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COMPULSORY INSURANCE FOR AIR CARRIERS

By Stuart G. Tipton and Russell S. Bernhard

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ON December 16, 1952, the Civil Aeronautics Board promulgated a proposed economic regulation which, if adopted, would impose on the certificated air carriers compulsory financial responsibility requirements with respect to the payment of certain tort liabilities.[1] In substance and practical effect the regulation would require the certificated air carriers to maintain insurance policies of a specified type, in prescribed limits, and only with Board approved insurance companies.

This regulation, if enacted, will be a complete departure from any of the fields of regulation the Board has heretofore occupied with respect to the certificated air carriers. Such action, moreover, would subject the certificated air carriers to a form of regulation that has not been imposed upon any other type of common carrier other than motor carriers; and even in the case of motor carriers, such regulations have been imposed only with express Congressional or legislative sanction. Grave doubts exist as to whether the Board actually has the legal authority to invade this highly important field of air carrier management, and, even if it should be found to have such power, as to whether the economic facts justify the exercise of such power.

I. The Legal Authority

A. Scope of Board Authority to Issue Regulations

In compliance with the requirements of Section 4 (a) of the Administrative Procedures Act (5 U. S. C. 1003), the Board has specified Sections 205 (a), 401, 402 and 416 (a) of the Civil Aeronautics Act as the basis for its authority to issue the proposed regulation. The relevant portion of Section 205 (a) reads as follows:

> "The Board is empowered to issue such . . . regulations, . . . pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

This is a specific and limited grant of authority. Regulations issued

[1] CAB Economic Regulation Draft Release No. 58, 17 Fed. Reg. 11700. The scope of this regulation also includes non-certificated air carriers, but this article is addressed only to the regulation as applied to the certificated air carriers.

in accordance with this section must be *"pursuant to and consistent with the provisions of this Act."* Section 205 (a) is *not a general* grant of regulatory authority under which the Board may issue any regulation, pertaining to the operation, management and general affairs of air carriers under its jurisdiction, which it deems necessary and in the public interest. The unambiguous language of Section 205 (a) authorizes the Board to issue only such regulations as implement those powers which Congress has expressly conferred upon the Board by specific provisions in the Act.

Similarly, Section 416 (a) authorizes the Board to establish classes of air carriers and to establish:

> ". . . such just and reasonable rules, and regulations, *pursuant to and consistent with the provisions of this Title,* to be observed by each such class or group, as the Board finds necessary in the public interest." (Italics added)

Here, again, the authority of the Board to issue rules and regulations is expressly made subject to the condition that such regulations must be "pursuant to and consistent with" the provisions of Title IV of the Act.

Even apart from the precise limitations in Sections 205 (a) and 416 (a) on the Board's power to issue regulations, the law on the subject of the authority of administrative agencies to issue regulations establishes identical limitations. In *Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129, 80 L. Ed. 528, the Supreme Court said, at p. 531,

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."

In *Peoples Bank v. Eccles,* 161 F. 2d 636, the question arose as to the validity of a Federal Reserve Board regulation applicable to bank holding companies. The U. S. Court of Appeals for the District of Columbia, at pages 640-641, in holding the regulation unlawful, stated as follows:

> "Whether the Board of Governors has the power, in the effort to implement its theory that the enlargement of bank holding companies should be forbidden, to deny to Transamerica its right, otherwise entirely legal, to purchase and own shares in the Peoples Bank, depends on whether the Federal Reserve Act expressly or impliedly confers such authority. In other words, the validity of Condition No. 4 as a curb to the growth of a bank holding company depends upon whether the Congress intended to authorize the Board to arrest the extension of such companies. If such a legislative intent does not appear, grave doubt arises as to the right of the Board to form such an intent for itself. Furthermore, if a contrary intent on the part of Congress be found, unquestionably the Board's assumption of the power to check the expansion of bank holding companies amounts to an invasion of the legislative field. All the Board's power

springs from the statute. An administrative agency may have a wide latitude within which to function, and may be authorized to prescribe regulations which must be observed by those subject to its jurisdiction. But its regulations must fall within the limits of the authorizing statute, and must be such as will carry into effect the will of Congress. The broad discretion confided to the Board of Governors continues only so long as it acts within its statutory scope. When the Board reaches the border of the Federal Reserve Act it must stop, for to go beyond would be to impinge on Congressional prerogatives . . .

"The Act goes no further, with respect to limiting the activity of a holding company, than to provide that one which owns a majority of the shares of a member bank may not vote such shares without first obtaining a permit from the Board of Governors . . . This limited statutory restrictions upon bank holding companies, which contrasts strikingly with the broad restraint imposed by the Board in the present case, has added significance when considered in the light of certain legislative history of the Federal Reserve Act. From that history it is learned that the Congress, quite deliberately and because of what it considered an abuse of a power which it theretofore granted to the Board in broad general terms, provided that the Board of Governors may only impose such conditions upon a bank's admission to the System as are within and pursuant to the legislative intent in adopting the Act."[2]

The very recent decision of the Supreme Court in *American Trucking Assoc., Inc. et al v. I.C.C.*, U. S. Sup. Ct. No. 26, Oct. Term 1952, decided January 12, 1953, 21 L.W. 4096, confirms the foregoing principles relating to the scope of an administrative agency's power to issue regulations. In that case the validity of an I.C.C. regulation applicable to truck leasing was in question. The regulation was issued by the I.C.C. after long investigation of the problem, extended hearings, and detailed findings of fact. The motor carriers, in opposing the regulation, argued that the I.C.C. exceeded its authority in issuing the regulation because there was no express provision in the Act applicable to the subject of truck leasing. The Supreme Court, however, found that such power could be directly implied from various specific provisions of the Act, saying (21 L.W. 4099):

