

# THE TAXATION OF AIR CARRIERS†

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The future of air-line taxation was foreshadowed by two events of the year 1939. One of these was the destruction of the Polish army by the Luftwaffe. The second was the inconspicuous act of a Ramsey County official who listed on the Minnesota property tax rolls the whole fleet of Northwest Airlines despite the fact that all members of the fleet made regular excursions beyond the borders of the state and some of them regularly found their way onto the tax rolls of other states. Of the two events, the second had more immediate and more obvious tax implications. But the national concern for a vigorous peace-time aviation industry which was awakened by the war will be largely responsible for the translation of these implications into action and will, in the long run, far overshadow the Northwest Airlines case in its effects upon the taxation of this mode of transportation.

The facts of the *Northwest Airlines* case<sup>1</sup> and the diverse opinions which it elicited from the courts are too well known to bear repeating. We are concerned here with the consequences of the decision that the taxes extended on the Ramsey County assessment were constitutional and of the uncertainty whether the taxes imposed by other states on the same property, if litigated, would be sanctioned or condemned. One of the early effects was a Congressional proposal to prohibit state taxation of air carriers "in a manner, or on a basis, which results or is likely to result in multiple taxation."<sup>2</sup> This ambiguous provision was later supplanted by a proposal that the Civil Aeronautics Board conduct a study of multiple and unduly burdensome taxation of air lines and their employees by states, territories, possessions, and their political subdivisions and report its recommendations to Congress. The latter proposal was enacted<sup>3</sup> shortly after the United States Supreme Court placed

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<sup>1</sup> *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944). For opinion of the Supreme Court of Minnesota, see *State v. Northwest Airlines*, 213 Minn. 395, 7 N. W. (2d) 691 (1942). For critical commentary, see Note (1944) 57 HARV. L. REV. 1097 (Prof. Powell); Welch, *The Northwest Airlines Case* in NATIONAL TAX ASSOCIATION, PROCEEDINGS OF THIRTY-SEVENTH NATIONAL CONFERENCE (1944) 285.

<sup>2</sup> S. 246 and H. R. 1012, 78th Cong., 1st Sess. (1943).

<sup>3</sup> Pub. L. No. 416, 78th Cong., 2d Sess. (July 3, 1944), 58 STAT. 723.

the final stamp of judicial approval upon the Minnesota tax. The Civil Aeronautics Board reported the results of its study to the Congress early in 1945,<sup>4</sup> and its recommendations have been incorporated by Representative Bulwinkle in a bill<sup>5</sup> on which hearings are to be held shortly. Upon the fate of this bill hangs much of the immediate future of state taxation of the scheduled domestic air lines.

#### PROBLEMS OF MULTIPLE AND UNDULY BURDENSOME TAXATION

The present article is chiefly concerned with the problems raised in the course of the Civil Aeronautics Board's study. Of these the following appear to be most fundamental:

1. Should the air lines be removed from the tax jurisdictions of the states and subjected only to Federal taxation?
2. Should air lines be subjected to specially designed taxes or to the taxes that apply to other carriers or to business concerns generally?
3. Should the states be required to adhere to, or be limited by, uniformly defined tax bases?
4. Should the maximum amount of an air line's "allocable base"—the quantum available for division among the states—be appraised by a Federal agency?
5. Should the several states be required to adhere to, or be limited by, uniform allocation formulas?
6. Should an air line's maximum "allocation factors"—the fractions by which the "allocable base" is divided among the states—be computed by a Federal agency?
7. Should the states be precluded from taxing aviation fuel?

It will be observed that this list of questions includes no inquiry as to the particular formulas that will best divide the "allocable bases" among the several states. This inquiry necessarily absorbed much of the time and energy of the Civil Aeronautics Board and its staff. However, it is regarded here as a question of secondary importance to which a reasonably satisfactory answer can be readily obtained by informed but disinterested parties once agreement is reached on the fifth and sixth questions listed above.

#### THE PRESENT STATUS OF AIR-LINE TAXATION

A detailed description of contemporary tax institutions as they affect the commercial air lines will not be attempted in this article. In brief, these carriers are subject to substantially the same taxes that apply to other business concerns, or to other transportation companies, except for certain state motor fuel taxes and nominal state aircraft and pilot license fees. Thus the Federal Government derives net income, excess profits, capital stock, old age insurance, and unemployment compensation taxes from air carriers,<sup>6</sup> and indirectly derives gasoline and lubricating oil taxes from

<sup>4</sup> C. A. B., MULTIPLE TAXATION OF AIR COMMERCE, H. R. DOC. NO. 141, 79th Cong., 1st Sess. (1945).

