

# THE STATUS OF NON-SCHEDULED OPERATIONS UNDER THE CIVIL AERONAUTICS ACT OF 1938

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In no phase of the Federal regulation of civil aviation has greater confusion existed than with respect to the status under the Federal Civil Aeronautics Act of 1938<sup>1</sup> of what are commonly called "non-scheduled operations." The legal principles involved are difficult enough, but the general lack of understanding on the part of prospective operators has been increased by the loose use of such terms as "non-scheduled operations," "contract operations," and "charter operations." There is a tendency to use these terms interchangeably as describing all the various types of operations which do not operate over a fixed route or on trips scheduled in advance at fixed hours of the day, and to lump all operations so described into the category of those which are not subject to regulation. The terms "contract operations" or "charter operations" must be used with strict regard to their basic legal concepts before they may be safely used in describing the scope of the provisions of the Civil Aeronautics Act; and while "non-scheduled" may accurately describe the factual distinction between two major classes of commercial air transport operations, from the legal point of view the term is misleading. The scope of Federal aviation regulation is not prescribed by the Civil Aeronautics Act in terms of scheduled and non-scheduled operations, and there are substantial differences in the extent to which the various types of non-scheduled operations are subjected to regulation under the Act.

## THE PROVISIONS OF THE ACT

The Civil Aeronautics Act provides two principal types of regulation: economic regulation provided for in Title IV<sup>2</sup> of the Act and safety regulation prescribed in Title VI.<sup>3</sup> The most significant feature of the economic regulation in these days of expanding operations is the requirement that no operation of a kind subject to the Act may be conducted without first obtaining a certificate of public convenience and necessity from the Civil Aeronautics Board authorizing the operation of the service.<sup>4</sup> In addition, tariffs must be filed with the Board;<sup>5</sup> passenger and cargo rates may be fixed by the Board when they are unreasonable or discriminatory;<sup>6</sup> reports may be required, and accounts and accounting practices may be prescribed by the Board;<sup>7</sup>

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<sup>1</sup> 52 STAT. 977 (1938), as amended by 54 STAT. 735, 862, 1233, 1235 (1940), 56 STAT. 265, 300 (1942), 49 U. S. C. (1941) §401 *et seq.*

<sup>2</sup> CIVIL AERONAUTICS ACT OF 1938, §§401-416, 49 U. S. C. (1941) §§481-496. In the footnotes that follow the citation means 49 U. S. C.

<sup>3</sup> *Id.*, §§551-560.

<sup>4</sup> *Id.*, §481.

<sup>5</sup> *Id.*, §483.

<sup>6</sup> *Id.*, §§484, 642.

<sup>7</sup> *Id.*, §487.

consolidations, mergers, or acquisitions of control involving an air carrier must be approved by the Board;<sup>8</sup> interlocking relationships involving air carriers and certain other types of companies are subject to the Board's approval;<sup>9</sup> and some agreements between carriers must be filed with the Board.<sup>10</sup> In the safety field the Board prescribes air traffic rules and other safety standards and regulations,<sup>11</sup> and provision is made for the licensing of pilots and other airmen,<sup>12</sup> the issuance of safety certificates for aircraft,<sup>13</sup> and the issuance of air carrier operating certificates.<sup>14</sup>

The economic sections of the Act appearing in Title IV are by their express terms made applicable to an "air carrier" and to "air transportation." "Air carrier" and "air transportation" are in turn defined by the Act as follows:

"'Air carrier' means any citizen of the United States who undertakes . . . to engage in air transportation. . . ."<sup>15</sup>

"'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."<sup>16</sup>

"'Interstate air transportation,' 'overseas air transportation,' and 'foreign air transportation,' respectively, mean the carriage by aircraft of persons or property *as a common carrier for compensation or hire or the carriage of mail by aircraft*, in commerce between [specified areas]." (Italics supplied.)<sup>17</sup>

As a result of these definitions only two types of operations are covered by the economic regulation in Title IV of the Act, i.e., (1) operations "as a common carrier for compensation or hire" and (2) operations involving the carriage of mail.<sup>18</sup> commerce as defined in the Act. *Id.* §401(21).

As to such operations, the requirements relating to certificates of public convenience and necessity, the filing of tariffs, the fixing of rates, etc., apply under the statutory language.

On the other hand, the application of the provisions of Title VI of the Act dealing with safety regulation is, with two exceptions, governed by a completely different set of statutory definitions.<sup>19</sup> In general, the safety provisions apply to any aircraft, airman, or flight of aircraft. However, there are two special safety requirements which are imposed by the Act only upon an "air carrier" as heretofore defined. Thus an "air carrier" must secure an air carrier operating certificate from the Administrator of Civil Aeronautics, who issues such a certificate only if he finds that the carrier "is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder."<sup>20</sup> An "air carrier" also must comply with special safety regulations authorized by the Act with respect to overhaul and maintenance procedures.<sup>21</sup>

<sup>8</sup> *Id.*, §488.

<sup>9</sup> *Id.*, §489.

<sup>10</sup> *Id.*, §492.

<sup>11</sup> *Id.*, § 551.

<sup>12</sup> *Id.*, §552.

<sup>13</sup> *Id.*, §553.

<sup>14</sup> *Id.*, §554.

<sup>15</sup> *Id.*, §401(2).

<sup>16</sup> *Id.*, §401(10).

<sup>17</sup> *Id.*, §401(21).

<sup>18</sup> Subject, of course, to the further limitation that the operations must be in interstate or foreign

<sup>19</sup> See *id.*, §§401(3), 401(20).