"Moreover, we must reject at the outset any conclusion that the rules as a whole represent an attempt by the Commission to expand its power arbitrarily; there is clear and adequate evidence of evils attendant on trip leasing. The purpose of the rules is to protect

[2] See also: *Miller v. U. S.*, 294 U. S. 435, 79 L. Ed. 977, (regulations promulgated by the Veterans Administration); *U. S. v. George*, 228 U. S. 14, 57 L. Ed. 712, a regulation by the Commissioner of the General Land Office; *Morrill v. Jones*, 106 U. S. 466, 27 L. Ed. 267, a customs regulation by the Secretary of the Treasury; *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449, a regulation issued by the Secretary of the Interior; *Rodney Milling Co. v. U. S.*, 75 Fed. Supp. 707, *U. S. v. 200 Barrels of Whiskey*, 95 U. S. 571, 24 L. Ed. 491, and *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 68 L. Ed. 1034 (regulations of the Bureau of Internal Revenue); *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 74 L. Ed. 1063 (rules of the Commissioner of Prohibition); *Osborne v. United States*, 145 F. 2d 892 (regulations of the Secretary of Agriculture); and *Stearn v. United States*, 87 F. Supp. 596 (regulations of the Interstate Commerce Commission).

the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system. Sections 216 (b) and 218 (a) of the Act, for instance, require the filing of a just and reasonable rate schedule by each common carrier, and the violation of these rates and the demoralization of rate structures generally are a probable concomitant of current leasing practices. Section 204 (a) (2) requires the Commission to impose rules relating to safety of operation for vehicles and drivers. These are likewise threatened by the unrestricted use of nonowned equipment by the common carriers. And the requirements of continuous service in § 204 (a) (1), of observance of authorized routes and termini under §§ 208 (a) and 209 (b), and the prohibitions of rebates, §§ 216 (d), 217 (b), 218 (a) and 222 (c), also may be ignored through the very practices here proscribed. So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress."

Thus, the regulation proposed by the Board is invalid unless the Board has express or implied power under the Act to regulate air carrier financial responsibility for payment of tort judgments, or unless such authority is essential to carry out an express power.

B. Express Authority Under the Civil Aeronautics Act

The word "insurance" does not appear anywhere in the Act, nor is there any reference in the Act to the liability or responsibility of an air carrier to pay damages on account of liability incurred as a result of death of passengers or other persons, or of property damage, or for any other reason. The only appearance of the word "liability" in the Act is in Section 504 (an amendment added in 1948) under which Congress specifically exempted lessors and owners of security interests in aircraft from liability for injuries to or death of persons, or damage to or loss of property, on the surface of earth, caused by such aircraft, when not in the actual possession or control of such lessor or security owner.

C. Implied Authority Under the Civil Aeronautics Act

It may be contended that the Board's power to regulate the method by which air carriers shall meet their financial obligations in connection with tort liability arises, not expressly or by implication from any particular provision of the Act, but impliedly from the entire content of Part IV of the Act. Such a contention not only is subject to grave doubt on constitutional law grounds (hereinafter discussed), but examination of Sections 401 and 402 of the Act, consideration of the nature of the regulatory scheme established by the Act, analysis of the structure of the Act, review of the history of air carrier financial responsibility legislation, and the intent of Public Law 15 of the 79th Congress, all completely dispel any notion that Congress may have intended to confer such authority upon the Board by implication.

(1) *Authority to Attach Conditions to a Certificate*

The Board cites Sections 401 and 402 as the basis for implied authority for the proposed regulation. Section 401 (f) authorizes the Board to "attach to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require." Section 401 (h) authorizes the Board to "alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require." Sections 402 (f) and 402 (g) grant similar powers to the Board with respect to foreign air carrier permits. However, these provisions give the Board no power to regulate the methods by which carriers secure funds to pay tort judgments. The Board's power to attach conditions to a certificate or permit is broad, but it is not unlimited. The conditions must be directly related to the exercise of the privilege granted by the certificate.

The Supreme Court, on numerous occasions, has held that an administrative agency may not use a power to impose conditions as a basis for expanding its substantive powers into new fields. Thus, in *Interstate Commerce Commission v. Cincinnati, N.O. & T.P.R. Co.*, 167 U. S. 479, 42 L. Ed. 243, a case decided prior to the time the I.C.C. had express power to fix rates, the Supreme Court held that the I.C.C. could not use its express power to determine the reasonableness of rates as the basis for imposing conditions which would, in effect, amount to the prescribing of rates by the I.C.C. In *U. S. v. Pennsylvania R. Co.*, 242 U. S. 208, 61 L. Ed. 251, the I.C.C. was prevented from requiring a railroad to supply tank cars to a shipper, notwithstanding the express duty of carriers under the Act to furnish transportation upon reasonable request therefor and the express authority of the Commission to execute and enforce the provisions of the Act. The Supreme Court said, at page 61 L. Ed. 261: "A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute." In *Waite v. Macy*, 246 U. S. 606, 62 L. Ed. 892, the Supreme Court held that the Treasury Department's Tea Board had in fact usurped power not granted to it by the Tea Inspection Act by imposing as a condition of exclusion the presence of harmless coloring matter in tea, when the Act permitted it to exclude tea only if inferior to the established standards of purity, quality, and fitness for human consumption. In *U. S. v. Chi., M., St. P. R.R. Co.*, 282 U. S. 311, 75 L. Ed. 359, a condition imposed by the I.C.C., requiring a particular financial settlement to be made by a railroad as a prerequisite to I.C.C. approval of a security issue, was held by the Supreme Court to exceed the express or implied power granted to the I.C.C. under its statutory duty to approve or disapprove securities to be issued by railroads.

