity for the interstate carriers to make a larger profit, accordingly decreasing the need to make subsidy expenditures. Therefore it may be determined that TAC rate regulation of intrastate airlines will not contravene the purposes of federal legislation to regulate the rates of interstate air transportation. Such state regulation may indeed aid federal policy by increasing service to smaller communities while making it possible to reduce federal subsidy expenditures to CAB certificated carriers. The conclusion necessarily follows that rate regulation is a proper *function* of the TAC.

TAC RATE JURISDICTION OVER INTRASTATE ROUTES OF CAB CERTIFICATED CARRIERS

An entirely different problem arises in discussing TAC rate jurisdiction over the intrastate routes of CAB certificated carriers. Recently, Texas International and Braniff Airways, Inc. (CAB certificated carriers) submitted special tariff applications to the CAB requesting permission to lower their fares approximately 25 per cent between Dallas and Houston and Dallas and San Antonio. This action was taken in order to meet competition provided by Southwest Airlines, an intrastate airline certificated by the TAC. The CAB staff under delegation of authority indicated an intention to refuse to grant the application on the grounds, *inter alia*, that the CAB lacked jurisdiction over purely intrastate transportation. Upon being advised that their proposals would be denied, Braniff and Texas International withdrew their applications.⁶⁷ Hence it appears that the CAB intends to interpret the

⁶⁵ Taylor, *Economic Regulation of Intrastate Carriers in California*, 41 CALIF. L. REV. 454, 464 (1953); Comment, *State-Federal Economic Regulation of Commercial Aviation*, 47 TEXAS L. REV. 275, 281 (1969).

⁶⁶ In California, competition between intrastate and interstate carriers was expressed in price competition by intrastate airlines. As a result overall passenger fares were comparatively low. Between 1957 and 1964 air passenger travel increased 257% in California. The large increase is attributed to the overall low fares. See discussion *supra* at p. 271 and authorities cited therein. Also, see W. JORDAN, AIRLINE REGULATION IN AMERICA, Appendices Nos. 14(a), 14(B), 14(C) (Johns Hopkins Press—Boston 1970); see also Comment, *Intrastate Carrier—Competitive Impact—Pacific Southwest Airlines*, 32 J. AIR L. & COM. 607, table I at 610 (1966).

⁶⁷ Letter of inquiry from Charles Murphy (Director TAC) to Robert Murphy (Member CAB), June 25, 1971, on file at ST. MARY'S LAW JOURNAL; Letter of reply from Robert Murphy to Charles Murphy, June 30, 1971, on file at ST. MARY'S LAW JOURNAL. See

FAA Act of 1958 as not delegating authority to the Board to regulate rates of intrastate routes serviced by carriers operating under the authority of the CAB. If the CAB formally makes such a ruling, the effect would be to give state authorities exclusive jurisdiction over rates charged to all intrastate air travelers. A ruling of this nature would be difficult to reconcile because the Board would be claiming jurisdiction over economic regulation of interstate carriers on the one hand,⁶⁸ yet concurrently, not claiming rate jurisdiction over interstate carriers on the other hand.

The Board's interpretation of a statute will be upheld as long as the interpretation has ". . . warrant in the record and a reasonable basis in law."⁶⁹ It is questionable whether such a ruling would have a reasonable basis in the law.⁷⁰ Nevertheless, assuming that the Board officially interprets the act in the manner prescribed, and it is upheld in the courts, could the TAC regulate the rates of intrastate routes of CAB certificated carriers? In *Sheboygan v. Industrial Comm'n*,⁷¹ the Wisconsin Supreme Court held (under the Civil Aeronautics Act of 1938) that where the federal government has declined to accept jurisdiction over an area concerning aeronautics, the state governments may take priority. Therefore, due to the CAB's denial of jurisdiction, the Texas Legislature would have the power to pass regulatory legislation upon the subject matter.

