THE INCIDENTAL-TO-AIR EXEMPTION: CONFLICT AND CONFUSION

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Among the modern problems involving coordination and cooperation between different modes of transportation, few present such a clear example of *conflict* between the involved regulatory agencies and *confusion* in the governing law as does the so-called "incidental-to-air" exemption relating to coordinated air-motor transportation of air freight.

I. BACKGROUND

The Interstate Commerce Commission has jurisdiction, under Part II of the Interstate Commerce Act of 1935, to economically regulate the activities of motor carriers engaged in interstate commerce,[1] unless specifically excepted from regulation. Among the exceptions is that contained in §203(b)(7a) of the Act, which partially exempts from the ICC's regulatory authority motor transportation of property and passengers which is "incidental to transportation by aircraft."[2]

The Civil Aeronautics Board has jurisdiction, under the Federal Aviation Act of 1958, to economically regulate air transportation, which, by definition, includes movements partly by other transportation modes.[3] Insofar as is pertinent here, the CAB's jurisdiction embraces the acceptance or rejection of tariffs which are filed with it by direct

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1. "Interstate commerce" is defined as commerce between states "whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water". Interstate Commerce Act §203(a)(10), 49 U.S.C. §303(a)(10) [hereinafter cited as ICA].

2. The partial exemption provides: "Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft." ICA §203 (b)(7a), 49 U.S.C. §303(b)(7a).

3. "Air transportation" is defined as, *inter alia*, interstate air transportation which includes transportation "wholly by aircraft or partly by aircraft and partly by other

and indirect air carriers[4] to cover their services performed "in connection with . . . air transportation".[5]

The similarity of the language appearing in the respective statutes is immediately apparent. While the primary focus of this article is upon the meaning of the incidental-to-air exemption in the Interstate Commerce Act, it will be seen that the CAB's jurisdiction and actions with respect to air carriers' tariffs is directly relevant to the problem at hand. Indeed, the very nub of the problem relates to the degree of harmony—or inharmony—between the interpretations by the ICC and the CAB of *what* motor transportation services may be regarded as "incidental to" or "in connection with" air transportation.

The incidental-to-air exemption was enacted in 1938 as §1107(j) of the Civil Aeronautics Act.[6] The original bill, in the form passed by both the House and Senate, did not contain §1107(j) or any comparable provision. Rather, that section was added by the House and Senate Conference Committee, and the only mention of it by the Committee provides no clue as to what the conferees intended by it.[7] Thus, the legislative history behind the partial exemption is of no assistance in its interpretation.

Quite naturally, interpretative problems concerning the incidental-to-air exemption have arisen only in relatively recent years, after air cargo transportation came into substantial use. The growth in the utilization of domestic air freight transportation is a matter of common knowledge, *e.g.*, the airlines operated 304 million ton-miles in 1953 as compared with *2.8 billion* ton-miles in 1968.[8] As air cargo transportation continues to grow, the use of integrated air-surface modes of transportation necessarily will increase. Accordingly, the importance of intermodal coordination in this area will become much greater.

Interagency cooperation would appear to be the order of the day.

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forms of transportation." Federal Aviation Act §101(10) & (21), 49 U.S.C. §1301(10) & (21) [hereinafter cited as FAA]. Similar definitions were contained in the earlier Air Commerce Act of 1926 and in the Civil Aeronautics Act of 1938.

4. A "direct" air carrier is an airline, directly engaged in the operation of aircraft. See 14 C.F.R. 296.1(b). An "indirect" air carrier, as used here, is an air freight forwarder. See *Air Freight Case*, 9 C.A.B. 473 (1948); see also 14 C.F.R. 296.2(a).

5. FAA §403(a), 49 U.S.C. §1373(a), provides: "Every air carrier . . . shall file with the Board . . . tariffs showing all rates, fares, and charges for air transportation . . . and services in connection with such air transportation."

6. 52 Stat. 1029 (1938).

7. See 83 Cong. Rec. 8843, 8865 (June 11, 1938).

8. Air Transport Ass'n of America, *Air Transport Facts & Figures* (1954 & 1969 eds.).

However, it must be recognized at the outset that certain ingredients for interagency conflict are inherent in the regulatory framework. The ICC, on the one hand, is committed to the fundamental task of developing, coordinating, and preserving "a national transportation system" by the various transportation modes adequate to meet the needs of commerce, national defense, and the postal service.[9] By contrast, the narrow focus of the CAB is in developing and encouraging "an *air*-transportation system" adapted to the needs of commerce, national defense, and the postal service.[10] Additionally, it should be noted that the ICC must concern itself with a statutory *exemption* from its jurisdiction, while the CAB is concerned with an affirmative *grant* of jurisdiction. Traditionally, statutory exemptions have been strictly construed; while grants of jurisdiction have been construed in conformity with the dominating general purpose behind the statute (in this case, the furtherance of air transportation).