<sup>20</sup> *Id.*, §554(b). This certificate is not the same as the certificate of public convenience and necessity. The latter is issued by the Civil Aeronautics Board on the basis of economic considerations.

<sup>21</sup> *Id.*, §555.

One related provision of the Act should be noted. The last sentence of Section 401(f) of the Act provides:

"Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board."<sup>22</sup>

This section has been construed to refer to air carriers holding certificates of public convenience and necessity from the Board. The Board has prescribed no regulations under this section, except an emergency regulation which during the war required certificated air carriers to secure the Board's approval before performing any charter trip or other special service, but the section has been construed to permit certificated carrier to operate charter trips and special services without the promulgation of a Board regulation.

The statutory pattern is, therefore, that the point of primary significance in determining the extent to which a commercial transport operation is subject to the regulatory provisions of the Civil Aeronautics Act is whether the operation is a "common carrier" service or a service on which mail is carried. For operations not having either of these characteristics, no economic regulation, and less comprehensive safety regulation, is provided under the statutes. The Board, however, by a regulation in the form of an exemption order, has modified this statutory pattern for the time being.

#### THE NON-SCHEDULED EXEMPTION ORDER

The Board, by an exercise of its exemption powers,<sup>23</sup> has injected into the regulatory plan the concept of scheduled and non-scheduled operations. The character of an operation as scheduled or non-scheduled is given a legal significance at the present time by reason of Section 292.1 of the Economic Regulations issued by the Board.<sup>24</sup> This regulation, adopted immediately after the enactment of the Civil Aeronautics Act, exempts all non-scheduled operations from the provisions of Title IV of the Act.<sup>25</sup>

The regulation provides, in part, as follows:

"(a) Until the Board shall adopt further rules, regulations or orders with respect to such matter, every air carrier which engages solely in non-scheduled operations shall be exempt from the provisions of section 401 and all other provisions of Title IV of the Civil Aeronautics Act of 1938 (except as provided in paragraph (b) of this section). . . ."<sup>26</sup>

It will be noted that an exception is made to the exemption in paragraph (b) of the regulation. This exception reads as follows:

<sup>22</sup> *Id.*, §481(f).                      <sup>23</sup> *Id.*, §496(b).

<sup>24</sup> 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292-1.

<sup>25</sup> Title IV contains virtually all of the substantive powers of the Board with respect to regulation of an economic character. The exemption has been construed to include the Board's power to fix passenger and cargo rates, although the procedural provisions of the Act describing the Board's powers in this respect are in Title X, sec. 1002, of the Act. 49 U. S. C. (1941) §642.

<sup>26</sup> 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292.1(a).

“(b) The exemptions provided by this section shall not be applicable to the provisions of subsection (1) of section 401 of the Act or to the reporting requirements of section 407 of the Act; provided that no provisions of any rule, regulation, or order that may be adopted by the Board requiring reports pursuant to section 407 of the Act shall be deemed applicable to any non-scheduled operator unless such rule, regulation, or order expressly provides that such provision is to be applicable to air carriers who are engaged exclusively in non-scheduled operations.”<sup>27</sup>

As a result of this exemption, a broad field of operations, which otherwise under the Act would be subject to regulation as “common carrier services,” has been freed from economic regulation during the entire period of regulation under the Civil Aeronautics Act. This freedom from regulation is temporary, of course, in the sense that at any time the Board could, by repealing the exemption, subject to economic regulation such of these non-scheduled operations as have a common carrier status or engage in the carriage of mail. For the time being, however, operations which are non-scheduled within the meaning of the regulation may be inaugurated without securing a certificate of public convenience and necessity from the Board, and need not comply with other requirements relating to tariffs, rates, etc.

The effect of Section 292.1 of the regulations on safety regulation is quite different. The Act gives the Board no power to exempt carriers from the safety provisions of the statute. Therefore, the provisions of the Act which require, for example, that no air carrier shall operate without an air carrier operating certificate continue to apply in full force to all common carrier operations. Up to now this requirement has not been enforced in practice with respect to non-scheduled operations. However, the Board recently has proposed a new Part to the safety regulations<sup>28</sup> which would lay down the standards for the issuance of air carrier operating certificates to non-scheduled carriers, and prescribe special operations rules for non-scheduled services. When this new Part, or some modified version of it, is promulgated, all non-scheduled common carrier operations would be required to comply with it even though the exemption in Section 292.1 of the regulations should continue in effect.

#### THE MEANING OF “NON-SCHEDULED”

In exempting non-scheduled operations from economic regulation the Board included in Section 292.1 of the regulation a definition of “non-scheduled.” This definition is as follows:

“Within the meaning of this section any operation shall be deemed to be non-scheduled if the air carrier does not hold out to the public by advertisement or otherwise that it will operate one or more airplanes between any designated points regularly or with a reasonable degree of regularity upon which airplane or airplanes it will accept for trans-

<sup>27</sup> *Id.*, §292.1(b). Section 401(1) of the Act contains provisions relating to wages, hours, and working conditions of carrier personnel and section 407 deals with accounts and reports. 49 U. S. C. (1941) §§481(1), 487.

<sup>28</sup> Civil Aeronautics Board, Civil Air Regulations Draft Release No. 58, August 11, 1945.

portation, for compensation or hire, such members of the public as may apply therefor or such express or other property as the public may offer."<sup>29</sup>

Whether an operation receives the benefit of the exemption depends upon whether it falls within this language. While the definition simplifies to some extent the application of the regulation, the terms of the definition still are general and its application to particular cases remains a difficult problem. Unfortunately, the Board has not issued any formal decision construing the definition. However, the Board has informally investigated a number of cases of operations purportedly being conducted on a non-scheduled basis and some indication of the Board's views can be drawn from these.