In determining whether the TAC has been delegated the authority to regulate the rates of interstate airlines operating wholly intrastate, the same requisites apply as were used to determine the rate making delegation of the Commission over intrastate airlines. The regulation must be a proper *function* of the TAC. In other words, it must (1) encourage the development of aeronautical progress in Texas, (2) aid in accomplishing the purposes of federal legislation, and (3) not overburden an area of regulation within the jurisdiction of federal agencies.

The mere difference in ownership of a carrier would not affect the ability of the TAC to benefit air travelers and the air industry as a whole in Texas. As in the case of intrastate airlines, rate regulation of both intrastate routes of CAB certificated carriers and intrastate airlines

generally C. Rhyne, *Federal, State And Local Jurisdiction Over Civil Aviation*, 11 LAW & CONTEMP. PROB. 459, 471 (1946).

⁶⁸ For example, the CAB issues certificates of public convenience to air carriers that cross state lines.

⁶⁹ *American Airlines v. CAB*, 178 F.2d 903, 908 (7th Cir. 1949).

⁷⁰ It would appear that a reasonable interpretation of the FAA Act of 1958, 49 U.S.C. §§ 1301(10), 1301(21), 1371-1387 (1964), vests in the CAB the jurisdiction to economically regulate all air carriers that cross state borders. Specifically, 49 U.S.C. § 1374 (1964), imposes upon the Board the duty to regulate interstate airline rates. Cf. *Eastern Air Lines, Inc. v. Civil Aeronautics Board*, 294 F.2d 235, 237 (D.C. Cir. 1961), cert. denied, 368 U.S. 927, 82 S. Ct. 363, 7 L. Ed.2d 191 (1961). See discussion *supra* at 267.

⁷¹ *Sheboygan Airways v. Industrial Comm'n*, 245 N.W. 178, 182 (Wis. 1932).

may (1) increase the airline's share of the transportation market (2) improve service quality and (3) decrease the rate of industry failure. In fact, extending the TAC's jurisdiction would increase the Commission's opportunity to perform its functions through rate regulation because the fares of all intrastate flights would be within the jurisdiction of the Commission.

It is debatable whether such rate jurisdiction of the TAC would aid in accomplishing the purposes of federal legislation. In *Airline Pilot's Assoc. International v. Quesda*,⁷² the Second Circuit held that the purpose of the Federal Aviation Act of 1958 was to centralize in a single authority the power to create rules for the maximization of safety and efficiency for the use of the nation's airspace.⁷³ It will be recalled that in *Lichten v. Eastern Airlines, Inc.*,⁷⁴ the court held that the purpose of the federal rate regulation was to vest in a single agency the authority to insure uniformity of rates to all persons.⁷⁵ These policies contemplate interstate air transportation over which the CAB asserts jurisdiction.

CONCLUSION

If the CAB denies jurisdiction over intrastate routes of CAB certificated carriers, how can it be effectively argued that the principles of single agency and uniformity of rates apply? Surely it was not the intent of Congress nor the Texas Legislature to create a class of air carriers that are not susceptible to any type of rate regulation. "It is not in the public interest for an air carrier to enter the field and then operate as it chooses."⁷⁶ One of the purposes behind federal rate regulation of air carriers is to prevent rate wars and discriminatory practices like those which occurred in the railroad industry during the period of the "robber barons."⁷⁷ The very fact that Congress provided for rate regulation of interstate airlines signifies that it does not believe the airline industry lends itself to a free competitive enterprise. Therefore TAC rate regulation of intrastate routes of CAB certificated carriers would serve to fulfill federal policy. It follows that such regulation would be a proper *function* of the TAC. In this event, it would appear that it would be the duty of the TAC to fill the vacuum created by the CAB.

⁷² 276 F.2d 892 (2d Cir. 1960).

⁷³ *Id.* at 894.

⁷⁴ 189 F.2d 939 (2d Cir. 1951).

⁷⁵ *Id.* at 941.

⁷⁶ Application of Island Airlines, Inc., 384 P.2d 536, 542 (Hawaii 1963).

⁷⁷ A. THOMAS, ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORTATION 118 (1951).