II. The Early ICC Decisions: Creation of the Potential for Interagency Conflict

The ICC's earliest appraisals of the incidental-to-air exemption, prior to United States entry into World War II, did not consider the scope of the exemption in any detail.[11] Two of those decisions simply concluded that motor transportation of air express shipments over distances of 12 and 15 miles, respectively, constituted "a line-haul operation", and, therefore, was not within the partial exemption.[12]

The first extensive discussions of the exemption came at a time, in 1947, when commercial aviation was only recovering from the effect of the War. In the *Sky Freight* case,[13] the exemption was analogized to the terminal service exemption provided under §202(c) of the Interstate Commerce Act.[14] The ICC found that the purpose of the

9. National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. Preface to Part II.

10. FAA §102(a), 49 U.S.C. §1302(a) [emphasis added].

11. See, *e.g.*, *Port Columbus Cab Company Contract Carrier Applic.*, 24 M.C.C. 237 (1940); *Railway Express Agency, Inc., Extension of Operations—Clarksburg-Buckhannon*, 31 M.C.C. 700 (1942).

12. *Railway Express Agency, Inc., Extension of Operations—West Warwick, R.I.*, 31 M.C.C. 332 (1941); *Railway Express Agency, Inc., Extension of Operations—Bristol, R.I.*, 31 M.C.C. 385 (1941).

13. *Sky Freight Delivery Service, Inc., Common Carrier Applic.*, 47 M.C.C. 229 (1947).

14. ICA §202(c), 49 U.S.C. §302(c), provides a partial exemption from regulation for "the performance within terminal areas of transfer, collection, or delivery service" by

incidental-to-air exemption, with respect to property, was to allow air carriers a terminal area for the provision of *bona fide* collection, delivery, and transfer service on shipments having an immediately prior or subsequent movement by air. While the ICC declined to prescribe a precise geographical limitation for the exemption, it did hint that, because of the nature of air line-haul operations, a more extensive terminal area might be warranted for air carriers than for other transportation modes. Accordingly, as with §202(c), the partial exemption was interpreted as embracing "a reasonable terminal area" for air carriers. Within such an area, motor transportation of property would be considered subordinate to, an adjunct of, or "incidental" to any prior or subsequent transportation by aircraft. Specifically, in the *Sky Freight* case itself, the ICC found that operations in the nature of air freight collection and delivery services up to 45 miles from airports in the New York City area were within the exemption.

In the *Teterboro* case,[15] decided the same day as *Sky Freight*, the ICC for the first time interpreted the exemption as it relates to air passengers. In holding that the involved transportation of passengers to points located within 25 miles of the airport was exempt from regulation, the ICC again declined to prescribe territorial limits for exempt operation generally. The ICC followed *Sky Freight* in finding that, while the length of the motor movement was not alone the determining factor, the exemption did not apply to all transportation of passengers having an immediately prior or subsequent movement by air.[16]

The next year, the ICC engrafted an exception on the applicability of the partial exemption only to terminal-area collection, delivery, and transfer services. In the *Graff* case,[17] it was held that line-haul motor transportation may be within the exemption when the involved services are "emergency" in character, *i.e.*, when they are irregular and sporadic, and serve merely as a substitute for impossible or impracticable line-haul air transportation.[18] The Commission

motor vehicle when such services are "incidental" to transportation by railroad, express company, motor carrier, water carrier, or freight forwarder.

15. *Teterboro Motor Transportation, Inc., Common Carrier Applic.*, 47 M.C.C. 247 (1947).

16. See also, *Picknelly Extension of Operations—Bradley Field*, 47 M.C.C. 401 (1947), involving a surface movement of 13 miles.

17. *Graff Common Carrier Applic.*, 48 M.C.C. 310 (1948).

18. The *Graff* case involved motor transportation of passengers. The principles enunciated in that case were applied, some 10 years later, to motor transportation of

emphasized that surface operations in emergency circumstances clearly are subordinate to regular air services. Thus, the *Graff* decision—finding a motor haul in excess of 200 miles to be within the exemption—was regarded as "no real departure" from previous interpretations of §203(b)(7a).[19]

Also in 1948, the ICC decided two cases which, like *Sky Freight*, above, involved transportation in the vicinity of New York City. In the first case,[20] the Commission deemed significant, though not controlling, such considerations as air-carrier billing and responsibility for the entire air-surface movement and door-to-door rates published by the airline in deciding that operations to points within 40 miles of the airport were within the partial exemption. In the second case,[21] involving distances of over 130 miles, the presence of the same considerations was held not to bring the operations within the exemption. As the operations would have extended into areas located closer to, and served primarily by, other airports, the ICC regarded them as clearly *inter*terminal in character, exceeding a reasonable terminal area for the airport served. As in earlier cases, however, the Commission did not determine the precise extent to which the proposed operations were beyond the exemption.

Five years later, in response to the post-War growth of domestic air freight, the ICC examined in more detail the incidental-to-air exemption in the landmark *Kenny* case.[22] That proceeding involved an application to transport air freight between two airports located in the commercial zone of Pittsburgh and the surrounding area within 50 miles of either airport. In its initial report, the Commission concluded that the application, which was unopposed, should be dismissed, as the entire operation proposed was within the exemption. Subsequently, after hearings on a reopened record, that report was modified.

In its second *Kenny* report,[23] the ICC found that motor transportation of property, to be exempt, must be

> confined to the transportation in bona fide collection, delivery or

property. *Vanden Hauvel Ext.—Bendix and Midway Airports*, 78 M.C.C. 41 (1958); *Michaud Common Carrier Applic.*, 73 M.C.C. 677 (1957). Those same principles are viable today. See p. 23, *infra*.