One such case involved an operator who, in addition to offering general "charter services," advertised that he would render service over a specified route and that the planes "will leave any time, day or night." The operator made provisions so that transportation could be arranged for through hotel transportation desks, travel agents, and airline ticket offices in the area, but the agents had no instructions concerning schedules other than that trips would be operated at any time. During the period of 54 days under investigation the operator made 101 trips over the one route. The trips departed at varying times of the day and no pattern or uniformity in times of departures and arrivals was apparent. Although the departure times were irregular, the service itself was regular in the sense that it was held out to the public as being continuously available and was actually performed on what was on the average a daily basis. On the other hand, small aircraft were operated and there was no evidence that the departure of individual trips were planned until the prospective passenger contacted the operator or its agents and arranged for the transportation. In this case the Board took no further action against the operator after completion of the informal investigation.

An example of the opposite result is found in a case involving the following facts: This operator also furnished service over a fixed route. There was no formal advertising nor were timetables issued, but considerable initial publicity of a "news item" character was given to the service. Hotel reservation desks which were made agents for the sale of transportation were advised that departures would be around a certain time in the morning of specified days of the week and apparently were free to disclose this information to prospective passengers. Similar information concerning departures was transmitted to some companies whose employees were expected to be large sources of traffic. There was evidence that the departure times were varied somewhat from day to day by a formula fixed in advance. In actual operations, one trip was made daily with a morning departure time which, while varying somewhat from day to day, apparently conformed generally to the pre-arranged formula. In this case, the Board advised the operator informally that in the Board's opinion the operation was not within the non-scheduled exemption.

<sup>29</sup> 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292.1(a).

Another case involving the construction of the non-scheduled exemption is now pending before the Board in a formal proceeding.<sup>30</sup> With respect to the applicability of the exemption, this case would appear to fall somewhere between the two cases described above. The trips were operated over a fixed route and the operator planned in advance to operate a daily round trip and also determined in advance the hours at which the trips would be operated. On the other hand, the operator's employees were instructed as follows:

"You may state an exact departure and arrival time for any special flight about which inquiry is made. In answer to general inquiries about schedules, however, you must state that arrival and departure times are approximate. You must explain that the actual departure time for each trip will be indicated on the passenger's ticket and he will be given a fixed departure time, therefore, only for his own trip."

The operator's press releases and advertising announced only that a service would be operated over the route, no reference being made to the fact that the trips were to be on a daily basis nor to the times of departure. However, in some manner various newspapers secured the information that the service would be operated daily and this fact was published by them in news items, which in at least one instance included a statement of actual departure times. In view of some vagueness in the instructions to employees quoted above and conflicts in testimony of witnesses, there is uncertainty about the manner in which inquiries from prospective passengers were handled in practice. For example, the instructions could be construed as not prohibiting advice that trips were operated daily, and if any inquiry were made as to transportation for a particular day in the future the instructions might sanction advising that trips departed in the afternoon or at approximately a specified time. There is evidence that advice of this kind actually was given to prospective passengers on occasions. Operations were conducted on a daily basis with a 14 passenger plane in approximate conformity to the scheduled departure times, except for cancellations due to weather, and transportation was sold by individual seats as distinguished from a "charter" of the whole plane.

Inasmuch as this case is pending, no attempt will be made to reach any conclusion on it here. The operator contends on brief in the case that under the regulation it is the "holding out" to the public of regular services that removes an operation from the non-scheduled category, and denies that there was any such holding out here. The operator's contention that the definition of non-scheduled operations is based upon the nature of the holding out by the operator is sound as a general principle and, accordingly, the fact that the service may have been operated in fact on a regularly scheduled basis is not controlling. On the critical question whether the service was held out to the public in the sense intended by the Board's definition of non-scheduled a number of questions of principle are suggested by the case, e.g., (1) what is the effect of newspaper publicity concerning times of departure if it is not intentionally promoted by the operator, (2) can the

<sup>30</sup> In the Matter of Certain Activities of Trans-Marine Airlines, Inc., C. A. B. Docket No. 1967.

operator, with only the condition precedent that the prospective passengers request information concerning trips on a day specified by the passenger, advise passengers in advance of purchasing transportation of an exact, or even approximate, time of a departure already determined upon by the operator, (3) where the service is planned for a period in advance on a daily basis may not any practicable response to inquiries of prospective passengers constitute the holding out of a regular, and therefore a scheduled, service, (4) where the service is operated daily for a substantial period of time at approximately the same times of departure does the general knowledge acquired by the public of the regularity of the service establish the holding out to the public referred to in the regulation, and (5) is the holding out through advertising or answers to general inquiries that a service is on a daily, or similarly recurrent basis sufficient to remove the service from the exemption. The Board's decision should furnish answers to some of the questions raised by this case.