<sup>5</sup> H. R. 3446, 79th Cong., 1st Sess., introduced June 12, 1945.

<sup>6</sup> Under the Revenue Act of 1945, the two excess profits taxes and the capital stock tax are repealed as of 1946. A special provision of the INTERNAL REVENUE CODE, §727(h), operated to relieve most of the air-mail carriers of liability for the war excess profits tax.

them as the result of their consumption of commodities on which manufacturer's excise taxes have been collected. The states generally apply their net income, capital stock, and unemployment compensation taxes to air lines in common with other incorporated business enterprises; and property tax laws apply to these carriers either without special adaptation or with provision for state assessment in lieu of the traditional local assessment of this type of tax.<sup>7</sup> A few taxes on gross earnings from intrastate traffic are collected from the air lines, and these may be either of general scope, as in Indiana, Mississippi, and Washington, or of more limited application, as in Kentucky, New York, Pennsylvania, and Tennessee. The only other air-line tax of significant yield is that imposed on aviation fuel in nearly half of the states.

The relative magnitude of these several types of taxes varies considerably from year to year and from one carrier to another. For the scheduled domestic air carriers, Federal taxes (including gasoline and lubricating oil taxes accrued by the carriers though paid by others) have exceeded state and local taxes in all years of record, rising to what will probably prove to have been a near-peak of 89.4 per cent of the total in 1943.<sup>8</sup> Net income taxes, most of which are Federal, rose from around 12 per cent of the total in 1938 to 78.6 per cent in 1943.<sup>9</sup> Payroll and fuel taxes have comprised the other two large categories; both have increased steadily in absolute amounts but, because of the faster increase of income taxes, have declined in relative importance as air-line prosperity has risen. State and local taxes on property, net income, capital stock, and gross receipts—the taxes involving or threatening the type of multiple taxation to which Northwest Airlines objected—comprised 2.6 per cent of all air-line taxes in 1943 and were less than 7.5 per cent at the highest point of which we have knowledge.<sup>10</sup>

Not only do state and local taxes comprise a small percentage of total air-line taxes, but air lines account for a small percentage of total state and local government revenues. The 1942 state and local taxes of the scheduled domestic carriers operating in continental United States (excluding payroll taxes allocated to war contract operations) amounted to \$1,900,913.<sup>11</sup> This was only 0.015 per cent of total state and local government revenues in that year.<sup>12</sup> Georgia, Tennessee, Utah, and Wyoming were the only states in which these carriers accounted for as much as 0.1 per cent of all government revenues in 1942, and the highest of the percentages in these four states was 0.215 in Wyoming. California, Georgia, Illinois, and Tennessee were the only states which, together with their political subdivisions, collected more than \$100,000

<sup>7</sup> State assessment of air lines is now found in Kentucky, Maryland, Minnesota, Nevada, North Dakota, Oregon, Utah, Washington, West Virginia, Wisconsin, and Wyoming. It is associated with central assessment of other public service enterprises in all cases.

<sup>8</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 15. See also, BD. OF INVESTIGATION AND RESEARCH, CARRIER TAXATION, H. R. DOC. NO. 160, 79th Cong., 1st Sess. (1945) 314-316.

<sup>9</sup> CARRIER TAXATION, *supra* note 8, at 314; MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 16.

<sup>10</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 16.

<sup>11</sup> *Id.* at 75.

<sup>12</sup> BUR. OF THE CENSUS, GOVERNMENTAL FINANCES IN THE UNITED STATES: 1942, U. S. SUMMARY (1945) 14.

from the scheduled domestic air lines as the result of 1942 operations, and only Tennessee collected more than \$200,000. It follows from these facts and the moderately ascending trend of the air lines' state and local tax payments that these levels of government, both in the aggregate and individually, have not yet relied upon the taxation of air transportation for a significant part of their fiscal sustenance.

It does not follow that the states are indifferent to air-line taxation. Their interest arises partly from the belief that air transportation will greatly expand within the next few decades. But perhaps of even more importance is the identification of the air-line tax controversy with the whole issue of states' rights. Those who are opposed on general grounds to Federal encroachment upon the taxing powers of the states are concerned with the size of the camel, not the size of the camel's nose.