19. *Graff, supra* note 17, at 316.

20. *Golembiewsky Common Carrier Applic.*, 48 M.C.C. 1 (1948).

21. *Peoples Express Co. Extension of Operation—Air Freight*, 48 M.C.C. 393 (1948).

22. *Kenny Extension—Air Freight*, 49 M.C.C. 182 (1949), *modified*, 61 M.C.C. 587 (1953).

23. *Kenny Extension—Air Freight*, 61 M.C.C. 587, 595 (1953).

> transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier.

Thus, the report re-affirmed and amplified the "*bona fide* collection, delivery, or transfer service" test which had been applied since the *Sky Freight* decision. The Commission again considered that any determination of a precise territorial zone for the application of the exemption would be "most difficult and impractical"; however, it concluded that the above-quoted test, with its requirement for a through air bill of lading and a continuous movement from point of pickup to point of delivery, was "self-limiting".[24]

The *Kenny* decision suggested that a "reasonable" terminal area for direct air carriers might be reflected in the tariff filings which those carriers make with the CAB covering the particular points to and from which they hold themselves out to the public to perform pickup and delivery service on air freight.[25] This interpretation of the exemption was considered desirable for the reason that it readily distinguished between motor operations within and without the scope of the exemption. Further, the interpretation was regarded as flexible, as future enlargements or curtailments of air terminal areas could be effected simply by changing the pickup and delivery tariffs on file with the CAB. Nonetheless, a potentially serious drawback with the interpretation was its premise that direct air carriers in fact would limit their tariff holding-out of pickup and delivery service to "reasonable" terminal areas. The ICC recognized this weakness when it stated:[26]

> The air carriers now establish their own terminal area limits by the filing of tariffs with the C.A.B., and *our interpretation of the exemption of section 203(b)(7a) is based on the assumption that that agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area.*

24. *Ibid.*

25. Although, at the time of *Kenny*, there was very little pickup and delivery service performed for air carriers beyond the commercial zones of the cities served [*Id.* at 589-92], the ICC stated "that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify special considerations in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers." [*Id.* at 595].

26. *Id.* at 596 [emphasis added].

Inherent in the principles set forth in *Kenny* lurks the real possibility of interagency conflict.

For about eight years following *Kenny*, the ICC applied the principles therein in deciding, on an *ad hoc* basis, whether or not particular motor operations were "incidental" to air transportation. Motor operations were found partially exempt from ICC regulation in cases involving *bona fide* collection and delivery service performed under through airline bills of lading to points named in terminal area tariffs published by the air carriers;[27] conversely, operations not meeting those requirements were held to be outside the scope of the exemption.[28] In 1961, in the *Panther* decision,[29] the *Kenny* principles were extended to air freight forwarders. That case held that exempt motor transportation of property on behalf of air freight forwarders must be confined to *bona fide* collection, delivery, and transfer service on shipments having an immediately prior or subsequent movement by air as part of a continuous movement under air freight forwarder bills of lading to and from points specifically named in both the direct and indirect air carriers' terminal area tariffs on file with the CAB.[30]

The *Kenny* case had no bearing on the scope of the incidental-to-air exemption with respect to passengers. The ICC imposed no requirement that motor transportation of passengers be arranged or paid for by air carriers or be provided under through air tickets covering the entire air-surface movement. Instead, while continuing to state that distances were not necessarily controlling, the Commission apparently was persuaded largely by distances in holding that movements of from 45 to 100 miles were not covered by the exemption.[31]

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27. *Fischer Common Carrier Applic.*, 83 M.C.C. 229 (1960); *Scari Extension—Airports*, 76 M.C.C. 319 (1958); *Commodity Haulage Corp., Common Carrier Applic.*, 69 M.C.C. 527 (1957).

28. *Nickerson Common Carrier Applic.*, 88 M.C.C. 186 (1961); *Fischer, supra* note 27; *Scari, supra* note 27; *Southern Pacific Transport Co.—Air Freight*, 73 M.C.C. 345 (1957); *Gromand Common Carrier Applic.*, 72 M.C.C. 257 (1957).

29. *Panther Cartage Co., Extension—Air Freight*, 88 M.C.C. 37 (1961); *accord, Air Cargo Terminals, Inc., Extension—San Bernardino, Calif.*, 88 M.C.C. 468 (1961).

30. The ICC further held in *Panther* that, to the extent motor operations performed for an air freight forwarder are not exempt, the forwarder is functioning as a surface freight forwarder for which Commission authority must be obtained. See 49 C.F.R. 404.1.

31. *DiLauro Common Carrier Applic.*, 84 M.C.C. 501 (1961); *Woodrum Field Airport Limousine Service, Inc., Common Carrier Applic.*, 82 M.C.C. 647 (1960); *Airport City Limousine Service, Inc., Common Carrier Applic.*, 69 M.C.C. 293 (1956).

III. Institution of ICC and CAB Rulemaking Proceedings

With the continuing development and growth of air freight, the ICC experienced increasing pressure to avoid a case-by-case approach to the partial exemption. Thus, late in 1961, it instituted on its own motion a rule-making proceeding for the stated purpose of determining and prescribing by regulation "the circumstances under which and the areas or distances within which motor transportation of property . . . is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a)"[32] The Order initiating and proceeding called for participation by motor carriers, air carriers, and any other interested parties.