The Board's power to attach terms and conditions to a certificate, under Section 401 (f) of the Act, is therefore necessarily limited to

matters germane to the exercise of the privilege granted by the certificate. That privilege is the right to operate aircraft in common carrier service between designated points and over specified routes. The conditions which the Board may attach to a certificate must be directly related to the providing of such service. The Board presumably has recognized this limitation in the past, because the conditions so imposed have related specifically to the manner of performing the authorized service, such as non-stop limitations, traffic limitations, airport limitations, and similar operating conditions.[3] Indeed, the very language of Section 401 (f), in describing certain types of conditions the Board may not impose, likewise refers exclusively to operating matters.

The manner in which an air carrier may derive the necessary funds to pay a judgment based on a tort claim arising out of an aircraft accident is a subject entirely apart from that of physically operating aircraft in common carrier air service. If the Board could, by a condition in the certificate, require the air carrier to provide for the payment of such debts in a particular manner, it also presumably could impose a condition requiring the air carriers to pay its bills for gasoline in a specified way, or a condition requiring the air carrier to obtain its financing and to issue its securities in a prescribed fashion. In fact, if the Board's authority to impose conditions may relate to anything the Board deems to be in the public interest, as the Board contends at Page 2 of its Draft Preamble, and is not limited to matters germane to the exercise of the specific privilege granted by the certificate, then all the other powers expressly granted to the Board with regard to air carrier regulation are mere surplusage. All such powers could be derived simply by imposing conditions in the certificate. Obviously, such broad power was never intended by Congress to be vested in the Board by the inconspicuous provision in Section 401 (f) authorizing the Board to attach reasonable conditions to the exercise of the privilege granted by the certificate.

(2) *Air Carrier Regulation Generally*

Under the doctrine of *American Trucking Associations, Inc., et al, v. I.C.C.*, supra, if the Board were to establish that its power to regulate the air carriers under the Civil Aeronautics Act is jeopardized by the absence of an obligation imposed upon the air carriers to provide for the payment of their tort liabilities in a particular manner, then a basis for implied authority to issue the proposed regulation presumably might be found. No such contention, however, is made by the Board; and the fifteen-year history of effective air carrier regulation under the Act would make such a contention absurd on its face. Rather, the entire basis advanced by the Board for its proposed action is to the effect that Congress has overlooked a field of legislation in which the Board feels that Congress should have acted; and because Congress did not act in such field, the Board is taking it upon itself so to act.

[3] See the Board's Economic Regulations Parts 202 and 203.

Such a usurpation of legislative authority in the field of common carrier financial responsibility legislation is not without precedent. Financial responsibility regulations applicable to common carrier motor vehicles are presently in force in many states; but in every state where such a regulation now exists, it has been put into effect by the appropriate state regulatory agency *pursuant to a specific statutory authorization.* However, in two instances state regulatory agencies attempted to adopt such financial responsibility regulations under general statutes granting such agencies authority to regulate common carriers, but without specific legislative authority to deal with the subject of financial responsibility, and in both instances such action was held to be unlawful.

In *West et al v. Sun Cab Company, Inc.,* 160 Md. 476, 154 Atl. 100 the Public Service Commission of Maryland required the Sun Cab Company, which operated about two-hundred taxicabs in Baltimore, "to take out and carry public liability insurance in a responsible insurance company or companies and in a form satisfactory to the Commission, and in the amount of $10,000 for any one person and $20,000 for any one accident . . ." In lieu of this requirement, the company was authorized to maintain an indemnity reserve fund of not less than $100,000. The taxicab company obtained an injunction on the ground that the Commission had no authority to impose such a condition or regulation. On appeal, the Court of Appeals of Maryland sustained the injunction, saying:

> ". . . There is only one question involved, and that is the power of the commission to require taxicab owners to take out indemnity insurance as a prerequisite to a permit to operate cabs in this state . . . The appellant admits there is no statutory provision which in terms authorizes it to impose on any taxicab owner the condition that, before he can engage in the business of conveying passengers for hire he must take out indemnity insurance, but contends that the authority is among the implied powers of the commission, and that the logical and reasonable construction of the Act . . . (citations omitted) . . . warrants the passage of the orders in this case as conducive to the safety of passengers and others using the public streets. There is no dispute of the authority of the commission over the operation of taxicabs.
>
> "It is provided . . . by section 373 that 'whenever the commission shall be of the opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or services of any common carrier or other such corporation in respect to any services, transportation of persons, freight or property within this state are unjust, unreasonable, unsafe, unreasonably improper or inadequate, the commission shall determine the just, reasonable, safe, and reasonably adequate and proper regulations, practices, equipment, appliances and service to be in force and to be observed in respect to such transportation of persons, freight and property, and so fix and prescribe the same by order' . . .
>
> "The powers of the commission are such as are conferred by the Act of 1910, chapter 180, and amendments, known as the Public Service Commission Law, and all its acts are legislative; but, unlike

the Legislature, it is limited strictly to the power so delegated. . . . It exercises a naked statutory authority, and has no power save such as were expressly granted to it by the Legislature and such implied powers as are necessary to enable it to exert its express powers . . .

"The appellant contends in effect that, while the Legislature did not in terms require cabs or motor vehicles operated for hire to take out indemnity insurance, it intended that they should and that its intention is expressed by the 'practices' and 'safety' clauses in the act. We do not have any expression of the Legislature in the act as to what its purpose or intention was, but we do have the construction which an administrative board or creature of the Legislature, from which the board derives all its authority, places on it. It assumes to do what the Legislature has not done. The construction of the law is a judicial function, and, unless the language of a statute is so clear and unambiguous as to construe itself, it is for the courts to say what the Legislature means and intends . . .