#### EXCLUSIVE FEDERAL TAXATION

The simplest and surest method of terminating the multiple and unduly burdensome state taxation to which the Civil Aeronautics Board's attention was directed is to terminate state taxation. This possibility was mentioned in the *Northwest Airlines* case by Mr. Justice Jackson when he observed that the Federal Government might, if it chose, "exact a single uniform Federal tax on the property or the business [of the air lines] to the exclusion of taxation by the states."<sup>13</sup> Any such program, it may be assumed, would be associated with special Federal excise taxes, the proceeds of which would be distributed among the states. But even with this seasoning it would be distinctly unpalatable to the states, and, constitutional questions aside,<sup>14</sup> may fairly be regarded as visionary within the present political environment. Undoubtedly, then, the air lines will continue to be taxed under both Federal and state laws, and the solution of the problem of multiple taxation must be sought in limitation rather than prohibition of state taxation.

#### DIFFERENTIAL TAXATION

The leading precedent for Federal limitation of state taxing powers is found in Section 5219 of the U. S. Revised Statutes. This section authorizes the states to impose a limited number of taxes upon national banks and their shareholders, with

<sup>13</sup> *Northwest Airlines v. Minnesota*, 322 U. S. 292, 303-304 (1944).

<sup>14</sup> Engaging in interstate commerce has never afforded sanctuary from state and local property taxation, even when unassociated with the conduct of intrastate commerce. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899). At one time, a showing by a non-transportation corporation that all of its activities within a state were incident to the conduct of interstate commerce protected it from a franchise tax measured partly by prorated net income and partly by prorated value of its shares of capital stock. *Alpha Cement Co. v. Massachusetts*, 268 U. S. 203 (1925). The doctrine on which this decision was based is losing ground and is not likely to survive another test in the Supreme Court. Cf. *Stone v. Interstate Natural Gas Co.*, 103 F. (2d) 544 (C. C. A. 5th, 1939); *Spector Motor Service v. Walsh*, 139 F. (2d) 809 (C. C. A. 2d 1943). Even state gross earnings taxes on fractional parts of receipts from interstate commerce, though supplementing and not merely substituting for property and special-benefit taxes, are now likely to be sanctioned by the Court. Cf. *Western Live Stock v. Bureau*, 303 U. S. 250 (1938). Whether Congress, by breaking its silence on the Commerce Clause, could deprive the states of these prerogatives and of their even better-established authority to tax concerns engaged in both interstate and intrastate business is a question that cannot be answered on the strength of a single justice's dictum. See MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 156.

certain restrictions as to rates. Because of the section, banks are often subject to tax laws that apply to few other types of business and are exempt from tax laws that are applicable to business corporations generally.

Those who are familiar with Section 5219 will recognize it as a warning rather than a guide post. No matter how wisely drafted, an air-line counterpart of this section would preclude the application to air lines of established business tax institutions in some states and, by way of compensation, would permit the imposition of some taxes that are not applied to the business community as a whole. The states could not reasonably be expected to accommodate their general business tax structures to the Federal statute because of the insignificance of air-line taxes relative to total business tax collections. Consequently, the air lines would appear to be under-taxed when the Federal statute protected them from levies to which other enterprises were subject and would be exposed to overtaxation where the statute permitted levies that the state declined to generalize. Neither prospect is pleasing to the air lines, for they are too sensitive to public opinion to wish to escape what is popularly regarded as their fair share of the tax burden and too keenly aware of their political impotence in state legislative circles to wish to forsake the safety which lies in numbers. Nor have the states been endeared to differential taxation by their experience with Section 5219 or with the gross earnings taxes that many of them have substituted at one time or another for ad valorem taxation of railroad property.<sup>15</sup> It may therefore be predicted that air lines will continue to pay most of their state taxes under laws originally designed for other carriers or for the business community at large rather than under laws especially designed for them.

#### UNIFORM DEFINITION OF ALLOCABLE BASES

Since most tax liabilities are computed by multiplying a tax base by a tax rate, the limitation of state taxes on air lines may operate with respect to either or both of these factors in the equation. Moreover, the state tax base of an interstate carrier is derived by multiplying an "allocable base" (e.g., a unit appraisal of the operating property) by an allocation factor and adding the product to any nonallocable items that are subject to the tax. In the case of property taxes, the allocated portion of the tax base or both the allocated and unallocated portions must often be further multiplied by one or more equalization ratios in order to reduce them to local assessment levels. To be completely effective, Federal limitations of state taxes on air lines must deal with all of these factors in the equation used to determine the tax liability.