The ICC's action followed by little more than a week the institution by the CAB of its own rule-making proceeding related to the determination of permissible limits of zones for air freight pickup and delivery service pursuant to appropriate tariffs filed by air carriers.[33] The CAB explained that, in the past, it had used distance as the criterion for deciding whether tariff filings would be accepted or rejected. Specifically, the CAB utilized a 25-mile "rule of thumb"; that is, with the exception of the New York and Chicago metropolitan areas where greater distances were allowed,[34] tariff proposals for pickup and delivery service beyond 25 miles either from the airport or the corporate limits of the airport city were administratively rejected. In its Notice, the CAB announced that it tentatively had decided to expand air terminal areas to include points within 50 miles from the center of airport cities, except for New York and Chicago which would be considerably larger.

In instituting its proceeding, the CAB referred to the incidental-to-air exemption in the Interstate Commerce Act. In this connection, it stated:[35]

> In administering the exemption provision, the Interstate Commerce Commission has given weight to the fact that the air cargo pick-up and delivery service is described in tariffs on file

32. ICC Docket No. MC-C-3437, *Motor Transportation of Property Incidental to Transportation by Aircraft*, Order of Division 1 (October 4, 1961).

33. CAB Docket 12951, *Part 222—Tariffs of Air Carriers; Air Cargo Pick-Up and Delivery Zones*, Notice of Proposed Rule Making (August 23, 1961).

34. For a graphic illustration of the progressive expansion of the New York City air terminal zone, as allowed by the CAB, see ICC Bur. of Econ. Staff Report, *Air-Truck Coordination and Competition*, p. 24 (Statement No. 67-1, February 1967).

35. Notice, *supra* note 33, Explanatory Statement pp. 1-2.

> with the Civil Aeronautics Board and, to that extent, what the Board accepts may have a bearing upon whether regulation will be applied by the Commission. Obviously, both the Board and the Commission should strive to administer the respective acts so that there is no undue conflict between what the Board considers "service in connection with * * * air transportation" and what the Commission considers as service "incidental to transportation by aircraft."

Thus, in 1961, the CAB expressly recognized the potential conflict of administrative functions and purposes between itself and the ICC under the respective enabling statutes—the same conflict to which the Commission had alluded in 1953 in the *Kenny* case.

During the pendancy of the two rule-making proceedings, the ICC continued to regard *Kenny* as governing authority.[36] Additionally, with regard to passengers, the ICC deemed it advisable to institute a similar proceeding.[37] Accordingly, in late 1962, the Commission on its own motion instituted a rule-making proceeding looking to the determination of the scope of the exemption for the motor transportation of passengers.[38]

IV. Adoption of ICC and CAB Regulations

The CAB was first to conclude its rule-making proceeding. In 1964, it adopted regulations[39] which re-affirmed the previous 25-mile "rule of thumb" and, thereby, rejected the tentative 50-mile rule. The CAB's disposition was based largely on the fact that in most communities air freight pickup and delivery service extends only to the corporate limits or slightly beyond; in relatively few communities—the major air cargo generating points—does such service extend farther than 25 miles.[40] The

36. *Con-ov-air Air Freight Service, Inc., Common Carrier Applic.*, 92 M.C.C. 526 (1963); but see *Al Renk & Sons, Inc.—Alaska "Grandfather" Applic.*, 89 M.C.C. 91, 96 n.6 (1962), wherein the Commission merely noted that the considered operations "may or may not" be within the exemption.

37. *Hatom Corporation, Common Carrier Applic.*, 91 M.C.C. 725 (1962), in which operations ranging from 26 to 65 miles from the airport were held not exempt from regulation. The ICC in an earlier report had held that motor transportation of passengers were exempt regardless of distance, so long as there was an immediately prior or subsequent movement by air [88 M.C.C, 653 (1962)].

38. ICC Docket No. MC-C-4000, *Motor Transportation of Passengers Incidental to Transportation by Aircraft*, Order of Commission (December 26, 1962).

39. CAB Regs., Part 222, 14 C.F.R. 222.

40. CAB Docket 12951, *Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File*, Preamble to Regulations (April 28, 1964).

Board's regulations, however, established an application procedure for air carriers which desire to file tariffs for pickup and delivery service beyond a radius of 25 miles from the airport or the corporate limits of the airport city. The CAB stated that, in passing upon applications, it would determine whether the proposed service is "truly" pickup and delivery, as distinguished from line-haul, surface transportation. While assuring that this determination would not impinge on the ICC's freedom to determine whether the involved surface transportation was exempt from motor carrier regulation, the CAB stated that it "anticipates, however, that the ICC will give due and appropriate weight to the Board's finding that the contemplated services are truly air cargo pickup and delivery in nature, as it does today."[41]

Only one week after the CAB's action, the ICC issued its *Incidental to Air (Property)* decision[42] and, concurrently therewith, adopted regulations[43] which largely preserved the principles earlier established in the *Kenny* case. In again declining to fix geographical limits for the incidental-to-air exemption with respect to property, the Commission considered that the *Kenny* standard had served to encourage the development of air freight; moreover, it took note of the CAB's actions since *Kenny* and attached considerable weight to "that agency's reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years."[44]