"The contention is made here that the order establishes a practice which would tend to public safety. . . . In none of these do we see any meaning or interpretation ascribed to the word from which it might be inferred that the 'practices' of a public utility or carrier have to do with anything except its physical operations which have been or, after an order of the commission, would become customary and usual.

"We cannot, therefore, justify the action of the commission on the ground that it is or would be one of the 'practices' intended by the statute, nor do we think it can be supported under the safety clauses of the act. It is not a device, contrivance, equipment, facility, practice, operation, or regulation having any relation to public safety. Such a requirement as the order of the commission imposes is legislative, and, until the Legislature speaks, those who use the public roads and streets of this state for business or pleasure are not required to do anything except to pay their taxes and license fee required by the Motor Vehicle Act, subject to such regulations as are required by law."

In *Patrick et al, Public Utilities Commissioner of the District of Columbia v. Smith,* 45 F. 2d 924, the validity of a financial responsibility regulation applicable to motor common carriers was in issue. The regulation required evidence of financial responsibility as a prerequisite to obtaining a taxicab license. The statute under which the Commission issued the regulation provided that public utilities in the District of Columbia may be "required to furnish service and facilities reasonably safe and adequate" and the Commissioner was given full power to issue regulations implementing the Statute. In holding the regulation to be invalid, the Court of Appeals of the District of Columbia said (P. 925):

"We are of the opinion that the commission exceeded the powers granted to it by the act in promulgating the regulation in question, and accordingly hold that the decree of the lower court enjoining its enforcement is right.

"The provisions of paragraphs 2, 92, and 96, of section 8, supra, plainly relate to the material equipment and facilities of all utilities within the District and their actual physical operation; also to the efficiency of the service rendered by them, and the regulation of the rates charged by them. The act contains no mention or implication

of any authority delegated to the commission to make or enforce such a regulation as is involved herein. And, in view of the fact that such a regulation necessarily imposes a substantial tax upon a class of persons within the District, which may be diminished or increased at the discretion of the commission, it is not to be presumed that such authority would be granted by mere implication in the act.

"It must be remembered that the Congress of the United States exercises exclusive legislative powers within the District of Columbia, and the Public Utilities Commission is merely an administrative agency . . ."

(3) *Structure of the Civil Aeronautics Act*

The very structure of Title IV of the Act, which provides for the economic regulation of air carriers, negates the concept of implied power in the Board to impose the type of regulation in question. Title IV follows a clearly defined pattern of granting specific power to the Board, with respect to those subjects where regulation was deemed by Congress to be necessary. Thus, as examples, Sections 401 and 402 prescribe certificates and permits as prerequisites of air-carrier and foreign-air-carrier operations, and the Board is authorized to approve or reject applications for such certificates or permits; Section 403 requires the filing of tariffs and authorizes the Board to reject tariffs which are inconsistent with the Act or the Board's tariff regulations; Section 406 authorizes the Board to fix mail rates; Section 407 authorizes the Board to prescribe accounting practices; Sections 408 and 409 authorize the Board to approve otherwise prohibited inter-carrier and personal relationships and dealings; Section 410 authorizes the Board to disapprove the granting of financial aid to air carriers by other government agencies; Section 1002 (d) authorizes the Board to prescribe the lawful rates to be charged by air carriers for interstate and overseas air transportation, and to establish through service and joint rates in interstate and overseas air transportation.

Congress has, beyond any question, granted to the Board extensive authority to regulate the air carriers; but the authority so granted is not unlimited. Congress has seen fit to withhold from the Board various powers of regulation which government agencies regulating common carriers often are granted. Thus, as examples, the Board has not been granted authority to regulate contract-air-carrier operations, or brokerage in air transportation services, or issuance of air-carrier securities, or rates in foreign air transportation, or bills of lading and liability to the public, or security for the protection of the public in obtaining payment of judgments against air carriers.

Congress obviously was not unaware of these other tools of carrier regulation which were being withheld from the Board. The Civil Aeronautics Act of 1938 was closely patterned after the Motor Carrier Act of 1935. Yet, in the Motor Carrier Act (passed by Congress only three years earlier), Congress specifically granted to the Commission many of the very powers it withheld from the Board. Thus, Section 209 of the Motor Carrier Act prohibits the operation of contract motor

carriers unless authorized by the Commission; Section 211 prohibits brokerage in motor carrier transportation unless authorized by the Commission; Section 214 prohibits the issuance of securities by motor carriers unless authorized by the Commission; Section 215 prohibits a certificate or permit from remaining in force unless insurance or some other form of protection of the public in connection with liability for personal injuries and property damage has been filed with and approved by the Commission; and Section 219 prescribes full-value liability of motor carriers for loss or damage of cargo and authorizes the Commission to establish limitations upon such liability.

Each of the foregoing fields of regulation is unequivocally omitted from the Civil Aeronautics Act, yet each specifically appears in the Motor Carrier Act passed by Congress only three years earlier. Had Congress intended to grant the Board authority in those fields, it could readily have done so. The precise language of the Motor Carrier Act was available as a pattern. The only reasonable conclusion is that Congress did not intend that the Board should have these powers. The Board, on repeated occasions, has admitted that it does not have authority under the Act to regulate contract air carriers, or air-transportation brokers, or air-carrier security issuances. Yet, the lack of authority to act in these fields rests on no different basis than the lack of authority to regulate air-carrier insurance and financial responsibility for payment of tort claims.

(4) *Legislative History*

It is not necessary, however, to determine the intention of Congress from a comparative analysis of the Act. Congress has fully expressed its views on this subject.

(a) *H.R. 1012* (78th Cong.)