The typical state tax base includes both allocated and unallocated elements, but it is commonly assumed that any Federal definition of maximum state tax bases would be concerned principally with the allocated portion. The least that such a definition might do is to govern the division of a taxable characteristic into allocable and nonallocable items; for example, the Bulwinkle bill provides that the allocable

<sup>15</sup> CARRIER TAXATION, *supra* note 8, at 72, 133-135.

base of the property tax shall be all operating property except real estate and permanently located tangible personal property. If it were so minded, Congress, under authority of the commerce clause, doubtless could define the maximum allocable base for property taxation to include all operating property. But it is unlikely that Congress can either require or prohibit allocation of nonoperating property or nonoperating income.<sup>16</sup>

Having defined the maximum allocable base by exclusion of nonallocable items, the Federal law might go to almost any length in describing the manner in which the dollar value of the allocable base was to be determined. Thus, in taxing an air line which held only operating property, the states might be limited to normal net income for Federal tax purposes as the allocable base for net income taxes or to the book value of capital stock, surplus, and undivided profits as the allocable base for capital stock taxes. Such a limitation is not a true Procrustean bed, for it lops off the limbs of the tall guests without stretching those of the short ones. However, it may be assumed that the dimensions of the bed would be selected with the expectation that there would be some limbs to lop and that a considerable measure of uniformity of tax bases would thus be achieved.

Once agreement upon nonallocable items had been reached, a uniform definition of the maximum property tax base should be readily attainable, since market value is an all but universal assessment standard. True, there is some diversity among the states as to whether the initial objective is to arrive at the market value of the carrier as a going concern or to arrive at separate market values for various classes of assets or individual items of property. But this diversity presents no problem for Federal disposition once the assets have been divided into allocable and nonallocable elements: if the franchise is allocable, going-concern valuation is inevitable; if it is nonallocable, going-concern valuation is impossible. This follows from the fact that the franchise value is, by assumption, the difference between the going-concern value and the sum of the piece-meal values of all assets except the franchise.

The differences among states in their definitions of taxable net income are much more numerous,<sup>17</sup> and there are at least a dozen different tax bases among the thirty-odd state levies generically and not too accurately designated as capital stock taxes. Consequently, any "ceiling" definitions of taxable net income and capital stock that might be conceived for the air lines would almost certainly be broader than prevailing definitions in some states and narrower in others.

It is apparent that "ceiling" definitions of allocable bases by Congress would invite differential taxation of air lines in some states and virtually require it in others; and it was probably for this reason that the Civil Aeronautics Board refrained from recommending them. Whether the differential was favorable or prejudicial to the air lines would depend upon the height of the ceiling, the constitutional freedom of the states to segregate air carriers from other concerns for tax purposes, and the

<sup>16</sup> This is not to say that the states are free to allocate such property or income, but rather that the denial of the power to allocate is a function of the courts rather than of the Congress.

<sup>17</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 61-62.

willingness of the state legislatures to depart from the principle of uniformity where free to do so.

#### FEDERAL APPRAISAL OF ALLOCABLE BASES

Most proposals for uniform ceilings on allocable bases contemplate not only statutory definitions of the ceilings by Congress but also administrative determinations of the dollar values of the ceilings by Federal administrative agencies. If, for example, the definition of the Federal normal tax base is to be the ceiling for state net income tax purposes, then the Bureau of Internal Revenue's determination of the Federal tax base is to be used in computing the maximum tax that a state may levy upon net income; if net book value of flight equipment is to be the ceiling of the allocable base for state property tax purposes, then the Civil Aeronautics Board is presumably to determine the book value through its vaguely defined powers to regulate accounting procedures and practices.

Federal determination of allocable bases would have at least three advantages over decentralized determinations. First, it would protect the air lines from state importation of values through the medium of excessive appraisals rather than through the more orthodox route of excessive allocation fractions.<sup>18</sup> Second, it would eliminate the duplication of effort and added compliance costs inherent in separate determination of allocable bases by each of the states in which a single carrier operates. Finally, a Federal agency might be expected to perform this function more competently than any state agency, since it could employ specialized personnel who would devote themselves exclusively to air-line taxation and would gain special insight into the financial affairs of individual lines by reason of their familiarity with the affairs of competitive and complementary carriers.<sup>19</sup>

Despite these advantages, the prospects for Federal assumption of this aspect of state tax administration are not bright. The Civil Aeronautics Board found little support for this proposal among the state and local officials with whom its staff discussed airline taxation. Furthermore, the air lines are not now in a position to demonstrate that they have been injured by exaggerated appraisals of allocable bases by state or local tax administrators. The logic and economy of highly centralized assessment are therefore likely to fall victim to the doctrine of states' rights, a doctrine that is more obviously violated by Federal definition and appraisal of allocable bases than by Federal allocation between the taxing state and all others of an allocable base defined and appraised by the state.