The regulations promulgated by the ICC altered the *Kenny* precedent in one significant respect. Under *Kenny*, the territorial limits of the exemption at a particular point would enlarge automatically through the CAB's acceptance of tariff filings for extended terminal area services. In *Incidental to Air (Property)*, the ICC decided that only by "retaining some control" over air terminal expansion could it properly discharge its statutory responsibility concerning the scope of the exemption. For this reason, it adopted regulations which reflect the *Kenny* definition of exempt operations, but which further provide a procedure for defining, either on petition or on the Commission's own

41. *Ibid.*

42. *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964), *aff'd sub nom., Air Dispatch, Inc.* v. *United States*, 237 F.Supp. 450 (E.D.Pa. 1964), *aff'd per curiam*, 381 U.S. 412, (1965).

43. 49 C.F.R. 210.40.

44. *Incidental to Air (Property)*, *supra* note 42, at 85. The ICC also continued to assume, as it had in *Kenny*, that the Board "would not hesitate to reject a publication which would result in an unreasonably large exempt area." *Ibid.*

motion, the geographical limits of the partial exemption at a particular point.[45] The Commission made clear that, in defining territorial limits under the new procedure, "prior action of the C.A.B. allowing air carriers to publish extended terminal service tariffs would be considered, but would not be determinative."[46]

Some two months after its *Property* decision, the ICC issued the *Incidental to Air (Passengers)* report[47] and prescribed regulations[48] governing exempt motor transportation of passengers. Departing from its previous refusal to set a definite mileage limitation for the exemption, the Commission concluded that only operations within a radius of 25 miles from the airport, as well as within the entire commercial zone of any city the boundary of which intersects the 25-mile radius, would be considered as "incidental" to air transportation. However, a procedure also was prescribed for individually determining, either on petition or on the Commission's own motion, the exempt area at a particular airport.

In both its *Passenger* and *Property* reports, the ICC approved and continued the approach taken in the *Graff* decision[49] concerning line-haul motor transportation which is "emergency" in character. The Commission emphasized that the emergency must be caused by conditions beyond the control of the air carrier, such as bad weather or equipment failure, and must be regarded as an emergency by the officials of the direct air carrier.[50]

With respect to surface transportation of property on behalf of air freight forwarders, the ICC modified its holding in the *Panther* decision[51] that the exempt zone includes only points which are named in both the direct and indirect air carriers' tariffs on file with the CAB. To be within the exempt zone, the points are required to be named in the indirect air carrier's tariff, rather than in both.

The jurisdiction of the ICC to define, and to prescribe rules of

45. 49 C.F.R. 210.40(c).

46. *Incidental to Air (Property)*, *supra* note 42, at 87.

47. *Motor Transportation of Passengers Incidental to Transportation by Aircraft*, 95 M.C.C. 526 (1964).

48. 49 C.F.R. 210.45.

49. *Graff*, *supra* note 17, and accompanying text.

50. *Incidental to Air (Property)*, *supra* note 42, at 87-88; *Incidental to Air (Passengers)*, *supra* note 47, at 537-38. The ICC's special treatment of emergency transportation for purposes of the partial exemption was upheld in *National Bus Traffic Ass'n* v. *United States*, 249 F.Supp. 869 (N.D.Ill. 1965), *aff'd per curiam*, 382 U.S. 369 (1966).

51. *Panther*, *supra* note 29.

general applicability relating to, the incidental-to-air partial exemption was affirmed by the courts.[52]

V. Air Terminal Area Expansion Under the Regulations

To date, the respective regulations adopted by the ICC and the CAB concerning proposals to extend air terminal areas beyond existing limits have been utilized to very different degrees.

The procedure established by the ICC for individually determining the scope of the exemption for air freight collection and delivery services at a particular airport has been invoked on few occasions, and in no case has a decision yet been issued.[53] In only one case has the procedure for defining the exempt zone for the transportation of passengers been employed; there the ICC merely held that motor transportation of passengers between two airports serving the same metropolitan area is within the exemption.[54]

By contrast, the CAB's application procedure for authority to file pickup and delivery tariffs for points beyond 25 miles has given rise to a number of decisions. Since the regulations were adopted, the CAB has granted 14 applications to extend air terminal zones for ten different metropolitan areas: Atlanta, Boston, Charlotte, Cleveland, Dallas, Detroit, Indianapolis, Kansas City, Newark, and Wichita.[55] The extensions in those cases encompass 277 specifically named points which are located beyond the 25-mile limit, up to a distance of approximately 80 air miles from the airports or city limits involved. Actually, the number of points to which extensions have been allowed is far greater than 277, as the CAB has indicated that any and all intermediate points will be considered to be, *prima facie*, within permissible limits.[56] The CAB's orders allowing the extensions, while granting applications

52. *Air Dispatch, Inc.* v. *United States*, 237 F.Supp. 450 (E.D. Pa. 1964), *aff'd per curiam*, 381 U.S. 412 (1965); *National Bus, supra* note 50; *Wycoff Company* v. *United States*, 240 F.Supp. 304 (D.Utah 1965).