H.R. 1012, 78th Congress, proposed extensive amendment to the Civil Aeronautics Act of 1938, and related legislation.

The bill, as originally introduced, contained an "Air Carrier Liability Act" which would have authorized the Board to require liability insurance. Section 210 (a) of the proposed Liability Act required operators of aircraft engaged in air commerce to "comply with such reasonable rules and regulations as the Civil Aeronautics Authority shall prescribe governing the filing and approval of insurance policies, surety bonds, or qualifications as a self-insurer, in such reasonable amount as the Authority shall require, conditioned to pay any final judgment rendered under the provisions of this title."

The provisions relative to compulsory insurance were deleted from the bill by the House Committee on Interstate and Foreign Commerce, along with other provisions relative to air-carrier liability, on the ground that the Committee desired to study the matter further before making recommendations.[4]

[4] House Report, No. 124, 78th Congress, p. 7.

A review of the hearings held before the House Committee on H.R. 1012 in February and March, 1943, indicates that the framers of the Civil Aeronautics Act of 1938 would be surprised at the Board's present assertion of power to require compulsory liability insurance. Chairman Lea twice referred during the hearings to the deliberate omission from the Civil Aeronautics Act of 1938 of any provision for compulsory insurance.

Chairman Lea said, at p. 79:

> "When the Civil Aeronautics Act was passed, the air lines were in more or less difficulty in securing insurance. That was one of the problems, the specific treatment of which we omitted from the bill, or the act."

Chairman Lea also said, at p. 367 of the Hearings:

> "In connection with the enactment of the Civil Aeronautics Act of 1938, the problem of insurance for air carriers was developed. The committee concluded to omit specific legislation on that question, thinking that perhaps there would be a development of experience that would better guide us as to what, if anything, should be done. It is, of course, apparent that the question of insurance is a very practical part of the problem of aviation on account of the high cost of insurance.
>
> "Judging by what has been reported here and what the committee has learned, it would seem that the committee should very properly consider giving the Civil Aeronautics Board some authority in reference to insurance with a view of, in the first place, being assured that the insurer is a responsible party to carry out the obligation he assumes, and that the terms of the policy of insurance should be consistent with the proper protection to the carriers and to the persons who are beneficiaries under the insurance and also that so far as practical provision be made to secure reasonable rates for such insurance and reinsurance."

(b) *Other Bills* (78th Cong.)

In October, 1943, the House Committee on Interstate and Foreign Commerce reported H.R. 3420, a bill designed to replace H.R. 1012. H. Report No. 784, 78th Congress. A minority of the committee at the same time submitted H.R. 3491, a similar bill in substitution for H.R. 1012.

Both of these included a proposed Section 1106 which would have required the Board "to keep itself informed concerning the business of insuring and reinsuring aviation risks," and to "from time to time report to Congress concerning the adequacy and reasonableness of aviation insurance and reinsurance."

Thereafter, Congressman Bulwinkle discussed the insurance provisions of H.R. 3420 in an extension of remarks on January 10, 1944.[5] He said, in part:

[5] "Misconceptions about the Lea Civil Aviation Bill, H.R. 3420." Cong. Record, 78th Congress, Appendix, p. A-20, A-22.

"L. The Lea Bill Does Not Regulate Insurance or Put the Government in the Insurance Business

"It has been said that the bill provides for Federal regulation of aviation insurance and puts the Government in the insurance business.

"This is untrue.

"The bill only provides, in section 1106, that the Commission shall study aviation insurance, consult with State agencies regulating aviation insurance, and make reports to Congress. Surely Congress is entitled thus to secure information on a matter which so profoundly affects all phases of aviation."

Meanwhile, Congressman O'Hara introduced another bill, H.R. 5020, which would have added to the Civil Aeronautics Act of 1938, a title dealing with the liability of air carriers. Section 1220 of the bill provided that "Carriers shall comply with such reasonable rules and regulations as the Civil Aeronautics Board shall prescribe governing the filing and approval of insurance policies, surety bonds or qualifications as a self-insurer, in such reasonable amount as the Board shall require, making provision, to the extent reasonably possible, for liability imposed under this article."

In comment on this bill, Congressman O'Hara said,[6]

"In addition, in order to make certain that any recovery granted to a passenger or shipper is promptly paid, the bill grants to the Civil Aeronautics Board authority to make regulations requiring appropriate liability insurance. The bill would also help the air lines to plan their insurance programs with certainty by prescribing limitations upon the extent to which a passenger or shipper could recover."

The fact that these several bills, dealing with the subject of compulsory aviation insurance, were introduced in the 78th Congress, plus the enlightening remarks of their sponsors, particularly Congressman Lea, who participated so actively in drafting the Civil Aeronautics Act of 1938, clearly indicate that Congress in 1943 did not construe the Civil Aeronautics Act as authorizing the Board, by regulation, to require air carriers to maintain liability insurance.

(c) *Act of June 16, 1948, 62 Stat. 470*
(Sec. 504, Civil Aeronautics Act)

Congress, on June 16, 1948, enacted specific legislation dealing with the subject of liability for injuries to or death of persons, and for damage to or loss of property, on the surface of the earth, caused by aircraft. That Act (Section 504 of the Civil Aeronautics Act) specifically relieved lessors of, and owners of security interests in, air-craft from such personal-injury and property-damage liability; but Congress did

[6] Extension of remarks of June 14, 1944, Cong. Record, Appendix, p. A-3236.

not see fit, even when dealing specifically with this subject of liability for aircraft accidents, to prescribe insurance or other financial-responsibility requirements applicable to those persons who were not relieved of liability under the Act of June 16, 1948, and whose liability to the public for aviation accidents continued.

(d) *H.R. 8126* (81st Cong.)