#### UNIFORM ALLOCATION FORMULAS

It was an allocation problem that Northwest Airlines carried through the country's highest tribunal, and it is lack of uniformity in allocation practices that results in "multiple taxation" as the term is understood by the Civil Aeronautics Board.<sup>20</sup>

<sup>18</sup> This advantage would be particularly apparent in property taxation, since the allocable base for this tax, as presently conceived, depends so much upon the judgment of the assessor.

<sup>19</sup> Cf. NAT'L ASS'N OF ASSESSING OFFICERS, ASSESSMENT ORGANIZATION AND PERSONNEL (1941) 106-107.

<sup>20</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 27.

The Board has therefore proposed that each of the states levying a particular type of tax be required to use a uniform allocation formula, or a formula that produces a smaller allocation fraction, to the end that the several fractions used to divide a given carrier's allocable base among the states with taxing jurisdiction can never add up to more than one and will add to exactly one if each state chooses to avail itself of its full authority.

All allocation formulas are arbitrary in some degree, and there is no scientific method of measuring this degree. The selection of a uniform allocation formula is therefore a political process in the best sense of the term—a compromising of opposing interests without compromising of principles.<sup>21</sup> It is primarily for this reason that the writer favors prescription of the formula by Congress, a political body, rather than by a Federal administrative agency.<sup>22</sup> It is also the reason why Federal participation in the allocation process is more imperative than Federal participation in the determination of allocable bases. A carrier's net income or its value as a going concern cannot be determined exactly, but at least the determination can be based upon scientific principles and logical deductions from established facts. Such a determination can much better be left to the state administrative and judicial agencies than the determination of allocation formulas, a task to which the scientist and the logician can bring little special insight.

But there is more than a little danger that a Federally determined formula will prove unsatisfactory if it can be changed only by Congress. Some measure of discretion, albeit slight, should be vested in an administrative agency so that the formula may be modified to meet the unforeseen circumstances that are too limited in scope or too temporary in character to merit Congressional action. Such modifications, it may be predicted, would almost always be made at the behest of the air lines, not of the states. To a state, or even to a political subdivision of a state, the difference between the statutory formula and the modification which a Federal agency might make would be of little or no fiscal significance; to an air line it might make a considerable difference. But it does not appear that administrative modifications of a statutory formula would often be necessary or desirable, and it is hardly conceivable that a Federal agency, even though sensitive to the needs of the industry, would manipulate allocation formulas with the overt purpose of improving an air line's profit and loss statement.

<sup>21</sup> T. V. Smith, *THE LEGISLATIVE WAY OF LIFE* (1940) 77.

<sup>22</sup> It is widely held that state tax departments should be given great latitude in the formulation of allocation policies, and it is reasoned by analogy that a Federal agency should be given equal latitude in the event the Federal Government assumes responsibility for allocation of air-line tax bases. There is some reason to doubt the validity of this analogy. The most persuasive reasons for giving a state department free rein are to avoid the rather remote possibility of violating the commerce or due-process clauses of the Federal Constitution and to facilitate coordination with the policies of neighboring states in order to minimize multiple or fractional taxation. If interstate coordination and due process of law are to be achieved by exercise of Congressional prerogatives over interstate commerce, the proper analogy is with state apportionment of bases among the state's political subdivisions rather than with interstate allocation as now practiced. Intrastate apportionment is usually governed by rather rigid statutory formulas. See *CARRIER TAXATION*, *supra* note 8, at 125.



If the states are to use uniform allocation formulas, some Federal action is clearly indicated. It has been proposed that the several states individually adopt a uniform air-line property tax law. Probably some measure of success would be achieved if such a program were vigorously promoted. While it is hardly to be expected that all states would conform, the amount of multiple taxation might, in time, be reduced to negligible proportions. However, this is the hard way to achieve uniformity in allocation formulas. Moreover, it is a way from which there is no easy retreat. Experience with air-line taxation has been so limited, and the future of the industry is so unpredictable, that the chances of selecting in the first instance allocation factors which will prove permanently satisfactory are not great. It will be difficult enough to change a Federally defined allocation formula once vested interests are built up about it, even though it may be found to have distinctly undesirable characteristics; to change the formulas of forty-eight states and the District of Columbia without Federal coercion would be miraculous.