53. In ICC Docket No. MC-C-3437 (Sub-No. 1), *Cleveland-Hopkins Airport Exempt Zone*, Order of Division 1 (July 17, 1967), the petition was allowed to be withdrawn without a decision on the merits. Two other cases presently are pending before the ICC. See note 87, *infra*.

54. *Exempt Zone—Dulles and Friendship Airports*, 100 M.C.C. 58 (1965).

55. CAB Dockets 20036, 20009, 19778, 19586, 17972, 17927, 16344, 15740, 15665, 15664, 15582, 15581, 15327, 15325, Orders Authorizing Filing of Pick-up and Delivery Tariffs. See also Docket 19725, where the CAB included the entire island of Puerto Rico within the pickup and delivery zone for San Juan.

56. *E.g.*, CAB Dockets 17927 and 16344, *supra* note 55.

by particular air freight forwarders, are in the nature of general rulemaking orders; therefore, the extensions are available to the entire air industry.[57] Some of the extensions have included points which, though relatively lesser air freight generating points, are served by their own airports. In fact, only one case has been found in which an application for an enlarged pickup and delivery zone has been denied by the CAB, involving a distance of 179 miles for the purpose of serving a single air freight shipper.[58]

The CAB uniformly has considered applications on the basis of what economic data and representations are contained in the proposals themselves, and has not deemed hearings to be necessary.[59] The extensions granted by the CAB have been based primarily on the following factual findings:[60]

(1) the distances involved are "no more extensive" than those authorized in the New York, Chicago, and Los Angeles areas, and would permit extended pickup and delivery service to be offered as "part of the basic air transportation service" available at the concerned points;

(2) extended pickup and delivery service would be "coordinated" with the schedules of the direct air carriers;

(3) the motor vehicle equipment to be used is limited in capacity and consists of small vans or straight trucks "traditionally used" for pickup and delivery operations, *i.e.*, the limited size, weight, capacity, and operating range of the trucks would pose "effective economic barriers" to their use in line-haul operations;

(4) the rates for extended service would be "closely related" to the "usual" charges for pickup and delivery service within the 25-mile zone; and

(5) only an integrated air-surface movement under single carrier responsibility would provide the full advantages of air freight service available at major airports to the present and potential users of air freight at smaller, outlying points.

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57. *Law Motor Freight, Inc.* v. *C.A.B.*, 364 F.2d 139, 142-43 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

58. CAB Docket 15382, *Jet Transportation, Inc.*, Order dated March 22, 1966.

59. The courts have held that hearings are not required. *Law Motor Freight, supra* note 57, at 144-45; *National Motor Freight Traffic Ass'n v. C.A.B.*, 374 F.2d 266 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

60. The CAB's standards obviously are not designed to identify a reasonably limited air terminal area for the performance of *bona fide* motor collection, delivery, and transfer service within the meaning of the Interstate Commerce Act. The CAB does not consider any geographical, political, economic, or commercial factors of the type which govern the determination of "terminal areas" for purposes of ICC regulation.

On a number of occasions, the CAB has rejected contentions by objecting parties that the points involved were outside the scope of the incidental-to-air exemption applicable to motor carriers under the Interstate Commerce Act. The CAB has stated simply that its action "is not intended to reflect any views on whether applicant requires authority from the ICC or other regulatory agencies."[61] Further, the CAB has held in several cases that such matters as public need for extended pickup and delivery service and the adequacy of existing pickup and delivery service are "not germane" to the issues;[62] and recently the CAB has declined to consider the contention that granting the application would have an adverse effect upon existing motor carriers through the diversion of traffic presently being handled by them.[63]

The general approach of the CAB to the application procedure provided by its regulations has been judicially approved. In the *Law Motor Freight* case,[64] the United States Court of Appeals for the First Circuit held that, despite the "scant" economic data and "thin" record upon which the CAB's determination was based, the criteria utilized and the rationale therefor were "not unreasonable for an agency mandated to develop air transportation."[65] More importantly, the court held that the CAB was not required to apply the same definition of "terminal area" which has been applied by the ICC to surface carriers under §202(c) of the Interstate Commerce Act. The court noted that the CAB's new criteria serve to identify "reasonably close communities" for purposes of that agency's jurisdiction over pickup and delivery service tariffs, as opposed to the criteria employed by the ICC to identify "a single homogeneous community" for purposes of the exemption for surface collection, delivery, and transfer service.[66] The court considered that of paramount importance were the efforts by the ICC and the CAB to achieve "continuing accommodation" in their purposes and "to minimize the potential conflict" arising from their power to interpret, respectively, what is "incidental to" or "in connection with" air transportation.

61. Note 55, *supra*, for citations.

62. CAB Dockets 17972, 16344, 15740, 15582, and 15581, *supra* note 55.

63. CAB Docket 19586, *supra* note 55.

64. *Law Motor Freight, supra* note 57.

65. *Id.* at 145.

66. See, *e.g., Central Truck Lines, Inc.* v. *Pan-Atlantic Steamship Corp.*, 82 M.C.C. 395, 404 (1960), *aff'd sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D.Del. 1963).

> The system, devised to avoid interagency conflict while preserving agency sovereignty, is to give the Board the first judgment, which shall be given non-conclusive respect by I.C.C.[67]

Thus, the court made clear that, were the ICC subsequently requested to determine the exempt or nonexempt status of the identical motor operations beyond 25 miles, the CAB's order would not have any binding effect.