#### PROPOSALS FOR MODIFICATION OF THE NON-SCHEDULED EXEMPTION

It is apparent that, without regard to their economic soundness, the exemption and the definition of non-scheduled are inadequate. It is extremely difficult now for an operator to determine whether his plans will fall within the exemption and this uncertainty should be minimized to the extent that it is feasible. From the policy point of view the exemption also needs reexamination. It was adopted seven years ago in the early days of economic regulation, probably more as a means of postponing a problem which could not be handled due to the press of other activities required by the Act than as a reasoned economic policy. These considerations led the Board to institute on July 26, 1944, an investigation into the general problem of the desirability of revising or terminating Section 292.1.<sup>31</sup> Public hearings have been held in this investigation and a report by the Board's examiners who presided at the hearing has been issued.<sup>32</sup>

The report of the examiners recommends the repeal of Section 292.1 and suggests a new exemption for certain types of operations based upon a proposed new classification of carriers. The examiners' recommendation, in effect, would exempt from economic regulation all services transporting persons and property for hire with three limitations—the limitations being (1) that the service must consist of trips originating or terminating at a "principal place of business" of the operator, (2) that not more than ten trips per month could be operated between points between which "reasonably direct service" is available under existing certificates of public convenience and necessity, and (3) that the services must be those of a carrier exclusively engaged in operations falling within the first two limitations. This recommendation is in one respect considerably broader than the present exemption in that the proposal would exempt even scheduled operations where reasonably direct certificated services were not available. On the other hand, the limitation recommended with respect to operations between points between which

<sup>31</sup> In the Matter of Investigation of Non-scheduled Air Services, C. A. B. Docket No. 1501.

<sup>32</sup> *Id.*, Report of Examiners, August 22, 1945.

certificated service is available would retain, in such a case, the idea of a distinction between scheduled and non-scheduled operations but would redefine non-scheduled operations in terms of a maximum number of trips permissible during a month.

The recommendation of the examiners in this proceeding has not yet been considered by the Board. Any future exemption could, of course, be designed to extend to an entirely different classification of operations than are now exempted, or to exempt different classes of operations from Title IV of the Act in varying degrees. Disposition of the problem necessarily will depend on the views the Board takes concerning the economic need for regulation of the various types of operations subject to the Act. A number of different proposals have been made with respect to the treatment of the exemption order, which reflect varying views as to the directions in which economic regulation is advisable or undesirable: the examiners propose that what can be roughly described as fixed base operations be exempted; others have suggested that what is needed is an exemption for local services defined in terms of services which do not operate in excess of some specified distance or which are operated with aircraft having less than a specified capacity; it has been proposed that at least some specialized services such as the transportation of household goods be exempted; and, of course, there also are available the alternatives of removing all exemption and thereby bringing under economic regulation all common carrier operations or of continuing to exempt non-scheduled operations as is now the case. It appears probable that even though no change is made in the general policy of the exemption the Board in any event will modify the present regulation to the extent of defining more precisely the term "non-scheduled."

#### THE MEANING OF "COMMON CARRIER"

The concept of "common carrier" is a basic part of the Act. The general tests to be applied in determining whether an operation is that of a common carrier are well established by a great body of law applicable to surface transportation. Although the cases involving the status of air carriage have been relatively few, there has been a sufficient number to indicate clearly that the courts have applied the same general tests of status in this field of transportation as they have applied in other fields.<sup>33</sup> While the general principles are clear, the application of these principles to the variety of factual situations that can be presented is difficult.

A common carrier is generally defined as one who, as a regular business, undertakes for hire to carry for such persons as may apply so long as capacity is available.<sup>34</sup> No difficulty is presented in applying this principle to the case of estab-

<sup>33</sup> *Allison v. Standard Air Lines*, 1930 U. S. Av. R. 292 (U. S. D. C., S. D., Cal. 1930), *aff'd.* on other grounds 65 F. (2d) 668 (C. C. A. 9th, 1933); *Law v. Transcontinental Air Transport* (not officially reported), 1931 U. S. Av. R. 205 (U. S. D. C., E. D., Pa. 1931); *Smith v. O'Donnell*, 5 P. (2d) 690 (App. 2d D. Cal. 1931), *aff'd.* 215 Cal. 714, 12 P. (2d) 933 (1932); *Ziser v. Colonial Western Airlines*, 10 N. J. Misc. 1118, 162 Atl. 591 (1932); *Conklin v. Canadian Colonial Airways*, 242 App. Div. 625 (1934), *aff'd.* 266 N. Y. 244, 194 N. E. 692 (1935); *McCusker v. Curtiss-Wright Flying Service*, 269 Ill. App. 502 (1933); *Curtiss-Wright Flying Service v. Glose*, 66 F. (2d) 710 (C. C. A. 3d, 1933), *cert. den.* 290 U. S. 696 (1933).

<sup>34</sup> 13 C. J. S., *Carriers*, sec. 3.



lished airlines running on schedule between fixed termini selling transportation in the form of tickets for individual seats and carrying within the capacity of the plane all persons who desire transportation. In such instances, the courts have readily classified these as common carriers.<sup>35</sup>

Inquiries received by the Board indicate that as expressed by persons planning operations the problem of determining the common carrier status of aircraft operations most frequently takes the form of one of the following questions: (1) can a non-scheduled operation or one without fixed termini be a common carrier service, (2) can a charter service be so operated as to be a common carrier service, and (3) how many and what sort of special contracts for transportation convert a so-called contract service into a common carrier service.

As to the first point, it seems clear that the fact that an operation is not scheduled is not controlling as to its common carrier status nor is the fact that the operation is not between fixed termini.<sup>36</sup> Although some judicial decisions have given these factors some weight in connection with other circumstances surrounding an operation,<sup>37</sup> the concept of a common carrier service as one held out to the public would not justify giving any greater force than this to the lack of schedules or termini. It should be reemphasized here that the failure of the Board to apply economic regulation to non-scheduled operators in the past has not been due to any determination by the Board that such operators are not common carriers.

The greatest volume of non-scheduled commercial air transport operations in the past appears to have been in the form of so-called charter services. The term charter services is used here to refer to those operations typically held out as "service to any place at any time" and involving the operation of trips only upon the making of a special arrangement on the occasion of each trip by a single individual or single group. There has been a tendency to assume too readily that operations of this kind cannot have a common carrier status. To some extent, this assumption has been based on the idea that the arrangement is in effect, the lease of the aircraft by the operator rather than a transaction involving the furnishing of transportation to the passenger or shipper. But, in fact, this need not necessarily be the case in arrangements of this kind.