H.R. 8126, 81st Congress, proposed to add a Section 505 to the Civil Aeronautics Act. Paragraph (b) of the proposed section read as follows:

> "(b) The Civil Aeronautics Board shall, within one hundred eighty days after the date of enactment of this section, make regulations requiring that no civil aircraft shall be operated in air commerce unless the owner thereof has given proof of his ability to respond in damages in such amounts as the Board shall prescribe for the death of any person, and for the injury to persons or property resulting from the operation of such aircraft in air commerce. Such proof may be the bond of a surety company, a policy of insurance, or such other assurances as the Board may prescribe."

An extensive hearing was held on this bill before a subcommittee of the House Committee on Interstate and Foreign Commerce. At page 24 of the Committee Hearings on this bill, its sponsor, Mr. McGuire, stated:

> "Mr. Chairman, at a subcommittee hearing of this committee on March 13, I was surprised to learn that owners of aircraft are not required by law to show financial responsibility in case of accident. Since there are more than 100,000 private and commercial airplanes now circulating on our airways, it is incumbent upon us to correct this dangerous situation. For this reason I have introduced H.R. 8126."

There is no suggestion in any of the comments of any committee member, or any of the numerous other persons who testified on behalf of various government agencies, the insurance companies, the air carriers, private fliers, and the public, regarding H.R. 8126, that the Civil Aeronautics Board already had the power to issue regulations requiring insurance or other evidence of financial responsibility. The entire direction of the testimony and the remarks by committee members was toward the question of whether this was a power that should be given to the Board, and it was not given. The bill was not reported out of committee.

(e) *H.R. 7270* (82nd Cong.)

On March 27, 1952, Mr. Clement introduced a bill, H.R. 7270. The language of this bill is the same as that of H.R. 8126 (81st Congress) discussed above. The bill was referred to the Committee on Interstate and Foreign Commerce. No action has been taken on it to date.

In view of the statements by Chairman Lea in 1943, with reference to the original Civil Aeronautics Act of 1938, on the subject of air carrier compulsory insurance and financial responsibility requirements,

and the repeated attempts in the 78th, 81st, and 82nd Congresses to enact such legislation, plus the actual legislation touching on the subject of liability in the 80th Congress, the contention that such power has already been conferred on the Board by implication in the original Civil Aeronautics Act of 1938 is indefensible.

In the very recent decision of the Supreme Court of the United States concerning the steel-company seizures (*Youngstown Sheet and Tube Co. et al.* v. *Charles Sawyer,* No. 744–Oct. term 1951, Decided June 2, 1952) Mr. Justice Frankfurter discussed the subject of "implied power" and said:

> "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process.* * *"

(5) *Effects of Public Law 15, 79th Congress*

The imposition by the Board of compulsory financial responsibility requirements necessarily would involve specifications as to the terms, conditions, and provisions of the insurance the air carriers could purchase and the persons from whom they could purchase. The Board's proposed regulation, in fact does just that. By so prescribing, in a regulation, the circumstances under which air carriers must obtain their insurance, the Board would be, in effect, regulating the insurance companies themselves by prescribing not only the type of insurance that such companies must sell, if they are to remain in the business of writing aviation insurance, but also the particular companies which may continue to write aviation insurance.

Every insurance company authorized to sell insurance in the United States is today subject to the jurisdiction of the Insurance Commission of at least one State. Those Commissions have the authority to approve, disapprove, or prescribe the terms, conditions, and provisions of insurance policies issued by companies under their jurisdiction, and they have the authority to establish the financial and managerial standards required of companies engaging in the insurance business under their jurisdiction.

The authority of State Insurance Commissions to regulate companies insuring interstate transportation enterprises is expressly confirmed by Public Law 15 of the 79th Congress (15 USC 1011-12), which was enacted in 1945 following a decision by the United States Supreme

Court that insurance was subject to regulation by the Federal government under the Commerce Clause of the Constitution.[7]

The Civil Aeronautics Act does *not* specifically relate to the subject of insurance. Therefore, under the provisions of Public Law 15, the Civil Aeronautics Act may not be construed in a manner which would permit any action thereunder to invalidate, impair, or supersede the regulation of the insurance business by any State.

A regulation issued by the Board which would compel an insurance company either to change the form of its existing aviation insurance policy, a form which has been approved by the State Insurance Commission having jurisdiction over that company, or to discontinue writing aviation insurance, would beyond any doubt be invalidating, impairing, and superseding the applicable State insurance law. Such regulation would be in direct contravention of Public Law 15. Furthermore, a regulation issued by the Board, under which an insurance company, duly authorized to issue aviation insurance by the appropriate State Insurance Commission, could be declared by the Board as unqualified under its regulation to issue aviation insurance, would also directly contravene the express provisions of Public Law 15.

Such action by the Board, moreover, would inevitably lead to jurisdictional conflicts between the Board and the State Insurance Commissions. The victims of such conflicts will be not only the aviation insurance underwriters, who will be placed in the impossible position of endeavoring to comply with conflicting regulations, but also the air carriers themselves, with both their insurance and operating authority in jeopardy pending the resolving of those conflicts. The injurious effect upon the air carriers of a conflict between Board jurisdiction and the jurisdiction of State regulatory agencies was fully demonstrated recently in California. In view of the very specific prohibitory language of Public Law 15, and the obvious detriment to the air carrier interests that a jurisdictional conflict would engender, the Board should not endeavor to imply from the Civil Aeronautics Act a non-existent Power.