VI. The Exemption Today: Herein of Conflict and Confusion

While the ICC has not yet determined the limits of a particular terminal area for air freight in a proceeding instituted for that purpose under its new regulations, the Commission has dealt with the exemption in a number of other contexts. For example, in investigation proceedings, surface movements of air freight in excess of 57 miles have been held to be outside the exemption;[68] and, in application proceedings, the ICC has further explained the permissible types of arrangements by which exempt operations may be conducted,[69] and has refined the meaning of "air bill of lading".[70] Also, the Commission has held that unauthorized operations conducted in the past in the mistaken belief that they were within the exemption should not bar a grant of authority;[71] and that an application which partially embraces exempt operations will be granted in its entirety if the evidence does not permit the exempt portion to be precisely defined.[72]

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67. *Law Motor Freight, supra* note 57, at 145.

68. *Zantop Air Transport, Inc.—Investigation of Operations*, 96 M.C.C. 18 (1964), *remanded sub nom., Zantop Air Transport, Inc.* v. *United States*, 250 F.Supp. 623 (E.D. Mich. 1965), *on remand*, 102 M.C.C. 457 (1966), *aff'd*, 272 F. Supp. 265 (E.D. Mich., 1967); *cf., Film Transit, Inc., and Air Dispatch, Inc.,—Investigation of Operations*, 98 M.C.C. 145 (1965).

69. *Theodore Savage Contract Carrier Applic.*, 108 M.C.C. 205 (1968); *Airline Freight, Inc., Extension—Philadelphia Air Terminal Area*, 108 M.C.C. 197 (1968); *White Air Freight Service, Inc., Common Carrier Applic.*, 95 M.C.C. 616 (1964).

70. *Colorado Cartage Company, Inc.* v. *William Murphy*, 100 M.C.C. 745 (1966); see also ICC Docket No. MC-116280 (Sub-No. 4), *W. C. McQuaide, Inc., Ext.-Airfreight*, Report & Order of Rev. Bd. 3 (February 29, 1968).

71. *Film Transit, Inc., Ext.—General Commodities, Memphis, Tenn.*, 98 M.C.C. 694 (1965); *White, supra* note 68; *cf., Weston Trucking Co. Contract Carrier Applic.*, 108 M.C.C. 614 (1968); *A. Fournier's Express, Inc., Extension—Hartford, Conn.*, 108 M.C.C. 584 (1968).

72. ICC Docket No. MC-124688 (Sub-No. 2), *Independent Delivery, Inc., Ext.—Air Freight*, Report & Order of Rev. Bd. 1 (February 29, 1968).

Unfortunately, the cases suggest conflicting standards regarding the limits of the exempt zone. There are indications that the ICC regards *all* points located within 25 miles to be within the exempt air terminal area, even though all of the points are not specifically named in tariffs on file with the CAB.[73] These indications appear to be at odds with the requirement in the regulations that the air terminal area be "described" in an effective tariff.[74]

The ICC never has finally decided—either in the *Incidental to Air (Property)* or subsequent cases—the nature of the criteria which bear upon the individual determination of the exempt zone at a particular point, pursuant to the regulations. The ICC generally has indicated that the inquiry would be "somewhat similar" to that involved in determining the commercial zone for a municipality; that economic and geographical considerations, trade practices, industrial dispersion, population density, and political factors may be pertinent.[75] The Commission might decide that, as in commercial zone determinations, it will not consider traditional notions of public convenience and necessity; however, the ICC already has demonstrated its awareness of the overriding influence which the mandate of the national transportation policy exerts in this sensitive field. Thus, the Commission has made clear that it will avoid any approach to the exemption "which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act."[76]

At the very least, the CAB's continuing expansion of pickup and delivery zones in a number of metropolitan areas, upon meager evidentiary justification, casts in doubt the premise upon which the ICC's approach in *Incidental to Air (Property)* was based. The CAB no longer appears "reluctant" to permit enlargement of air terminal areas beyond 25 miles; at the same time, the ICC expressly has stated that it is "reluctant" to do so.[77] Moreover, the CAB's repeated statements to the effect that its determinations have no bearing upon whether the expanded surface operations are subject to ICC regulations

73. *E.g., Zantop Air Transport, Inc.—Investigation of Operations*, 102 M.C.C. 457, 462 (1966), *aff'd sub nom., Zantop Air Transport, Inc. v. United States*, 272 F. Supp. 265 (E.D. Mich. 1967); *Zantop Air Transport, Inc. v. United States*, 250 F. Supp. 623, 626 (E.D. Mich. 1965).

74. 49 C.F.R. 210.40(a). See also *White, supra* note 69, at 620-621.

75. See *Exempt Zone, supra* note 54, at 61; *Zantop, supra* note 68, at 22-23.

76. *Incidental to Air (Property), supra* note 42, at 86.

77. *Zantop, supra* note 68, at 22-23.

manifest a sovereign, rather than an accommodating, approach to the problem.[78]

In order to discharge its responsibilities under the national transportation policy, the ICC should accord particular weight to the impact of a steadily encroaching exempt zone upon the regulated motor industry, especially now that it has become apparent that its policies and those of the CAB are in conflict. A procedure premised upon interagency accommodation can not long survive when action by one agency undercuts the statutory functions of the other.