In the maritime field, for example, it has been held that a charter of a ship is not technically a lease of the vessel nor does the owner lose his status as a carrier unless rather complete control of the vessel is transferred under the charter agreement; in the absence of such a surrender of control the so-called charter is simply a

<sup>35</sup> *Allison v. Standard Air Lines*, 1930 U. S. Av. R. 292 (U. S. D. C., S. D., Cal. 1930), *aff'd.* 65 F. (2d) 668 (C. C. A. 9th, 1933); *Law v. Transcontinental Air Transport* (not officially reported), 1931 U. S. Av. R. 205 (U. S. D. C., E. D., Pa. 1931); *Conklin v. Canadian Colonial Airways*, 242 App. Div. 625, 271 N. Y. Supp. 1107 (1934), *aff'd.* 266 N. Y. 244, 194 N. E. 692 (1935); cited *supra* note 33.

<sup>36</sup> *Ziser v. Colonial Western Airways*, 10 N. J. Misc. 1118, 162 Atl. 591 (1932); *Claypool v. Lightning Delivery Co.*, 38 Ariz. 262, 299 Pac. 126 (1931); *Smith v. O'Donnell*, 5 P. (2d) 690 (App. 2d D. Cal. 1931), *aff'd.* 215 Cal. 714, 12 P. (2d) 933 (1933); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918); *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174 (1916); *McCusker v. Curtiss-Wright Flying Service*, 269 Ill. App. 502 (1933).

<sup>37</sup> *Beatrice Creamery Co. v. Fisher*, 291 Ill. App. 495, 10 N. E. (2d) 220 (1937).

contract for transportation.<sup>38</sup> The Interstate Commerce Commission has made a similar distinction in applying the provisions of the Motor Carrier Act to charter operations of motor vehicles,<sup>39</sup> and has held in many cases that services analogous to the typical aviation charter services have a common carrier status and must be certificated as such where they are held out as available to the public.<sup>40</sup> Judicial decisions also have held that taxi services can be common carrier services even where the passenger is entitled to the exclusive use of the vehicle<sup>41</sup> and that charter bus operations can have a similar status.<sup>42</sup> Of more direct significance to the aviation field, is the fact that it has already been held in one decision of a court that what, from the facts of the case, appears to have been a typical aviation charter operation was in law a common carrier service.<sup>43</sup>

It is not intended to generalize from this that all charter services are common carrier services. The answer in each case must depend upon whether the arrangements made are contracts for transportation and whether, as in the case of other types of service, the service is being held out as available to the public generally.<sup>44</sup> Whether such a service is so held out as to be a common carrier service would appear to present a problem generally similar to that presented by so-called contract services.

Considerable interest has been shown in the operation of air services for the carriage of cargo under special contract. In the case of these operations, as in charter services, the plans of many operators are predicated on the theory that the fact that both types of service are performed under special arrangements with the passenger or shipper will prevent the operations from taking a common carrier status and thereby leave them free from economic regulation under the Civil Aeronautics Act. However, the mere existence of a special contract or contracts for the transportation rendered is not, as a matter of legal principle, controlling as to the common carrier status of an operation.<sup>45</sup> Transportation by a common carrier also involves a contract. The significance of an operator's furnishing transportation only under special contracts made with each passenger or shipper is that such a

<sup>38</sup> *United States v. Hvoslef*, 237 U. S. 1 (1915); *Boston Elevated Ry. Co. v. Malley*, 288 Fed. 864 (D. Mass. 1923).

<sup>39</sup> *Tanner Motor Livery, Ltd., Com. Car. Application*, 32 M. C. C. 387 (1942); *U-Drive-It Co. of Pennsylvania, Inc., Com. Car. Application*, 23 M. C. C. 799 (1940).

<sup>40</sup> *Blue & Grey Sight Seeing Tours, Com. Car. Application*, 8 M. C. C. 124 (1938); *Joseph Newman, Com. Car. Application*, 17 M. C. C. 101 (1939); *Barrows, Com. Car. Application*, 19 M. C. C. 179 (1939); *Peters, Com. Car. Application*, 23 M. C. C. 611 (1940); *Liederbach, Com. Car. Application*, 41 M. C. C. 595 (1942).

<sup>41</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918); *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174 (1916).

<sup>42</sup> *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (S.D., N. Y., 1941).

<sup>43</sup> *McCusker v. Curtiss-Wright Flying Service*, 269 Ill. App. 502 (1933).

<sup>44</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916); *Langer v. Lukens*, 26 F. (2d) 855 (C. C. A. 9th, 1928).