#### FEDERAL DETERMINATION OF ALLOCATION FRACTIONS

The translation of statutory allocation formulas into allocation fractions is a more or less mechanical process requiring the exercise of judgment principally in the interpretation of the terms employed in the formula and in occasional adaptations of the formula to unforeseen circumstances that make its literal application impossible or notoriously inequitable. Whether the translation should be performed centrally by a Federal agency, as proposed by the Civil Aeronautics Board,<sup>23</sup> or separately by each of the state or local governments with jurisdiction to tax is therefore a question on which no large volume of tax payments is likely to hang. The relative convenience of the two procedures and the possibility that one or the other will yield valuable byproducts, rather than their relative effectiveness in eliminating multiple taxation, should determine the choice.

Those who prefer decentralized computation of allocation fractions to Federal computation believe that this will contribute in some small measure to the preservation of states' rights<sup>24</sup> and, if coupled with statutory rather than administrative definition of allocation formulas, will forestall another small increment in the Federal bureaucracy. On the other hand, the proponents of Federal computation believe that a central administrative agency is needed in at least the early stages of the experiment to interpret the terms of the allocation formulas, to appraise the success of the program, to bring promptly to the attention of the Congress the need for modification of the Federal statute, and to study the economic and political implications of an extension of the program to other carrier groups, such as the fixed-base

<sup>23</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 7-8, 47-50.

<sup>24</sup> As a matter of fact, the states would participate less actively in the allocation process under the so-called self-executing statute than under the CAB proposal. The CAB proposes that the states, through the Council of State Governments, nominate the members of an advisory committee which would assist the Federal allocation agency. The ministerial function of computing allocation formulas—the only state function with a “self-executing” statute—would be but one of the duties of the allocation agency and its advisory committee.

operators and the international carriers. Above all, the latter group believes that at least a small amount of discretion with respect to the formulas themselves should be vested in some Federal agency and that the computation of the allocation fractions would be a natural complement to any such function.

#### FEDERAL LIMITATION OF STATE TAX RATES

If the air lines are to be given full protection against punitive taxation by the states, it is necessary to limit tax rates as well as tax bases. The Civil Aeronautics Board recognized this problem by urging that air lines be subjected by the states to the same taxes as other business enterprises but did not recommend legislation to assure such treatment. It has been proposed in other quarters that a state, in levying any particular tax, be limited to the lowest rate imposed upon any other type of carrier and the highest rate levied on business corporations generally.<sup>25</sup>

Rate limitation poses technical problems far greater than those involved in current proposals to limit tax bases. It is generally agreed that rate limits must be expressed in relative rather than absolute terms; neither the states nor the air lines would relish politically feasible limitations expressed directly in numerical values. The problem is to find a proper comparative in the diverse tax systems of the forty-eight states. The experience of the states with the "other moneyed capital" comparative in Section 5219 illustrates the disruptive influence of this type of legislation; and one would not be aspiring to the ranks of the major prophets to predict a similar experience with a limitation of air-line tax rates. Even if it were possible to avoid immediate conflicts with established tax institutions, future conflicts would inevitably arise as the states endeavored to change their tax systems to conform to new circumstances and new concepts of tax equity and expediency.

It may be seriously questioned whether the air carriers need protection against excessive tax rates even though the states are, admittedly, constitutionally free to tax them out of existence.<sup>26</sup> If air lines owned their ways and terminals, as the railroads do, there would be some danger that taxes might approach the lethal level once air transportation had reached a state of relative maturity. But the history of water-carrier taxation is probably a much better basis on which to predict the future of air-carrier taxation. Neither water carriers nor air carriers are tied to a particular location by extensive real property ownership. Both are eagerly sought after—as railroads once were—by rival ports. Both are objects of public solicitude because they afford the means of transporting personnel and supplies to those places from which military attacks against the United States are likely to be launched. And, despite the maturity of water transportation, neither industry as a whole has been severely burdened by state and local taxes.<sup>27</sup> It is true that air lines are already subject to

<sup>25</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 138. The proposed property tax limitation is expressed differently (*id.* at 140) but produces somewhat similar results. The flight equipment of air lines, for example, is to be taxed at not more than the average rate of tax on tangible personal property throughout the State.

<sup>26</sup> *Nashville, Chattanooga & St. Louis R. R. v. Browning*, 310 U. S. 362 (1940).