D. Delegation of Legislative Authority

If, notwithstanding the clear structure of the Act and legislative history to the contrary, it were to be assumed that Congress by implication intended in the Civil Aeronautics Act to authorize the Board to regulate air carrier insurance and financial responsibility for payment

[7] The pertinent portions of Public Law 15 are the following:

"*Sec.* 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"*Sec.* 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance* * * * " (Emphasis added).

of tort judgments, such delegation of legislative authority would be unconstitutional.

In *Panama Refining Co. v. Ryan,* 293 U.S. 388, 79 L. Ed. 446, the Supreme Court concluded that certain regulations, relating to the transportation of oil, issued by the President under Section 9 (c), of the National Industrial Recovery Act, were unlawful because they were issued pursuant to an unlawful delegation of legislative power by Congress. Chief Justice Hughes, in presenting the opinion of the Court, reviewed the entire history of this constitutional-law question. In reaching the conclusion that these regulations were unlawful, he stated:

> ". . . We look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition . . . Section 9 (c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibtion, or not to lay it down, as he may see fit. . .
>
> "We turn to the other provisions of title I of the Act. The first section is a 'declaration of policy.' . . . This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited,—nothing as to the policy of prohibiting, or not prohibiting, the transportation of production exceeding what the States allow . . . It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to the particular subjects to be declared and defined, if at all, by the subsequent sections . . .
>
> "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute . . . In every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of cir-

cumstances and conditions in which the transportation is to be allowed or prohibited."

Similarly, in *Schecter v. U. S.,* 295 U.S. 495, 79 L. Ed. 1570, the Supreme Court unanimously held that regulations issued by the President under Section 3 of the Recovery Act were unlawful. In that case, Chief Justice Hughes said (p. 1584):

"... Congress cannot delegate legislative power to the President to exercise unfettered discretion to make laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

Justice Cardozo, in his concurring opinion in the *Schecter Case* said (p. 1591):

"The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Ref. Co. v. Ryan,* 293 U.S. 388, 440, ante, 446, 55 S. Ct. 241.

"This court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Ref. Co. v. Ryan,* supra. I thought that ruling went too far. I pointed out in an opinion that there had been 'no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases,' 293 U.S. at p. 435. Choice, though within limits, had been given him 'as to the occasion, but none whatever as to the means.' Ibid. Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them."

The issuance of a compulsory financial responsibility regulation by the Board upon the basis of an *implied* power, although the Act nowhere specifies standards as to when, in what circumstances, under what conditions, or upon whom such regulations shall be applied, and nowhere even mentions the subject of air carrier financial responsibility—would be precisely the type of action condemned by the Supreme Court in the *Panama Refining Company Case* and the *Schecter Case.* Although under some circumstances a power to act may be implied, the legislative standards governing the exercise of such implied power cannot also be implied. The Board apparently conceives its power under the Act to include the type of "roving commission" which Justice Cardozo so clearly denounced. Such implied authority, if it does exist, is clearly an unconstitutional delegation of legislative authority.

II. Economic Justification

Assuming *arguendo* that the Board has authority to issue a compulsory insurance regulation, the question then arises as to whether the Board should do so.

A. *The Board's Reasons*

The Board has advanced several reasons in support of the proposed regulation, but none of them are substantial, and they have only a superficial persuasiveness. Among the more prominent of the reasons are the following: first, protection of the public with respect to collection of judgments against air carriers; second, protection of the air carriers against the effects of excessive losses from accidents; third, furtherance of public safety; and fourth, enhancement of public acceptance of commercial aviation.

The public should have assurance that judgments obtained against air carriers as a result of accidents will be paid, and admittedly insurance is one means of providing such assurance. It does not follow, however, at least insofar as the certificated air carriers are concerned, that a compulsory financial responsibility regulation is required to provide the public with such protection. The certificated air carriers all carry insurance of the types prescribed by the Board in its proposed regulation and with fully adequate limits; and they have voluntarily done so for many years. In addition to such insurance, moreover, many of the certificated air carriers have a net worth greatly in excess of any insurance limits suggested by the Board. These facts are well known to the Board, both as a result of periodic audits of the certificated air carriers by the Board and as a result of various surveys of air carrier insurance conducted by the Board. Moreover, in the entire history of civil aviation in the United States, no certificated air carrier has ever been known to default in payment of a personal injury or property damage judgment against it arising out of an accident. The fact that the certificated air carrier must establish, as a prerequisite to obtaining a certificate, that it possesses adequate managerial and financial ability is, of course, a significant contributing factor to this unassailable record of financial responsibility.

The necessity of government regulation in certain fields of common carrier operation is, of course, recognized. Insurance, however, is not one of those fields. Neither the railroads nor the steamship companies have been subjected to compulsory insurance or financial responsibility regulations, and the record of the certificated air carriers in meeting payments of claims is clearly as good as, if not better than, any other form of carrier. Only the Motor Carrier Act of 1935 provides for such regulation; and when Congress was considering that legislation the testimony presented indicated that there was a great number of motor carriers that had neither the financial responsibility nor the insurance coverage to protect the public. But where, as here, the evidence is precisely to the contrary, and the certificated air car-

riers have fully demonstrated their capacity for responsible self-management in meeting their financial obligations to passengers and the public, government intervention is totally unwarranted.[8]

Although the Civil Aeronautics Act has placed the air carriers under Federal regulation, it has not placed them under Federal ownership and management. The air carriers are financed by private capital and are operated by managers selected by the stockholders. The protection of the stockholders' investment is the responsibility of management, not of the government. To date there has not been the slightest evidence of capital impairment of any certificated air carrier resulting directly from accidents. The management of the certificated air carriers, in this regard, has unquestionably been completely sound. Government intervention is entirely unwarranted and inconsistent with the traditions of American business.

Insurance or other financial guarantees cannot protect the public against accidents. It can only pay the public if an accident occurs. Public safety is enhanced by safety engineering and operating practices, advancement in radio and radar guidance, improved traffic conditions, and similar contributions to the industry by air carrier and government research and development.