<sup>45</sup> *Smitherman v. Mansfield Lumber Co.*, 6 F. (2d) 29 (W. D., Ark. 1925); *McKay v. Public Utilities Commission*, 104 Colo. 402, 91 P. (2d) 965 (1939); *Gornish v. Public Utilities Commission*, 134 Pa. S. 565, 4 A. (2d) 569 (1939); *Breuer v. Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623 (1928); *State v. Washington Tug & Barge Co.*, 140 Wash. 613, 250 Pac. 49 (1926).

practice tends to negative a holding out of the service to the public generally.<sup>46</sup> On the other hand, if, from other circumstances surrounding the operation, there is an apparent willingness to serve anyone who requests the service within the limits of available equipment, the operation would be a common carrier service even though performed under special contracts made prior to the transportation,<sup>47</sup> and the fact that on occasions business was refused would not necessarily prevent the operation from being that of a common carrier.<sup>48</sup>

The Interstate Commerce Commission has attempted to work out administratively a more concrete specification of the difference between common carrier and contract operations under the Motor Carrier Act.<sup>49</sup> The Commission holds that:

"We find, therefore, that from and after the effective date of the order hereinafter entered, all contract carriers of property by motor vehicle, as defined in section 203(a)(15) of the act, shall transport under contracts or agreements which shall be in writing, which shall provide for transportation for a particular shipper or shippers, which shall be bilateral and impose specific obligations upon both carrier and shipper or shippers, which shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which shall be preserved by the carriers parties thereto so long as the contracts or agreements are in force and for at least one year thereafter."<sup>50</sup>

In reaching this conclusion, the Commission stated that:

"The requirement that they be bilateral and cover a series of shipments over a period of time is necessary, if there is to be any practical and effective means, for the future, of preventing alleged contract carriers from trespassing on the field of common carriage."<sup>51</sup>

This view of the Commission has been approved by at least one judicial decision.<sup>52</sup> The Commission's action suggests one course which the Board might take in defining common carrier operations by aircraft in the field of cargo carriage.

The question has been raised frequently as to whether the number of contracts made by an operator has significance in determining his status. The Interstate Commerce Commission has indicated that the number of contracts which a carrier may have is one of the secondary considerations to be looked at in determining whether it is a common or a contract carrier.<sup>53</sup> On the other hand, there are some judicial decisions holding that an operator was not a common carrier even though a large number of contracts had been made, but in these cases the fact that the services were of a specialized character may have been responsible for the result.<sup>54</sup>

<sup>46</sup> *State v. Carlson*, 217 Ia. 854, 251 N. W. 160 (1933); *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916).

<sup>47</sup> See cases cited *supra* note 45.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Contracts of Contract Carriers*, 1 M. C. C. 628 (1937).

<sup>50</sup> *Id.* at 632.

<sup>51</sup> *Id.* at 633.

<sup>52</sup> See, *Fordham Bus Corp. v. United States*, 41 F. Supp. 712, 718 (S. D. N. Y. 1941).

<sup>53</sup> *Craig Contract Car. Application*, 31 M. C. C. 705 (1941).

<sup>54</sup> *Film Transport Co. v. Public Utilities Com.*, 17 F. (2d) 857 (E. D. Mich., 1927); *Columbus-Cinn. Trucking Co. v. Public Utilities Com.*, 141 Ohio St. 228, 47 N. E. (2d) 623.

In view of the legal definition of a common carrier, it does not seem that the number of contracts made by an operator should be given any great significance in resolving the fundamental question as to whether he is holding out the service to the public—although the fact that a large number of contracts was made would be some indication that the service was being so held out. The primary question is whether the service is being held out to the public and not what the results of the holding out are. While the Board has not made any recent survey of the so-called charter operations now being carried on, such general information as it has would indicate that most of them are being held out to the general public in a fashion which makes them common carrier services. No large number of operations for the carriage of cargo under contract has yet been inaugurated and it is not possible to generalize as to the status of these operations.

There are several special types of service which should be commented on briefly. The Board has received a number of informal inquiries from retail stores, mail order houses, producers associations, etc., as to the status of proposals to use aircraft in the delivery of goods sold to customers or in the transport of goods for the purpose of subsequent sale. In a number of judicial decisions it has been held that whether transportation in connection with a sale transaction is carriage for hire depends upon whether title to the cargo is held by the person operating the vehicle.<sup>55</sup> If title is held by the operator, no transportation for anyone other than the operator is involved and, of course, the movement is not common carriage;<sup>56</sup> if the operator does not hold title and the service is available to the public, the contrary result is reached.<sup>57</sup> To leave the problem rest here, however, would be an over-simplification of it, inasmuch as there are indications in other authorities that additional factors enter into this type of case.

The Interstate Commerce Commission has held in cases of this kind that a seller using motor vehicles to deliver goods sold by him is generally a "private carrier" under the Motor Carrier Act where the operations are incidental to and in furtherance of the business in which the seller is engaged,<sup>58</sup> and even though the seller adds a transportation charge to the price of the goods sold.<sup>59</sup> However, the Commission holds that under some circumstances motor vehicle operations in connection with sale transactions may be common or contract carrier operations even though title to the cargo is held by the operator.<sup>60</sup> The test, says the Commission, is whether the transportation:

<sup>55</sup> *Interstate Commerce Commission v. Clayton*, 127 F. (2d) 967 (C. C. A. 10th, 1942); *Campbell River Mills Co. v. Chic. M. St. P. & P. R. Co.*, 42 F. (2d) 775 (W. D. Wash. 1930); *Bay v. Merrill & Ring Lumber Co.*, 211 F. 717 (W. D. Wash. 1914); *Allaman v. Public Utility Commission*, 149 Pa. S. 353, 27 A. (2d) 516 (1942); *Weller v. Kolb's Bakery & Dairy*, 4 A. (2d) 130 (Ct. of App. Md. 1939).

<sup>56</sup> *Ibid.*

<sup>57</sup> *West v. Tidewater Express Lines*, 168 Md. 581, 179 Atl. 176 (1935).

<sup>58</sup> *Congoleum-Nairn, Inc.*, Contract Car. Application, 2 M. C. C. 237 (1937); *Shafer*, Com. Car. Application, 3 M. C. C. 347 (1937); *Jackson*, Com. Carrier Application, 7 M. C. C. 388 (1938); *Swanson*, Contract Car. Application, 12 M. C. C. 516 (1939); *Woitishek*, Com. Car. Application, 42 M. C. C. 193 (1943).