<sup>27</sup> CARRIER TAXATION, *supra* note 8, at chs. V, VI and VIII.

burdensome motor fuel taxes in some states and that these taxes, in the absence of Federal intervention, seem more likely to spread than to recede.<sup>28</sup> But some of these taxes were inadvertently conceived, and the proceeds of many of them, however badly divided among the states, are earmarked for expenditure by aviation commissions on activities that are of some slight benefit to the air lines. That the states will deliberately subject the air lines to general taxes (as distinguished from special-benefit taxes) more burdensome than the lowest general taxes imposed upon competitive transportation agencies seems distinctly improbable, and only states with heterogeneous business taxes are likely to subject air carriers to levies that are not applicable on equal terms to the general business community. It is questionable, therefore, whether the program for elimination of multiple taxation—the original sin in which the Civil Aeronautics Board's study of air-line taxation was conceived—should be jeopardized by being linked to a proposal that is certain to be regarded as a severe blow to state sovereignty.

#### TAXATION OF AVIATION FUEL

The chief danger of unduly burdensome taxation of air transportation lies in the realm of special-benefit taxes. Of these, only the motor fuel taxes are of present fiscal significance.

The Civil Aeronautics Board holds that there is a conclusive case against continuance of state aviation fuel taxes.<sup>29</sup> The special committee designated by the Secretary of the Treasury to conduct a study on intergovernmental fiscal relations, while not as unequivocal, was apparently of similar mind.<sup>30</sup> Even the North American Gasoline Tax Conference's Committee on the Taxation of Air Lines, a group composed entirely of state officials, was divided over the question.<sup>31</sup> It may be concluded from these expressions and from the fact that over half of the states of the Union have voluntarily refrained from taxing aviation fuel that the weight of opinion opposes exploitation of this source of revenue by the states and their political subdivisions.

It is another question whether the Congress should summarily eject the states from this tax field. Members of the Civil Aeronautics Board, one may infer, would gladly offer to the states exclusive rights to highway fuel taxes as a quid pro quo for evacuation of the aviation fuel tax field. Realizing, however, that the highway fuel tax was not theirs with which to bargain, they have contented themselves with the recommendation that the Secretary of the Treasury consult with the governors and fiscal authorities of the states with respect to the whole subject of motor fuel taxation and that he recommend to Congress a program for the removal of the impediments to a healthy development of civil aviation inherent in state taxes on aviation fuel.<sup>32</sup>

<sup>28</sup> In the 1945 legislative sessions alone, Minnesota and Montana were added to the list of 20 states previously taxing aviation fuel used in interstate operations and Oklahoma raised its tax on such fuels.

<sup>29</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 64.

<sup>30</sup> FEDERAL, STATE, AND LOCAL GOVERNMENT FISCAL RELATIONS, SEN. DOC. NO. 69, 78th Cong., 1st Sess. (1943) 18.

<sup>31</sup> MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 123.

<sup>32</sup> *Id.* at 9-10.

There is perhaps a stronger possibility that the states will abandon aviation fuel taxes than that the Federal Government will do so. The Committee on Intergovernmental Fiscal Relations suggested that the Federal Government occupy this tax field exclusively, using the proceeds to finance the construction and maintenance of free public airports, the laying out and maintenance of beacon systems, the provision of weather information, and the regulation of pilot licensing.<sup>33</sup> Similar effects upon air transportation would flow from the recommendation of the Board of Investigation and Research that the Federal gasoline tax be identified as a user tax and the portion of the proceeds derived from aviation fuel be expended on the Federal airways.<sup>34</sup> It is because the amount of gasoline put into the fuel tanks of a plane at a particular port bears no reasonable relationship to the benefits conferred upon the operator of this plane by the state and local governments with taxing jurisdiction at the port that state imposts on aviation fuel are condemned; and it is because fuel consumption is closely related to benefits received from Federal provision of aids to air navigation that a Federal tax on the same base is favorably regarded.<sup>35</sup>

#### TAXATION OF FIXED BASE OPERATORS

The recommendations of the Civil Aeronautics Board of the elimination of multiple taxation apparently relate only to the common-carrier air lines. Although contract- and private-carrier operations have developed to only a limited extent in the aviation industry, there is every reason to suppose that they will, in time, expand to substantial proportions and raise tax problems not unlike those raised by the common carriers.

There is little precedent for the allocation of the property tax base of the contract and private air carriers. Several states tax the property of contract highway carriers on an allocated basis, but the constitutionality of this procedure has not been tested in the Supreme Court. Against its validity one may array a long line of decisions relating to the taxation of watercraft<sup>36</sup> and the one decision on taxation of aircraft.<sup>37</sup> The latter decision may well be accepted as controlling if Congress remains silent as to this type of air carrier. Whether this decision sanctions taxation of planes at their bases or at the domiciles of their owners is a question which the Supreme Court has left unanswered but which most states may be expected to resolve in favor of plane headquarters.