The air carrier insurance which the Board's regulation contemplates is legal liability insurance. In the great preponderance of jurisdictions legal liability arises only from negligence or wilfulness. Commercial aviation does not become more attractive to the public merely because an air passenger's beneficiary will recover damages in the event the passenger is killed as a result of air carrier negligence or wilful misconduct. If anything, such a regulation, by its concern with the eventualities of a disaster, may be overemphasizing the possible unattractive contingencies of travel generally and air travel particularly, thereby discouraging, rather than encouraging, the use of commercial aviation. Air travelers who desire to do so may purchase all-risk insurance, and not merely insurance against air carrier negligence, at a nominal rate up to limits of $25,000 or $50,000, at any airline terminal. If public acceptance of air transportation is related to the insurance protection afforded the air traveler, certainly the inexpensive all-risk travel policy, and not airline legal liability insurance, is the answer.

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[8] There are, of course, those air carriers that are not certificated and are operating under exemptions without having established their managerial and financial responsibility. If the Board has concluded that regulation is essential, because of complaints lodged against those carriers, such action may be taken without subjecting the certificated carriers to such burdens. In *American Trucking Associations, Inc., et al. v. I. C. C.*, supra, the I. C. C. did not apply the leasing regulation to railroad leased trucks. This exemption was challenged as an unreasonable discrimination. In upholding the exemption, the court found that the conditions, calling for the regulation of the industry generally, did not exist in the case of railroad operated trucks stating (21 L. W. 2101):

"* * * certainly it is not required that the Commission extend its supervisory activities under the rules into fields where the evidence before it indicates no need, merely to satisfy some standard of paper equality."

B. Other Effects of the Regulation

Entirely apart from the inequities of imposing compulsory financial responsibility requirements on the certificated air carriers, there is the further problem of the expediency of such an undertaking by the Board. Air carrier insurance is an intricate problem. An air carrier seeking coverage usually negotiates a complex contract with the insurance company. The insurance is not a standard policy. It may cover not only passenger liability, and public liability and property damage liability, but also workmen's compensation, employer's liability, hull insurance, fire, theft, and many other forms of risk. The terms, rates, and conditions are established on an individual basis, tailored to the specific needs and the loss experience of the particular air carrier. Any uniform regulation by the Board would necessarily standardize insurance and preclude the negotiation of these specifically adapted contracts of insurance. Such a result can only operate to the detriment of the certificated air carriers.

Another serious problem would be created by the international repercussions of the proposed regulation. The representatives of the United States who have been active in the work of the International Civil Aviation Organization have frequently had occasion to be concerned over the possibility of application to our international carriers of onerous and duplicating insurance requirements. The possibility of worldwide application of insurance regulations by foreign countries has been regarded as a real danger to our carriers whose operations are more widespread than those of any other nation. Our carriers have encountered some difficulties of this sort already, but the problem has not as yet become severe. Anticipation of widespread insurance regulations has, however, been sufficient to justify ICAO in devoting a great deal of attention during the past few years to the development of a Council resolution designed to prevent the creation of burdensome insurance requirements. The United States has participated actively in the discussions of this resolution and has, in this way and others, manifested concern lest our carriers' insurance programs be interfered with by the governments of the foreign nations into which they fly, to the financial detriment of our carriers. The Board's proposal to impose insurance requirements upon foreign air carriers operating into the United States is directly contrary to the approach which United States representatives have previously adopted. In view of the leadership which the United States exercises in world air transportation, any step that the United States takes toward additional regulation is bound to cause other nations to follow. This being the case, by proposing the imposition of insurance requirements on foreign air carriers, the Board is certainly inviting retaliation against its own carriers, and promoting the creation of the problem which up to this time the United States representatives have sought to avoid.

Another problem is that of the qualification of insurance companies. A compulsory insurance regulation by the Board presumably

would necessitate a determination by the Board as to whether various insurance companies are qualified to write the required insurance. With respect to American insurance companies, the Board would either have to accept the approval of the State Insurance Commissions, or else it would have to establish itself as a Super Insurance Commission reaching its own conclusions irrespective of action by State commissions. An even more difficult aspect of this problem arises because of the very limited air carrier insurance market. Three domestic groups of insurers today write the predominant amount of such insurance, and the balance is underwritten by foreign insurers, many of which are not legally qualified to do business in the United States. The fact that they have not chosen to qualify, and are not rated in Best's Insurance Reports, however, in no way reflects on their integrity or financial strength. Some of the foreign marine insurance companies (which insure air carriers) have experience and resources far in excess of any American company. Obviously the Board cannot, by regulation, preclude the air carriers from using this long established market. Yet the Board is ill-prepared to undertake the duties of an Insurance Commission on a world-wide basis.

III. CONCLUSIONS

The Board appears to lack the legal authority necessary to promulgate the proposed financial responsibility regulation. The power to issue such a regulation does not appear expressly in the Civil Aeronautics Act, nor can it be implied as essential to the exercise of an express power. Moreover, the very structure of the Act, the Congressional history of legislation relating to this subject, and Public Law 15 all refute the contention that the power to issue the proposed regulation may be implied from the Act. Finally, since an implied power would leave the Board completely without Congressional guidance as to the nature and extent of such regulation, the existence of such an implied power would be unconstitutional.

Even if the Board were found to have such powers, the Board has advanced no sound reason why such a drastic regulation should be imposed upon the certificated air carriers, whose record in connection with the payment of tort judgments has been perfect. On the other hand, the air carriers would, in fact, suffer real harm from the imposition of such a regulation, without any benefit accruing therefrom to the public.