<sup>59</sup> *Swanson*, Contract Car. Application, 12 M. C. C. 516 (1939).

<sup>60</sup> *Campbell*, Com. Car. Application, 6 M. C. C. 277 (1938); *Conklin and Caton*, Com. Car. Application, 20 M. C. C. 469 (1939); *Roberts*, Extension of Operations, 28 M. C. C. 238 (1941).

“. . . is transportation which is supplied with a purpose to profit from the effort as distinguished from a purpose merely to make good or recover the cost of transportation furnished in the furtherance of some other primary business or transaction.”<sup>61</sup>

This distinction has been followed in judicial decisions where it is said that ownership of the cargo transported is not the test of whether carriage for hire is present in a case, but that the primary test is whether the transportation is merely incidental to the business of selling or is a major enterprise in and of itself.<sup>62</sup>

In view of the great variety of arrangements which can be made involving sales coupled with transportation, it would seem advisable in order to prevent evasion of the Act for the Board to adopt principles in this connection similar to those followed by the Interstate Commerce Commission.

Another special type of service which has been proposed on occasions is the so-called “flyaway service,” i.e., the flying of aircraft from the seller of the aircraft to the purchaser. Where this is done by the seller, who retains title, no transportation for hire would appear to be involved. However, the Interstate Commerce Commission has held that similar motor vehicle operations conducted by persons other than the buyer or seller of the vehicle, performed for compensation by persons holding themselves out to perform such service as a business and not as a casual or occasional transportation, is the transportation of property by motor vehicle.<sup>63</sup> The Commission’s reasoning appears to be based upon the conclusion that the operations in question are transportation. The Civil Aeronautics Act defines “air transportation” in terms of “the carriage by aircraft of persons or property” and the definitions of carriers by motor vehicle in the Motor Carrier Act are stated in similar language. The quoted phrase suggests that Congress may have had in mind only the transportation of cargo other than the aircraft itself, in which event aircraft “flyaway services” would not be subject to Title IV of the Act. Although the Board has made no ruling on this point, it is not certain that it need follow the Interstate Commerce Commission’s precedent.

As is the case in the application of the definition of the term “non-scheduled,” the determination of the common carrier status of aircraft operations in particular cases is most uncertain. Some consideration has been given to the possibility of securing the promulgation by the Board of a regulation which would set out the Board’s views as to the point at which various kinds of operations became those of a common carrier. Such a regulation could not be conclusive and would be subject to modification as a result of later proceedings before the Board or litigation in the courts, but it would at least provide a basis upon which operators could proceed with their plans with more assurance of their future fate than they now have. Alternatively, it might be feasible to establish a procedure for the issuance of in-

<sup>61</sup> *Woitishak, Com. Car. Application*, 42 M. C. C. 193, 201 (1943). This case contains a very complete review of the problem as it has arisen under the Motor Carrier Act.

<sup>62</sup> *Interstate Commerce Commission v. Clayton*, 127 F. (2d) 967 (C. C. A. 10th, 1942); *A. W. Stickle Co. v. Interstate Commerce Commission*, 128 F. (2d) 155 (C. C. A. 10th, 1942).

<sup>63</sup> *Wartena, Inc., Com. Car. Application*, 4 M. C. C. 619 (1938); *Fleming, Com. Car. Application*, 8 M. C. C. 469 (1938); *Saber, Inc., Ext. of Operations*, 23 M. C. C. 80 (1940).

formal opinions by the Board concerning the status of operations upon the submission of an adequate statement of fact, although such opinions would not be binding on the Board in a legal sense.

The common carrier status of an operation, as has been pointed out, is now important because only common carrier operations are subject to economic regulation under existing law. However, legislation is now pending in Congress which would provide for the regulation of those commercial air transport operations for hire which are not common carrier services.<sup>64</sup> The general outline of the regulation proposed by this legislation is similar to that now provided in the Civil Aeronautics Act for common carriers. Authority to operate in the form of licenses would be required. Provision would be made for the filing of tariffs showing minimum rates and the Board would be given power to fix minimum rates in the event that existing rates were unreasonable. A broad authority would be given under these proposals for the Board to exempt operations from regulation where it finds that the public interest requires it.

#### INTERNATIONAL SERVICES

What has heretofore been said concerning the application of the Civil Aeronautics Act is generally true both with respect to commercial operations within the United States and operations between the United States and foreign territories by United States citizens. In international operations common carriers who are citizens of the United States are required by the statute to secure certificates of public convenience and necessity from the Board, file tariffs, comply with all requirements of Title IV,<sup>65</sup> and secure air carrier operating certificates; and Section 292.1 of the regulations exempts from the application of Title IV of the Act such operations as are within its definition of "non-scheduled." However, the necessity of securing operating rights from foreign countries injects additional legal aspects into international operations. This subject could be fully developed only by a more extensive treatment than is possible in this paper; but a general outline of the current international law is necessary for a complete picture of the status of non-scheduled operations.

Prior to the International Aviation Conference held in the latter part of 1944 at Chicago, the United States entered into a number of bilateral air navigation agreements with foreign countries.<sup>66</sup> The basic right exchanged by these agreements was that of "liberty of passage" to the aircraft of the parties. However, all of these agreements contain the exception, usually in the following form, that "the establishment and operation of regular air routes" shall be subject to the prior con-

<sup>64</sup> H. R. 674 and S. 1, 79th Cong., 1st Sess. (1945).