Like the property tax, most of the other state taxes now imposed upon fixed-base plane operators are levied upon unallocated tax bases. The constitutionality of net

<sup>33</sup> SEN. DOC. No. 69, *supra* note 30, at 18.

<sup>34</sup> CARRIER TAXATION, *supra* note 8, at 1.

<sup>35</sup> The considerations that have saved motor vehicle registration taxes from displacement by motor fuel taxes may eventually induce the Federal Government to supplement its aviation fuel tax with a tax that is progressive rather than regressive with respect to the size of the plane.

<sup>36</sup> This series culminated in *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911). None of the cases involved a tax based on an apportionment of a unit appraisal; but, since several of them sustained the right of a single state to tax the full value of a vessel or a fleet of vessels, it has been widely assumed that no other state could tax a portion of such value. See CARRIER TAXATION, *supra* note 8, at 268-272.

<sup>37</sup> *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944).

income and privilege taxation by states whose landing fields are used as ports of call rather than home ports is established only in the event the carrier has qualified to do an intrastate business, and the states have had little occasion to go beyond these narrow limits. Aircraft registration fees are still few in number and nominal in amount. Multiple taxation is therefore more of a prospect than a reality for the contract air carriers and holds even fewer terrors for the private carriers.

The allocation formulas recommended by the Civil Aeronautics Board are readily adaptable to the contract carriers, since they are not dependent upon fixed routes or fixed schedules. But whether these or some other allocation procedures should be applied to the nonscheduled carriers is a question which may well await a fuller flowering of this branch of the aviation industry and the accumulation of experience with their regulation and with the allocation of the tax bases of the common carriers.

#### TAXATION OF INTERNATIONAL CARRIERS AND FOREIGN-FLAG LINES

The Civil Aeronautics Board also excluded from the scope of its recommendations the international carriers, whether incorporated in the United States or elsewhere.<sup>38</sup> These carriers present problems not found in the field of domestic transportation because they become subject to the taxes of two or more sovereign nations.

In all probability, the taxes that foreign nations may impose upon United States carriers will, in time, be settled by reciprocal treaties. Although these treaties will undoubtedly control, and perhaps even prohibit, state and local taxation of foreign-flag carriers whose routes reach or cross the United States, they will not deal with state and local taxation of the American-flag lines. Nor is there any necessary reason why state and local tax policies with respect to United States corporations should be influenced by these international treaties. Each state need only compute its tax base by treating a foreign country as the equivalent of another state. In the event such taxation places the American-flag operators under a competitive handicap as compared with foreign-flag lines, the remedy lies in Federal subsidies rather than in exemption or preferential taxation by states and their political subdivisions.

It has been tentatively suggested by the Civil Aeronautics Board that international multiple taxation of air commerce be eliminated by means of reciprocal treaties making an air carrier subject to the exclusive tax jurisdiction of the country in which it is organized and its planes are registered.<sup>39</sup> If such treaties are concluded and the states regard foreign countries as the equivalent of other states in the allocation process, an American-flag international carrier will be subject only to Federal taxation on that portion of its taxable capacity allocated to foreign countries. Other things being equal, this will result in a tax burden upon international air transporta-

<sup>38</sup> There is some implication, as well, that the territorial carriers are not covered. See *MULTIPLE TAXATION OF AIR COMMERCE*, *supra* note 4, at v. However, since flights between two territories or between a territory and the States present no multiple-tax problems not raised by flights between non-contiguous states, it seems likely that the Board's desire to give further study to the taxation of territorial carriers arises from its directive to study unduly burdensome taxation rather than from the multiple-tax directive.

<sup>39</sup> *MULTIPLE TAXATION OF AIR COMMERCE*, *supra* note 4, at v.

tion that is somewhat lighter than the burden imposed upon domestic air carriers or the domestic segments of carriers engaging in both domestic and international operations. But this is likely to be only one of the factors—and a minor one at that—which preclude the equation of marginal dollars of investment. The important objectives are to secure an appropriate division of international traffic between the air carriers and other media of transportation and to assure the survival of American-flag international carriers as long as they are able to maintain standards of service and of operational economies that compare favorably with those of foreign-flag carriers. The Civil Aeronautics Board's tentative suggestion, while lacking the rigorous logic of a proposal to treat all carriers alike regardless of nationality, is probably as well adapted to the achievement of these objectives in a nationalistic world as the alternative.