It is plain that the concern of the CAB is not the concern of the ICC. The Board, quite naturally, is concerned with ensuring that the potential for air cargo transportation will be fully realized. There are many outlying communities, beyond the "immediate environs" of the airport cities,[79] which legitimately require integrated air-surface transportation of air freight under single carrier responsibility. However, as early as 1947, in the *Sky Freight* case,[80] the ICC, in assuring motor carriers that the incidental-to-air exemption "will not open the door to any large field of unregulated motor operations", pointed to §1003 of the Federal Aviation Act[81] which expressly authorizes air carriers to engage in interline service with other carriers. Plainly, exempt motor operations are not the *sine qua non* to development of air cargo in outlying areas. In recent proceedings, therefore, the ICC has adopted a somewhat liberalized standard of public convenience and necessity in granting operating authority to carriers which propose to offer a specialized and expedited service in the motor transportation of air freight.[82] In this manner, present and potential shippers by air freight are able to obtain through air-surface

78. The CAB's approach *vis-a-vis* the ICC is indistinguishable from that expressed in *The Flying Tiger Line, Inc., Air-Truck Service*, 30 C.A.B. 242, 245 (1959), *aff'd sub nom., City of Philadelphia* v. *C.A.B.*, 289 F.2d 770 (D.C.Cir. 1961); see also CAB Docket 17472, *The Flying Tiger Line, Inc.*, Order dated July 20, 1966.

79. It should be emphasized that the CAB's 25-mile "rule-of-thumb" applies as a radius not only from the airport which the air carrier is authorized to serve but also from the *corporate limits* (not the municipal center) of the city if that is the certificated point. The 25-mile rule in itself creates an expansive area for nonregulated activity. In fact, the ICC has recognized that "the 25-mile zone generally permits pickup and delivery throughout each city and its immediate environs." *Zantop, supra* note 73, at 461.

80. *Sky Freight, supra* note 13, at 242.

81. 49 U.S.C. §1483.

82. *E.g., Kato Express, Inc., Extension—Standiford Field*, 108 M.C.C. 222 (1968); *T. J. Smith Common Carrier Applic.*, 107 M.C.C. 307 (1968); *Commodity Haulage Corp. Common Carrier Applic.*, 106 M.C.C. 135 (1968); *Film Transit, supra* note 71.

transportation under single-carrier responsibility, though the transportation is regulated by the ICC and the CAB.[83] Thus, one of the ICC's prime regulatory concerns—*i.e.*, the future of intermodal coordination[84]—can be advanced in an effective and workable fashion. Illustrative of the Commission's current thinking in this area is its recent grant of a certificate to an air freight forwarder authorizing motor transportation of air freight, which it regarded as "a step towards achieving intermodal coordination".[85]

To complicate matters, however, the CAB recently has approved applications by three long-haul motor carriers for air freight forwarding authority throughout the United States. In granting those applications, the CAB stated:[86]

> The Board has every intention to continue processing forwarders' requests to expand the pick-up and delivery services beyond presently defined terminal areas. The Board has granted many of those requests . . . .

Moreover, the CAB also has pending before it a multitude of other applications for similar authority, of which many have been filed by regulated motor and rail carriers. If those applications ultimately are granted, and if the current expansion of air terminal areas continues unabated, surface carriers will be permitted to extend their operations considerably beyond the boundaries prescribed for them by the ICC.

Thus, the potential conflict between the ICC and the CAB has come to fruition; and, with the continuing development of air freight transportation, that conflict can become only greater. Inevitably, the ICC will have to re-examine the incidental-to-air exemption, in order to ensure that exempt transportation truly is and will be "incidental to transportation by aircraft". It appears that light soon will be shed upon these problems by the ICC, either in two pending proceedings which involve the determination of exempt zones at particular airport

83. This type of coordinated, intermodal transportation has been available since 1961 through the "air-truck" program of Air Cargo, Inc. That program has been so successful that the number of shipments handled has increased from 15,351 in 1961 to 451,665 in 1968. Additionally, individual air and motor carriers have entered into joint through rate agreements in several areas.

84. See, Hon. Paul J. Tierney, *The Evolution of Regulatory Policies for Transport Coordination*, 1 TRANSP. L. J. 19 (1969).

85. *Direct Air Freight Corp. Common Carrier Applic.*, 106 M.C.C. 785, 791 (1968).

86. CAB Docket 16857, *Motor Carrier-Air Freight Forwarder Investigation*, p. 33 (decided April 21, 1969).

cities[87] or in response to a petition which has been filed requesting that the Commission reopen the *Incidental to Air (Property)* rulemaking proceeding.[88]

87. ICC Docket No. MC-C-3437 (Sub-No. 2), *Weir Cook Municipal Airport, Indianapolis, Ind.—Exempt Zone*; ICC Docket No. MC-C-3437 (Sub-No. 3), *Atlanta Airport, Atlanta, Ga.—Exempt Zone*. The records in the two proceedings were closed on November 13, 1968, and February 12, 1969, respectively.

88. ICC Docket No. MC-C-3437, *Motor Transportation of Property Incidental to Transportation by Aircraft*, Petition to Reopen Rulemaking Proceeding filed September 25, 1968.