<sup>65</sup> However, the Board's power to fix rates for the transportation of persons and cargo between the United States and foreign territories is limited to the removal of unreasonable discriminations. See secs. 404, 1002(d) and (f) of the Act, 49 U. S. C. (1941) §§484, 642(d) and (f).

<sup>66</sup> Department of State, Executive Agreement Series Nos. 24 (Italy), 38 (Germany), 47 (Sweden), 50 (Norway), 54 (Union of So. Africa), 58 (Denmark), 76 (United Kingdom), 110 (Ireland), 129 (Canada), 152 (France), 166 (Liberia).

sent of the party whose territory is touched by the operation.<sup>67</sup> Whether these agreements extend operating rights to services which are not on a scheduled basis depends upon the construction placed upon the phrase "regular air route." It would appear arguable that a non-scheduled service which operated with considerable frequency over a particular route would fall within the exception and therefore would be required to secure the same sort of permit from the foreign country that is required of a scheduled operation. The construction of the agreements in this respect does not appear to have been established yet in international practice. The United States also is a party to the so-called Havana Convention on Commercial Aviation between the United States and other American Republics.<sup>68</sup> This agreement provides for "freedom of innocent passage . . . to the private aircraft" of the contracting states, without making any express exceptions. In practice, however, the parties have required prior consent at least for the operation of regularly scheduled air transport services.

Two of the international agreements worked out at the recent Chicago Aviation Conference are already in effect as between the United States and certain other countries, i.e., the "International Air Services Transit Agreement" and the "International Air Transport Agreement,"<sup>69</sup> but these two agreements relate only to rights for "scheduled international air services."<sup>70</sup> In addition to these agreements an aviation convention was drafted at Chicago. This Convention contains express provisions dealing with the conditions under which non-scheduled international air services may be operated, but will not be effective until ratified by at least twenty-six countries. Article 5 of the Convention<sup>71</sup> grants to all civil aircraft the right to make non-stop flights and non-traffic stops. In addition, aircraft engaged in the carriage of traffic for hire "on other than scheduled international air services" are granted the right to take on or discharge traffic in the territory of the nations ratifying the Convention "subject to the right of any state where such embarkation or discharge takes place to impose such regulations, conditions, or limitations as it may consider desirable."<sup>72</sup> Since this Convention is not yet in effect rights for the operation of international non-scheduled services by United States operators now must depend upon the provisions of existing bilateral agreements and those of the Havana Convention, or upon securing special rights for the particular services.

Operations into the United States by citizens of a foreign country are made subject by the Act to the regulation provided for "common carriers,"<sup>73</sup> but where

<sup>67</sup> Other forms of the exception require prior consent for the operation of "[a] regular air route or service" (United Kingdom), "a regular air route or air transport service" (France), and of "regular scheduled services" (Liberia).

<sup>68</sup> 47 STAT. (Part 2) 1901, Department of State, Treaty Series No. 840.

<sup>69</sup> INTERNATIONAL CIVIL AVIATION CONFERENCE, FINAL ACT AND RELATED DOCUMENTS, issued by the Department of State (1945) 87-95.

<sup>70</sup> International Air Services Transit Agreement, Art. I, *id.* at 87; International Air Transport Agreement, Art. I, *id.* at 91.

<sup>71</sup> INTERNATIONAL CIVIL AVIATION CONFERENCE, FINAL ACT AND RELATED DOCUMENTS, *supra* note 69, at 60.

<sup>72</sup> *Ibid.*

<sup>73</sup> There are, however, some differences in the details of regulation as applied to United States air carriers and as applied to foreign air carriers.

their operations are not on a common carrier basis, they must secure a foreign aircraft permit from the Civil Aeronautics Administration under the provisions of Section 6(c) of the Air Commerce Act of 1926;<sup>74</sup> the last permit being a requirement which is not imposed upon citizens of the United States. Section 292.1 of the economic regulations, exempting non-scheduled operations from Title IV of the Act, does not apply to citizens of a foreign country.

#### CONCLUSION

To summarize—the current regulatory pattern is that (1) all non-scheduled operations as defined by the Board, performed by United States carriers, are, at least temporarily, free from regulation under Title IV of the Act (except with respect to Section 401(1) and in some respects Section 407), (2) such non-scheduled operations as are common carrier services are required by the Act to secure an air carrier operating certificate and comply with other safety regulations, the non-scheduled exemption providing no relief from these requirements, and (3) in the event of a repeal of the Board's exemption order in Section 292.1 of the Economic Regulations, all common carrier operations, whether scheduled or non-scheduled, would be subject to the economic regulation provided by Title IV of the Act.

The development of regulatory policies and the legal principles of regulation is just getting under way with respect to non-scheduled commercial air transport operations. Many of the provisions of the Civil Aeronautics Act are patterned after those of the Motor Carrier Act and the type of non-scheduled transport operations feasible with aircraft are to a considerable extent analogous to those which have developed in the past with motor vehicles on the surface. Consequently, it can be expected that the problems which arise in this field of aviation regulation will be similar to those which have already been faced by the Interstate Commerce Commission in administering the provisions of the Motor Carrier Act. While it is not possible to predict how far the Board will follow the Commission's precedents, the decisions of the Commission in its field provide in any event a useful basis for considering the similar problems of non-scheduled aviation.

Of more immediate concern to the person who is planning at this time to engage in some sort of non-scheduled aviation operations is the fact that during the next few months it is likely that new developments affecting this field will arise out of the Board's consideration of the pending investigation of non-scheduled air services.

<sup>74</sup> 44 STAT. 572 (1926), as amended by 52 STAT. (1938) 1028, 54 STAT. 1235 (1940), 49 U. S. C. (1941) §176(c).